By John H. Wigmore

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. 5 VOLUMES, SECOND EDITION.

A POCKET CODE OF THE RULES OF EVIDENCE IN TRIALS AT LAW.

CASES ON THE LAW OF EVIDENCE, SECOND EDITION.

CASES ON THE LAW OF TORTS, WITH NOTES, AND A SUMMARY OF PRINCIPLES. 2 VOLUMES.

THE PRINCIPLES OF JUDICIAL PROOF AS GIVEN BY LOGIC, PSYCHOLOGY, AND GENERAL EXPERIENCE AND ILLUSTRATED IN JUDICIAL TRIALS.

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

JOHN HENRY WIGMORE

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

IN FIVE VOLUMES

VOLUME I

SECOND EDITION

BOSTON
LITTLE, BROWN, AND COMPANY
1923

PRINTED IN THE UNITED STATES OF AMERICA

TO THE MEMORY OF

THE PUBLIC SERVICES AND THE PRIVATE FRIENDSHIP

OF

TWO MASTERS IN THE LAW OF EVIDENCE

CHARLES DOE OF NEW HAMPSHIRE

JUDGE AND REFORMER

AND

JAMES BRADLEY THAYER OF MASSACHUSETTS

HISTORIAN AND TEACHER

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

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

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

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

THE AUTHOR'S LETTER TO THE PUBLISHER

CONCERNING

THE SECOND EDITION

Northwestern University Law School
November 1, 1922.

Gentlemen:

I reply to your request for a statement from me as to the additions and other improvements made in the Second Edition (1923) of my Treatise on Evidence, now in press:

In general, the Second Edition will offer: A complete critical reëxamination of the text; numerous enlargements of it, to include new topics; revised citations for the entire body of statute-law, showing the new numberings of statutes in the latest current official editions; the inclusion of some 800 new citations of statutes and some 15,000 new citations of recent judicial decisions; together with numerous typographical improvements and other helps for the reader. All of this is the result of my own personal research and scrutiny, without other professional assistance.

On each of these points I will now offer further details:

1. TEXT. Every word of the text has been scrutinized. In almost every section some alteration has been made, with a view to improvement. In a few instances, changes of personal view have been noted; in many others, the new text is intended to reflect new trends of judicial and statutory law or new aspects of the "weight of authority." — The object has been to make the text speak as of to-day, and not of the day of first publication.

2. Numerous topics formerly treated in the footnotes have been given a place in the text, owing to enlarged importance given to them by the decisions or statutes of the interim.

3. Numerous new topics, called for by new applications of law which have come to the front since the date of the First Edition, have been added.

The following partial list will illustrate the scope of these additions to the text:

Rules of Evidence before Industrial Commissions, Public Utilities Commissions, and other Administrative Officials (§§ 4*a*–4*c*);
Rules of Evidence in Admiralty Courts, Military Courts, Juvenile Courts, Commercial Courts (§ 4*d*);
Rules of Evidence before Arbitrators, Clubs, Fraternities, etc. (§ 4*e*);
Rules of Evidence in Social Case-Work (§ 4*g*);
Altering the Rules of Evidence by Contract (§ 7*a*);
Tags, Signs, Number-Plates, as evidence of Identity of Automobiles, Railroad-Cars, etc. (§ 150*a*);
Finger-Prints and Footmarks as evidence of Identity (§§ 151*a*, 414, 415);
Physiological Traits as evidence of Paternity (§ 165);
Convictions of Crime, used against an Accused under the English Act of 1898 (§ 194*a*);
Insane Belief, as shown by Facts told to the Party (§§ 262, 263);
Other Offences as evidence of Intent in Sale or Prescription of Drugs and Narcotics (§ 368);
Other Utterances as evidence of Intent in Treason, Sedition, or Conspiracy (§§ 369, 370, 465);
Method of securing Unbiassed Experts (§§ 563, 2484);
Wife's Testimony in Desertion Cases (§§ 617, 2239);
Adoptive Parent's Testimony to Adoptive Child's Age (§ 667);
Information obtained by Dictagraph (§ 669);
Expert Witness reading a Prepared Report (§§ 740, 787, 1385);
Moving-Picture Photographs in Evidence (§ 798);
Continuous Interrogation under Arrest ("Sweat-box", "Third Degree") (§ 851);
Psychological Testimony to Deficiencies of Testimonial Capacity to Observe or Remember (§§ 935, 990);
Producing the Original of a Registered Title (§§ 1225, 1647);
Records and Certificates of Vital Statistics (§§ 1336, 1644);
Records of Indian Tribal Blood in Land Titles (§ 1347);
Certificates of Chemical Analysis of Foods and Fertilizers (§§ 1352, 1674);
Interpreters for Alien Witnesses (§ 1393);
Reputation to evidence Recognition of Illegitimate Child (§ 1606);
Reputation to evidence Keeping a Place for Illegal Sale of Liquor or Drugs (§ 1620);
Certificates of Service in Army and Navy (§ 1675*a*);
Hospital Records (§ 1707);
Common Carrier's Records of Liquor Transported (§ 1708);
Discovery of Premises and Chattels in Criminal Cases, Exhumation of Corpse, etc. (§§ 1863, 2194, 2224);
Corroborating a Claimant of Prior Invention of a Patent (§ 2065*a*);
Producing Eye-Witnesses of a Personal Injury (§ 2081*a*);
Producing Medical Testimony in Malpractice Cases (§ 2090);
Evidence obtained by Illegal Search for Liquor, etc. (§ 2184);
Compelling Depositions for Use in Another State (§ 2195);
Witness' Exemption from Liability to Arrest (§ 2195);
Witness' Privilege not to Disclose Premises, Chattels, etc. (§ 2216);
Privilege against Self-Crimination for Books and Reports (Motorists, Druggists, etc.) required by law to be made (§§ 2259*c*, 2259*d*);
Witness' Immunity from Self-Crimination (§ 2282);
Privilege for Communications to State Prosecutor (§ 2375);
Privilege for Communications to Judge, Conciliator, etc. (§ 2376);

Privilege for Business Reports (Taxes, Industrial Accidents, etc.) (§ 2377);
Privilege for Physician's Certificate of Death (§ 2385*a*);
Parol Evidence of Agreement to Treat Copy as Original (§ 2449);
Burden of Proof of Ownership of Automobile (§ 2510*a*);

All of these additions have been made either by inserting new section-numbers or by expanding existing sections. In only a few minor instances is a section-number changed, and for these a list of Changes is prefixed to each volume. Thus all citations in judicial opinions to the original text are equally available for the Second Edition.

4. To facilitate the reader's use, long paragraphs of text in the original have been broken up into shorter ones, and important topical catchwords have been more frequently italicized.

5. The Topical Index has been completely revised.

6. A Tabular Analysis of the topical scheme of the book has been placed at the beginning of each volume, and another one in § 3 of Volume I.

7. For the convenience of practitioners using the author's Pocket Code of Evidence in trial practice, a Table of Cross-References from Treatise to Pocket Code, by sections, has been placed at the beginning of each volume. (The Pocket Code already contains, at the end of each section, a similar cross-reference from Code to Treatise.)

8. For convenience in studying the argumentative use of evidence in speeches to juries, frequent references have been made, in footnotes at appropriate points, to the corresponding places in the author's compilation of materials entitled "Principles of Judicial Proof, as given by Logic, Psychology, and General Experience, and illustrated in Judicial Trials" (1913).

II. Statute Law. Since the First Edition, all States and Territories (except two or three) have revised their Codes or Compilations, — in some instances, twice. For the Second Edition, this entire body of statute-law has been re-examined, page by page, in the latest official revisions. All the citations in the original edition (some 8000 in all) have been replaced by the citations from the latest current official revisions. Several hundred new statutes, not found in the search made for the first edition, have been added; the total number of citations approximating 15,000. The session-laws subsequent to the official Revisions, down to 1922 inclusive, have been searched. In the case of four States, where new official Revisions were just going through the press in 1922, the courtesy of the Commissioners supplied the author with proof-copies, from which the new citation-numbers of the statutes were obtained. Thus, the citations of statute-law have been brought thoroughly up to date, in form for ready reference.

The statute law of the Philippine Islands and Porto Rico has been included, for the first time, in this Edition.

The Federal statutes have been supplied with citations to the new United States Code, now pending in Congress.

III. Judicial Decisions. The First Edition contained some 40,000 citations of judicial decisions. The Supplement of 1914 contained over 7000 more. To these have now been added more than another 7000, covering the intervening period; making a total of some 15,000 citations added to the original 40,000.

The judicial decisions of the Philippine Islands, Porto Rico, Alaska, and the United States Court for China have been, for the first time, included in this Edition. Use has been made of the two invaluable series of trial reports recently added to our annals, — the Notable British Trials series and the American State Trials series.

The historical portions have been re-enforced by gleanings from new volumes of the Selden Society's publications, American Colonial annals, and other sources. Recent professional memoirs have supplied illustrative anecdotes.

The expository quotations from judicial opinions, in the text, now include some of the best utterances from the most recent opinions.

IV. Typography and Arrangement. The entire work has been reset in type, — text, footnotes, and indices. All the citations furnished in the Supplements of 1907 and 1914, together with the citations of new material accruing in the interval, have been consolidated with the original citations, placing the newer ones in proper chronological order within each jurisdiction, so as to read consecutively.

Important improvements in typography and citation have been introduced:

1. At the first footnote to a section, the number of the section is inserted, in bold-face type, so as to enable ready finding of the notes belonging to that section.

2. Wherever the citations include cases or statutes from several jurisdictions, the State name in italics (in full or abbreviated) precedes each group.

3. Wherever numerous jurisdictions are represented, each State is separately paragraphed, with the State name in italics or capitals at the left of the column, so as to enable ready reference to the jurisdiction sought.

4. Wherever a succeeding case is cited from the same reporter or State series as the preceding one, the name of the reporter or State is repeated (instead of using the abbreviation "id." as in the First Edition). This change affects many thousand citations.

5. Where a long footnote, giving authorities for the detailed treatment in the text, covers several pages, it is now placed at the beginning of the text (instead of at the end, as frequently happened in the original edition); so that in no case (unless unavoidable) do the footnotes to one section run over and appear under the text of a succeeding section.

6. An improvement calculated to assist all users of the book is the insertion of the State name for every report cited. Modern practitioners seem to be no longer so familiar with the early reporters' names as was the older genera-

tion; it has therefore been assumed by the author that the reader who desires to study in the original the judicial opinions here cited will be best served by furnishing always the means for direct resort to the report without consulting a Table of reporters' names. In this Edition, either the State name is inserted with each citation of a private reporter (thus, "Jones *v.* Smith, 2 All. Mass. 14"); or, when a series of citations from a single State occurs, the State name in italics precedes the series.

It is hoped that the foregoing summary of the effort spent upon the Second Edition indicates that it has been generally improved as well as brought down to date, and that it will satisfy the profession which has so kindly given its approval to the First Edition.

Sincerely yours,
JOHN H. WIGMORE

PREFACE TO THE FIRST EDITION

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

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

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

Bill," said a gentleman of legal attainments to Sir James Stephen, "would be a very short one; it would consist of one rule, to this effect: 'All rules of evidence are hereby abolished.'"

Nevertheless, when all is known and examined, the reproach is not merited. That distinguished legislator, Sir James Stephen himself (and the domination of his thought in our law of Evidence during the past generation has been rivalled only by that of Professor Thayer), was able, after a practical judicial experience second to no man's, to devote his greatest work "to prove the proposition that the English rules of Evidence are *not* a mere collection of arbitrary subtleties which shackle, instead of guiding, natural sagacity."

Nor can it be charged to the judges, or to their declared judgments, that they have failed to supply the materials for a right apprehension of the law's reasoning. "Let all people," said Lord Chancellor Parker, two centuries ago, "be at liberty to know what I found my judgment upon; that so, when I have given it in any cause, others may be at liberty to judge of me"; and it is in this spirit that they have acted throughout the modern development of the law of Evidence. Their reasonings are scattered copiously through the pages of the Reports. It is not that the judges have failed to supply them; it is we who have failed to consider them. When Hobbes' Philosopher reproaches the Lawyer, in their Dialogue on the Common Laws, that "the great masters of the mathematics do not so often err as the great professors of the law," the Lawyer's retort is a just and appropriate one: "If you had applied your reason to the law, perhaps you would have been of another mind."

The rules of Evidence, as recorded in our law, may be said to be essentially rational. The reason may not always be a good one, in point of policy. But there is always a reason.

If we are to save the law for a living future, if it is to remain manageable amidst the spawning mass of rulings and statutes which tend increasingly to clog its simplicity, we must rescue these reasonings from forgetfulness. A main attempt, therefore, in the following pages and in the preparation for them, has been to search out and to emphasize the accepted reasons for each rule. As an important aid to their exposition, the method has been employed of setting forth the most influential, the most lucid, and the most carefully reasoned passages anywhere recorded in judicial annals, — the best things that have been said upon the rules of Evidence. 'Multa ignoramus', Coke warns us, 'quæ non laterent, si veterum lectio nobis esset familiaris.' The encyclopedic method, compiling in concise form the barren summaries of voluminous originals, may become an inevitable one in our law. But (as a great historian once lamented, in describing the downfall of classical learning in the Middle Ages), such a method is "a usual concomitant of declining literature; for it supersedes the use of the great writers, and effects the oblivion of good models." One of the greatest services (but little mentioned) of Professor Langdell's modern system of case-study in schools of law has been to enlarge and perpetuate, for each new generation of the

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

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

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

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

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

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

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

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

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

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

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

J. H. W.

NORTHWESTERN UNIVERSITY LAW SCHOOL,
CHICAGO, September 16, 1904.

CONTENTS

CONTENTS

CONTENTS

CONTENTS

CHAPTER XII

Topic VII. — Other Offenses or Similar Acts, as Evidence of Knowledge, Design, or Intent

1. General Principles

CONTENTS

CONTENTS

CHAPTER XIV

TOPIC IX. — EVIDENCE TO PROVE EMOTION (MOTIVE, FEELING, PASSION)

CHAPTER XV

TOPIC X. — EVIDENCE TO PROVE IDENTITY

CHAPTER XVI

SUB-TITLE III. — EVIDENCE TO PROVE FACTS OF EXTERNAL INANIMATE NATURE (EVENTS, CONDITIONS, TENDENCIES, CAUSES, QUALITIES, AND EFFECTS, OF THINGS AND PLACES)

CONTENTS

CONTENTS

CHAPTER XXIII

TOPIC III. — EMOTIONAL CAPACITY

SUB-TOPIC A. — INTEREST AS A TESTIMONIAL DISQUALIFICATION

CHAPTER XXIV

SUB-TOPIC B. — MARITAL RELATIONSHIP AS A TESTIMONIAL DISQUALIFICATION

CHAPTER XXV

TOPIC IV. — TESTIMONIAL KNOWLEDGE

A. GENERAL PRINCIPLES OF KNOWLEDGE

CONTENTS

VOLUME TWO

CHAPTER XXVI

Topic V. — Testimonial Recollection

CONTENTS

CHAPTER XXVII

TOPIC VI. — TESTIMONIAL NARRATION OR COMMUNICATION

CHAPTER XXVIII

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

CHAPTER XXX

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

A. Moral Character

B. Insanity, Intoxication, and other Organic Incapacity

CONTENTS

CHAPTER XXXIII

TOPIC IV. — SPECIFIC ERROR (CONTRADICTION)

CHAPTER XXXIV

TOPIC V. — SELF-CONTRADICTION

1. General Principle

2. Collateral Matters Excluded

3. Preliminary Warning Necessary

4. What amounts to a Self-Contradiction or Inconsistency

5. Explaining away the Inconsistency

CONTENTS

CHAPTER XXXV

TOPIC VI. —ADMISSIONS

CONTENTS

CHAPTER XXXVI

SUB-TITLE III. — TESTIMONIAL REHABILITATION

CHAPTER XXXVII

TITLE III. — AUTOPTIC PROFERENCE (REAL EVIDENCE)

CONTENTS

CONTENTS

CHAPTER XLI

Sub-Topic B. — Preferred Reports of Prior Testimony

Sub-Topic C. — Sundry Preferred Witnesses

CONTENTS

VOLUME THREE

CONTENTS

CONTENTS

CONTENTS

CHAPTER XLIX

Topic III. — Declarations about Family History (Pedigree)

CHAPTER L

Topic IV. — Attestation of a Subscribing Witness

CHAPTER LI

Topic V. — Regular Entries

CONTENTS

CHAPTER LV

Topic IX. — Learned Treatises

CONTENTS

CHAPTER LVI

TOPIC XIII. — DECLARATIONS OF A MENTAL OR PHYSICAL CONDITION

CONTENTS

CHAPTER LVII

TOPIC XIV. — SPONTANEOUS EXCLAMATIONS

CHAPTER LVIII

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

CONTENTS

CONTENTS

CHAPTER LXII

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

VOLUME FOUR

CHAPTER LXIII

TITLE IV. — SIMPLIFICATIVE RULES

SUB-TITLE I. — ORDER OF PRESENTING EVIDENCE

CONTENTS

CHAPTER LXVI

TOPIC II. — OPINION RULE APPLIED TO SUNDRY TOPICS

CONTENTS

CHAPTER LXVII

TOPIC III. — OPINION RULE, APPLIED TO TESTIMONY TO MORAL CHARACTER AND PROFESSIONAL SKILL

CHAPTER LXVIII

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

CONTENTS

CHAPTER LXIX

TITLE V. — SYNTHETIC (OR QUANTITATIVE) RULES

SUB-TITLE I. — NUMBER OF WITNESSES REQUIRED; CORROBORATION REQUIRED

Topic I. — Rules Depending on the Kind of Issue

1. Criminal Cases

2. Civil Cases

Topic II. — Rules Depending on the Kind of Witness

CHAPTER LXX

SUB-TITLE II. — KINDS OF WITNESSES REQUIRED

CONTENTS

CHAPTER LXXI

SUB-TITLE III. — VERBAL COMPLETENESS

CONTENTS

CHAPTER LXXII

SUB-TITLE IV. — AUTHENTICATION OF DOCUMENTS

CHAPTER LXXIII

PART III. — RULES OF EXTRINSIC POLICY

TITLE I. — RULES OF ABSOLUTE EXCLUSION

CONTENTS

CONTENTS

CHAPTER LXXVIII

Sub-Topic III. — Privilege for Self-Criminating Facts

CONTENTS

VOLUME FIVE

TOPIC B. — PRIVILEGED COMMUNICATIONS

CHAPTER LXXIX

SUB-TOPIC I. — CONFIDENTIAL COMMUNICATIONS IN GENERAL

CHAPTER LXXX

SUB-TOPIC II. — COMMUNICATIONS BETWEEN ATTORNEY AND CLIENT

CONTENTS

CHAPTER LXXXI

Sub-Topic III. — Communications between Husband and Wife

CHAPTER LXXXII

Sub-Topic IV. — Communications by and to Jurors

CHAPTER LXXXIII

Sub-Topic V. — State Secrets and Official Documents

CONTENTS

CHAPTER LXXXIV

Sub-Topic VI. — Communications between Physician and Patient

CHAPTER LXXXV

Sub-Topic VII. — Communications between Priest and Penitent

CHAPTER LXXXVI

PART IV.—PAROL EVIDENCE RULE (CONSTITUTION OF JURAL ACTS)

Introduction

A. Creation of Jural Acts (Voidness and Voidableness)

1. Subject, Terms, Delivery, in General

2. Intent and Mistake, as Affecting Subject, Terms, and Delivery, of an Act

3. Voidable Acts

CONTENTS

CONTENTS

CHAPTER LXXXVII

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

TITLE I. — GENERAL THEORY

CHAPTER LXXXVIII

TITLE II. — BURDENS AND PRESUMPTIONS IN SPECIFIC ISSUES

CONTENTS

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.

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.

TABLE II

The printing of this treatise began in August, 1922, and occupied many months; it was therefore desirable to set a definite point of time for the ending of citations (instead of inserting current late cases in the latter portions of the book only), in order that those who use the book may know where to begin in examining later sources appearing since its publication. The point of stoppage taken was therefore that volume of the several National Reporters which ended nearest to July 1, 1922; this ranged (dating by the weekly issues) between May, 1922, and August, 1922. The latest volumes of Reporters consulted were as follows:

TABLE II. LATEST NATIONAL REPORTERS EXAMINED

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

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

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.)

1st Ed.	2d Ed.	1st Ed.	2d Ed.	1st Ed.	2d Ed.
6	6, 6 *a*, 6 *b*	936	937	1856	1856, 1856 *a–e*
68	68, 68 *a*	938	939	1859	1859, 1859 *a–g*
150	150, 150 *a*	990	989	1862	1862, 1863
164	163	1031	1032	1863	1864
165	164	1032	1033	2090	2091
208	208, 208 *a*	1056	1057	2091	2093
318	309	1057	1058	2129	2128
321	320	1058	1059	2130	2129
367	367–370	1232	1233	2183	2183, 2184
370	371	1345	1344	2184	2185
371	372	1346	1345	2213	2212
372	373	1347	1346, 1347	2214	2213
414	416	1354	1354, 1355, 1356	2215	2214
415	417			2259	2259, 2259 *a–d*
416	418	1633	1633, 1633 *a*	2281 *a*	2282
464	464, 465	1662	1662, 1663	2282	2283
562	562, 563	1676	1676, 1676 *a*, 1676 *b*	2374	2376
617	618			2375	2378
785	785, 767	1768	1766	2376	2379
787	787, 787 *a*	1795	1767	2461	2466
875	874	1796	1768	2462	2461, 2462
934	934, 938	1797	1769	2511	2511, 2511 *a*
935	936	1855	1855, 1855 *a*		

TABLE OF CROSS-REFERENCES TO THE POCKET CODE OF EVIDENCE

Treatise §	Code §
1	**1**
3	**2**
2	**3**
4	**8–11**
5	**17–20**
6	**27–30**
6 *a*	**21–22**
7	**31–34**
9	**35**
10	**36**
11	**37**
12	**38–41**
13	**42–44**
14	**45**
15	**46–48**
16	**49–53**
17	**55–70**
18	**71–93**
19	**94**
20	**97–101**
21	**102–103**
24	**105–114**
26	**115–116**
30–36	**117**
38	**118, 119**
39	**120**
40	**121**
41	**122**
42	**123**
43	**124**
51	**125**
52–54	**126–130**
55	**130**
56	**136**
57–58	**137**
59	**131–133**
60	**135**
61	**134**
62	**138–140**
63	**140–145**
64	**146–147**
65	**148**
66	**149**
67	**150**
68	**151**
68 *a*	**152**
70–76	**154–158**
77	**160**
78	**163–164**
79	**165**
80	**161**
83	**167**
84–88	**168**
89	**169**
92	**170**
93–99	**171**
102–104	**177**
105–109	**178–181**
110–111	**182**
112	**184**
113	**183**
117	**185–186**
118	**187**
130–132	**188–190**
133	**191**
135	**192**
136	**192 *a***
137	**193**
139–142	**194**
143–144	**195**
148	**196**
149	**197**
150–150 *a*	**198**
151	**199**
152–153	**200**
154–155	**201**
156	**202**
157	**203**
158–160	**205**
163	**207**
164	**208**
165, 168	**206**
166	**209**
167	**210**
172–176	**211**
177	**212**
191	**215**
192–194	**218–219**
195	**224**
196–197	**216, 222, 223**
198	**226–227**
199	**228**
200	**229**
201	**230**
202	**231**
203	**232**
204	**233**
205	**234**
206	**235**
207	**236**
208	**238**
208 *a*	**237**
209–213	**239**
215	**219**
216	**220**
218	**221**
219	**240**
220	**241**
221	**242**
222	**245**
223	**246–249**

TABLE OF CROSS-REFERENCES TO POCKET CODE

Treatise §	Code §
224	**243**
225	**250**
227	**251**
228	**252–253, 256–258**
229	**254–255**
230	**259**
231	**261–262**
232	**263**
233	**264**
235	**265**
237	**266**
238	**267**
239	**268**
240	**269**
241	**270**
242	**271–275**
244	**276**
245	**277**
246	**278**
247	**279**
248	**280**
249	**281**
250	**282**
251	**283**
252	**284**
253	**285**
254	**286**
255	**287**
256	**285**
257	**285**
258	**288**
259	**286**
260	**289**
265–266	**290**
267	**291–292**
268–272	**293**
273	**650**
274	**651**
276	**652**
277–279	**654**
280	**655–656**
281	**664**
282	**647–648, 653**
283	**649**
284	**657**
285–290	**658–661, 664**
291	**662–663**
293	**294, 665**
300	**297**
301	**298**
302–303	**299**
304	**300**
305	**220**
309–317	**302**
321	**303**
324–327	**304**
329–331	**305**
333–338	**306**
340–344	**307**
346–349	**308**
351–352	**309**
354	**310**
357–360	**311**
363–365	**312**
367	**314**
368	**313**
369–370	**314**
371–373	**315**
375–376	**316**
377	**317**
378	**318**
379	**319**
382	**320**
383	**321**
385–387	**322**
389–391	**324**
392	**326**
394	**327**
395	**328**
396–397	**329**
398–402	**330**
402–406	**331**
410–417	**333–334**
418	**336**
431–432	**337**
434	**338**
435–436	**339**
437	**340–341**
438–440	**342**
441–449	**344–349**
451–456	**350–351**
457–458	**352–353**
459–465	**354–357**
475–480	**360–361**
483	**362**
484	**363**
485	**364**
486	**365**
487	**366**
492–496	**367**
497	**368–369**
498–500	**367**
505–506	**370**
507	**371**
508	**372**
515	**373**
516–518	**374**
519–524	**375**
525–531	**376**
555–556	**378**
557–559	**379**
560	**380**
561	**381**
564–566	**383**
567	**386**
568–569	**384**
570	**385**
571	**387**
576–577	**388**
578	**390**
579–580	**389**
581	**392**
583–587	**393**
600	**395**
601–620	**396**
608	**397**
650–653	**400**
654	**401**
655	**402**
657	**405–412**
658	**403**
659–663	**404**
664	**413**
665	**406–408**
666	**410**
667	**411**
669	**412**
672–674	**414, 1416**
675	**1417**
677	**1418**
679	**1419**

TABLE OF CROSS-REFERENCES TO POCKET CODE

Treatise §	Code §
681	**1420**
682	**1421–1423**
687	**408**
688	**409**
689	**416**
690	**403**
691–692	**417**
693	**418**
694–697	**419**
699–707	**420**
709	**420** *bis*
711–713	**422**
714	**423**
715	**424**
716	**425**
725	**427**
726–729	**428**
730	**429**
734	**431**
738–739	**442**
744	**431, 443**
745	**432**
746	**433**
747	**434**
748	**435**
749	**436**
750	**437**
751	**438**
752	**439**
753	**440**
754	**441**
758	**444**
759	**446**
760	**447**
761	**448**
762	**449**
763	**450**
764	**451**
766	**454**
767	**461, 475**
769–770	**462**
771–772	**463**
773	**464**
774	**465**
775	**465**
776	**462**
777–779	**466**

Treatise §	Code §
780	**467**
781	**468**
782	**467–472**
783	**473**
784	**474**
785	**475**
786–788	**455–459**
789	**479**
790–792	**480**
793	**481**
794	**482**
795	**483**
796–797	**484**
799	**488**
800–801	**489**
802	**490**
803	**491**
804	**492**
805	**494–495**
811	**496–497**
815	**700**
821	**701**
822	**702**
824	**703**
825	**704**
826	**705**
827–830	**706**
832	**707**
833	**708**
834	**709**
835–836	**710**
837	**711**
838	**712**
840	**713**
841	**714, 715**
842–852	**716–720**
853–855	**721**
856–859	**722**
860	**723**
861	**724–727**
862	**728**
874–881	**500**
884–888	**501**
889–892	**502**
894	**503**
896–899	**504**
900	**505**

Treatise §	Code §
901	**506**
902–907	**507**
907–908	**508**
909–913	**509–511**
914–915	**512**
916	**513–514**
917–918	**515**
920–921	**518**
922–926	**519–520**
927–929	**521**
930	**522**
931	**523**
932	**524**
933	**525**
934	**526**
935	**527**
936–937	**528**
939–940	**529**
943	**532**
944	**533**
946	**534**
948	**535**
949	**536**
950–952	**537–538**
953	**539**
956	**540**
957–959	**541**
960–962	**542–543**
963	**544**
964	**545**
966	**546**
967	**547**
968	**546**
969	**548**
977–978	**549**
979	**550**
980	**551, 555**
981	**552**
982	**553, 556**
983	**554**
984	**554**
986–987	**550–556**
988	**557**
989	**558**
990	**555**
991–996	**561–564**
1000–1002	**567**

TABLE OF CROSS-REFERENCES TO POCKET CODE

Treatise §	Code §
1003	568
1004	569
1005	570
1006	572
1007	571
1008–1015	573
1017–1019	574
1020	575
1021	576
1022	577
1023	578
1025–1028	579
1029	581
1030–1034	582
1035	583
1036	584, 591
1037	585
1038	578
1040	586
1041	587
1042	588
1043	589–590
1044–1045	591
1048	630
1049	631–632
1051	633
1053	634
1055	640
1057	636
1058	637
1059	638
1060	641
1061–1062	642–645
1063	680
1064	681
1065	682
1066	683
1067	684
1069–1070	667
1071	666, 668
1072	668, 670
1073	671, 673
1074	675, 676
1075	677
1076	686
1077–1079	687
1080	688
1081	689–691
1082	692–693
1083	694
1084	695
1085	696
1086	697–698
1100	595
1104	596
1105	597
1106	598
1107	599–600
1108	601
1109	602
1111	604–605
1112	606, 607
1116	608
1117	609
1119	611
1122–1124	612
1125	613
1126	615
1127	616
1128	617
1129	618
1130	619
1131	443, 614
1134	622
1135	623–624
1136	623
1137–1138	625
1139	625
1141	626
1142	627
1144	628
1150–1156	730
1157–1158	731
1159	732
1162	734
1163	735–736
1164	737
1165	738
1168	739
1171–1172	745
1173	746
1178	747
1181	748
1182	749
1183	750
1185	751–753
1186	754
1187	757
1189	758
1190	755
1191	757
1192	756
1193	759
1194	760
1195	761
1196–1197	762
1198	763
1199	764
1200	765
1201	766
1202–1203	767
1204	770
1205	768
1206–1207	771
1208	769
1209	772
1210	773
1211	774
1212	775
1213	776
1214	777
1215–1217	778
1218–1221	779
1223	780
1224–1227	781
1230	782
1232	783
1233	784–785
1234	786–789
1235	790
1236–1240	791
1241	792
1242	793
1243	794–795
1244	796–797
1245	798
1246–1247	799
1248	800
1249–1250	801
1252–1254	806
1255–1257	807–810

TABLE OF CROSS-REFERENCES TO POCKET CODE

Treatise §	Code §
1258	811
1259–1263	812–818
1265	820, 825
1267	821, 825
1268	822, 826
1269	827
1270	828
1271	829
1273	831
1274–1275	832–835
1277–1280	823
1281	824
1285	850
1289	851
1290	852
1291	855
1292	853
1293	854
1294	857
1295	858
1296	859
1297	860
1298	861
1299	862–863
1300	864
1301	865
1302	866
1303	866
1304	868
1305	867
1306	884
1308–1310	839
1311	870–871
1312	872
1313	873
1314	874
1315	875–876
1316	877
1317	878
1318	879
1319	880
1320	881
1321	885
1326–1329	890–892
1330	893
1331	894
1335–1338	896
1339	897
1344	900
1345–1346	901
1348	900
1349	902
1350	903
1351	904
1352	905
1353–1355	906
1356	907
1360–1362	910, 912
1365	911
1371	913
1373–1376	914–915
1378–1382	916
1383	917
1384	918
1386–1388	919–920
1389	921
1390	922–923
1391	924
1392	925–926
1393–1394	927
1395	928
1396–1398	929
1402	930, 939
1403	931
1404	932
1405	933–934
1406	935
1407	936–937
1408–1410	938
1414	940
1415	941
1416	942–944
1417	945
1420	950
1424	950
1431–1433	952
1434	953
1435	952
1438–1441	954
1442	956
1443	955
1445	957–959
1446	960
1447	961
1448	962
1450	963
1451	964
1455	966
1456	967
1457	966, 968
1458–1459	969
1460	970
1461	972
1463–1465	973–974
1466	975
1469	977
1471	976
1472	978
1476	971
1480	980
1481	981–982
1482	980
1483–1484	983
1485	984
1486	984–985
1487	987
1488	1069
1489	988
1490	991
1491	989
1492	990
1493	994
1495	992
1496–1497	997
1500–1502	995
1503	996
1505	1000
1511–1512	886
1513	887
1514	1001
1517	1002
1521	1003
1523	1005
1524	1006
1525	1007
1526	1008
1528	1011
1530	1012–1015
1531	1009
1532	1016
1536–1537	1018

TABLE OF CROSS-REFERENCES TO POCKET CODE

Treatise §	Code §
1538	**1019**
1539	**1020**
1540–1543	**1021**
1547	**1022**
1548	**1023**
1550	**1024**
1551	**1025**
1552	**1026**
1554	**1029–1030**
1555	**1028**
1556	**1027**
1557	**1031**
1558	**1032**
1564	**1035**
1565	**1036**
1566–1567	**1037**
1568	**1038**
1570	**1039**
1573	**1040–1043**
1576	**1045–1047**
1580	**1050**
1582	**1053**
1584	**1060**
1585	**1056**
1586–1587	**1054**
1588	**1055, 1058**
1591	**1059**
1592	**1060**
1597	**1062–1063**
1598	**1064**
1599	**1065**
1602	**1066**
1603	**1067–1068**
1605	**1069**
1610	**1071**
1612	**1072**
1614	**1073**
1615	**1074**
1616	**1075**
1617	**1076**
1618	**1077**
1620	**1078–1080**
1621	**1081–1083**
1623	**1085**
1624	**1086**
1625	**1087**
1631–1632	**1090**
1633	**1092–1096**
1633 *a*	**1094**
1635	**1097**
1637	**1098**
1639	**1100**
1640	**1101**
1641	**1102**
1642–1644	**1103–1105**
1645	**1106**
1647	**1107**
1648–1651	**1110**
1652	**1111**
1653	**1112–1115**
1655	**1116**
1657	**1117**
1658	**1118**
1659	**1119**
1660	**1120**
1661	**1121–1123**
1662	**1124–1125**
1664	**1130–1132**
1665	**1133**
1666	**1136**
1667	**1137**
1668	**1138**
1669	**1139**
1670	**1130**
1671	**1141–1142**
1674	**1144–1145**
1675	**1146**
1676	**1148**
1676 *a*	**1147**
1676 *b*	**1149**
1677	**1152–1154**
1678	**1155–1156**
1679	**1158**
1680	**1145, 1152**
1681	**1145, 1152, 1160**
1682	**1161–1162**
1683	**1163**
1684	**1164, 1181**
1690	**1170**
1694	**1171**
1697	**1173**
1698	**1174**
1699	**1175**
1700	**1177**
1702	**1180**
1703	**1181**
1704	**1182**
1705	**1183**
1706	**1180**
1709	**1186**
1710	**1187–1191**
1712–1713	**1195–1198**
1714	**1200**
1718	**1201**
1719–1720	**1202**
1721	**1205**
1722	**1203–1204**
1725–1726	**1207–1208**
1727	**1209**
1728	**1210**
1729	**1211**
1730	**1212**
1732	**1213–1217**
1734	**1218**
1735	**1219**
1736	**1220**
1737	**1221**
1738	**1222–1223**
1740	**1224**
1747–1749	**1230–1232**
1750	**1233–1235**
1751	**1236**
1755	**1237**
1760–1761	**1238**
1762	**1239**
1768	**1240**
1770	**1242–1244**
1772–1776	**1245**
1777	**1246**
1778	**1248**
1779	**1249**
1781	**1250**
1782	**1251**
1783	**1252**
1784	**1254**
1786	**1260**
1788	**1255**
1789	**1256**
1790	**1257**
1791	**1258**
1792	**1259**

TABLE OF CROSS-REFERENCES TO POCKET CODE

Treatise §	Code §
1800	**1266**
1801	**1267**
1802	**1268**
1803	**1269**
1805	**1270**
1806	**1271–1272**
1807	**1273–1275**
1808	**1277–1278**
1810	**1280–1282**
1816	**1286**
1817	**1286–1288**
1818	**1295–1297**
1819	**1298–1301**
1820	**1291–1293**
1821	**1289, 1294**
1822	**1290**
1824	**1285**
1827–1828	**1302–1307**
1831	**1310**
1832	**1311**
1834–1836	**1312**
1837–1838	**1314**
1839	**1315**
1840	**1316–1317**
1841	**1318–1320**
1842	**1321**
1845–1847	**1325**
1849	**1326**
1850–1851	**1327–1329**
1852–1853	**1330**
1854	**1328–1330**
1855	**1330**
1856–1856 *e*	**1332–1334**
1856 *d*	**1341**
1859–1859 *e*	**1335–1336**
1859 *f*	**1342**
1861	**1345**
1862	**1339**
1863	**1344**
1866	**1352**
1867	**1350–1351**
1869–1870	**1353–1358**
1871	**1360**
1872	**1362–1364**
1873	**1361**
1874–1875	**1366**
1876–1877	**1367**
1878–1880	**1367**
1882	**1369–1371**
1883	**1372, 1375**
1884	**1373–1374**
1885–1890	**1376**
1892–1894	**1378**
1896	**1379**
1897	**1380**
1898–1900	**1381**
1904	**1383–1384, 1390–1391**
1906	**1400**
1907	**1401**
1908	**1401–1403**
1909	**1404**
1910	**1405**
1911	**1406**
1918	**1410**
1923	**1413–1415**
1924	**1411–1412**
1929	**1424–1425**
1934–1938	**1430–1434**
1940–1944	**1435–1438**
1946–1947	**1440–1443**
1949–1951	**1445**
1952	**1446**
1953	**1447–1449**
1954	**1450**
1955	**1451**
1956	**1452**
1957	**1453**
1958	**1454**
1959–1960	**1455**
1962	**1457**
1963–1968	**1458**
1969–1972	**1459**
1974	**1461**
1975	**1462**
1976	**1463**
1977	**1464**
1983	**1468–1469**
1984	**1470**
1985	**1471**
1997–2000	**1475–1480**
2004	**1479**
2006	**1476–1477**
2007	**1478**
2008	**1480**
2009	**1484**
2010	**1485**
2011	**1482**
2012	**1481**
2013	**1483**
2014–2015	**1487**
2016	**1488–1490**
2018	**1484**
2019	**1485**
2020	**1483**
2021	**1483**
2023–2027	**1491**
2034	**1500**
2037–2039	**1503**
2041–2043	**1504–1505**
2044	**1506**
2046	**1528**
2047	**1507**
2048	**1509**
2050	**1510**
2051	**1511–1512**
2052	**1513**
2054	**1514**
2056–2060	**1516**
2061–2062	**1520**
2063	**1521, 398**
2065	**1522**
2066	**1523–1525**
2067–2069	**1529**
2070–2071	**1530**
2072	**1531**
2073	**1532–1533**
2078	**1534**
2079	**1535**
2081	**1536**
2082–2084	**1537**
2085	**1538–1541**
2086	**1542**
2088	**1543**
2089	**1544**
2093	**1545**
2094	**1547**
2097	**1549–1550, 1552**
2098	**1551**
2099–2100	**1553–1559**
2102	**1561–1562**
2103	**1563**

TABLE OF CROSS-REFERENCES TO POCKET CODE

Treatise §	Code §
2104	1565
2105–2107	1566
2108	1568
2109	1569–1570
2110	1571–1573
2113	1575
2115	1576
2116	1578
2117	1579
2118	1581
2119	1580
2120	1582
2121–2123	1583–1586
2124	1587–1588
2125	1589
2128	1591
2129	1592
2130	1595
2131	1596
2132–2133	1597–1603, 1605
2135	1604
2137	1608
2138	1609–1610
2139	1611
2140	1612
2141	1613
2143	1614–1616
2144	1617
2145	1618
2148	1620
2150	1620–1621
2151	1622–1623
2152	1624
2153	1625
2154	1626
2155	1594
2156	1627
2158–2159	1630–1631
2161	1633–1634
2163	1638
2164	1639
2165	1640
2166	1641
2167	1642
2168	1635–1637
2169	1643
2175	1650
2180	1652
2182	1654
2183–2184	1656
2185	1656
2191	1670
2192	1660
2193–2194	1662
2195	1671
2196	1673–1675
2197	1672
2199	1663–1666
2200	1667–1669
2201	1680
2202	1681
2203	1682
2204	1685
2205	1686
2206	1688–1691
2207	1692
2210	1694
2211	1695
2212	1696–1697
2213	1699
2214	1700
2215	1701
2217–2218	1702
2219	1703
2220	1704
2221	1705
2223	1707
2228	1710
2230–2231	1711
2232–2233	1713–1714
2234	1715
2235	1716
2236	1717
2237	1712
2239	1723
2240	1721–1722
2241	1724
2242	1725
2243	1726
2245	1719–1720
2251	1730
2252	1731
2254–2257	1732
2258	1733
2259	1734
2259 *a*	1735
2260–2261	1736
2263	1737
2264	1738
2265	1739
2268	1740–1741
2269	1742
2270	1743–1744
2271	1745
2272	1746–1747
2273	1748
2275	1750
2276–2277	1751–1752
2279–2280	1753
2281	1754
2282	1755
2283	1754
2285	1760
2286	1762
2287	1763
2292	1765
2294	1767
2296	1768–1769
2297	1770
2298	1771
2300	1774
2301	1775
2302	1776
2303	1777
2304	1778
2306	1780
2307	1781
2308	1782, 1784–1785
2309	1783
2310	1786
2311	1787–1789
2312	1790–1792
2313	1793
2314	1794
2315	1795
2317	1796
2318–2319	1785, 1797
2321	1799–1800
2322	1801
2323	1802
2324	1803

TABLE OF CROSS-REFERENCES TO POCKET CODE

Treatise §	Code §
2325	1804–1806
2326	1804
2327	1805, 1808
2328–2329	1807
2334	1812
2336	1813–1815
2337	1816
2338	1817
2339	1819
2340	1822–1823
2341	1820–1821
2346	1825, 1947
2348–2356	1947
2361	1830, 1832
2362–2363	1834–1836
2368–2373	1850
2374	1833
2375	1837–1840
2378–2379	1842–1849
2380	1855
2381	1856
2382	1857
2383	1858
2384	1859
2385	1860
2386	1861–1862
2387	1863
2388	1864–1865
2389–2390	1866
2391	1867
2395	1870
2400–2401	1871–1874
2404	1877
2406	1878–1881
2407	1882
2408–2409	1883–1892
2410	1893
2411	1894
2413	1895
2414	1896
2415	1897–1898
2416	1899–1905
2417–2418	1906
2419	1907
2420	1908–1910
2421	1911–1912
2423	1913
2425	1915
2427	1917
2430	1921
2431	1922–1925
2432	1927–1928
2433	1929
2434	1930
2435	1931
2436	1932
2437	1933
2438	1934
2439	1936
2440	1937
2441	1938
2442	1935
2443–2445	1934 *a*
2446	1939
2447	1941
2450	1946
2451–2452	1944–1955
2454–2456	1950
2458	1953–1954
2459	1955
2460	1958–1960
2461–2463	1961
2464	1962–1965
2465	1966–1969
2466–2467	1970–1972, 1977
2470	1975
2471	1976
2472	1978
2473	1979–1980
2474	1981
2475	1982
2476–2477	1983–1984
2483–2484	1990–1992
2485–2487	1994–1998
2486	2035
2488–2494	1999–2003
2490	2012–2013
2493	2014
2495	2006–2009
2496	2010, 2015–2019
2497	2022–2026
2498	2027–2031
2500	2041–2043
2501	2045
2502	2046
2503	2047
2504	2048–2054
2505	2055–2058
2506	2059
2507	2060
2508	2061
2509	2062
2510	2063
2511	2064
2512–2513	2066
2514	2065
2515–2516	2067
2517–2518	2068
2519–2525	2069–2079
2527	2080
2528	2081
2529	2082
2530	2083
2531–2532	2084–2086
2533	2087
2534	2088
2535	2089
2536	2091–2092
2537	2093
2538	2094
2539	2095
2549	2100
2550	2101–2103
2552	2104–2106
2553–2554	2107–2109
2556	2110–2112
2557	2113–2114
2558	2115
2559	2116
2565	2120, 2130
2567	2121–2123
2568	2124
2569	2125–2126
2570	2127
2571	2130
2572	2131
2573	2132
2574–2577	2133
2578–2579	2134
2580–2582	2135
2588–2589	2140
2590	2141, 2145
2591	2143
2592	2144
2593	2146
2594	2148–2150
2596	1599

1. TABULAR ANALYSIS OF TOPICS

BOOK I. ADMISSIBILITY OF EVIDENCE.

INTRODUCTORY: THEORY AND PROCEDURE.
I. RULES OF RELEVANCY.
II. RULES OF AUXILIARY PROBATIVE POLICY.
III. RULES OF EXTRINSIC POLICY.
IV. PAROL EVIDENCE RULES.

[*See Table 2, for further analysis.*]

BOOK II. BY WHOM EVIDENCE IS PRESENTED.

I. BURDEN OF PROOF, AND PRESUMPTIONS.
GENERAL PRINCIPLES.
II. BURDENS AND PRESUMPTIONS IN
SPECIFIC ISSUES.

BOOK III. TO WHOM EVIDENCE IS PRESENTED.

I. JUDGE.
II. JURY.

BOOK IV. PROPOSITIONS NEEDING NO EVIDENCE.

I. JUDICIAL NOTICE.
II. JUDICIAL ADMISSIONS.

2. TABULAR ANALYSIS OF BOOK I (ADMISSIBILITY)

PART I. RULES OF RELEVANCY

I. Circumstantial Evidence

- I. of Human Act
- II. of Human Quality, etc.
- III. of Inanimate Fact

[*See Table 3*]

II. Testimonial Evidence

- I. Qualifications
- II. Impeachment
- III. Rehabilitation
- IV. Admissions

[*See Table 4*]

III. Autoptic Proference

PART II. RULES OF AUXILIARY PROBATIVE POLICY

I. Preferential

- I. Documentary Originals
- II. Attesting Witness, etc.

II. Analytic

Hearsay

1. Cross-Examination
2. Confrontation

III. Prophylactic

- I. Oath
- II. Perjury-Penalty
- III. Publicity
- IV. Sequestration
- V. Discovery

IV. Simplificative

- I. Order of Evidence
- II. Sundries
- III. Opinion

V. Synthetic

- I. No. of Witnesses
- II. Kind of Witness
- III. Verbal Completeness
- IV. Authentication

PART III. RULES OF EXTRINSIC POLICY

I. Absolute Exclusion

II. Optional Exclusion (Privilege)

I. Testimonial Duty

II. Privileges of Non-Attendance

III. Privileges of Silence

A. Topics

1. Sundry
2. Anti-Marital
3. Self-Criminating

B. Communications

1. Sundries
2. Attorney
3. Marital
4. Jurors
5. Informers: Officials
6. Physician
7. Priest

PART IV. PAROL EVIDENCE RULES

I. Enaction

II. Integration

III. Formalities

IV. Interpretation

3. TABULAR ANALYSIS OF BOOK I, PART I, TITLE I

CIRCUMSTANTIAL EVIDENCE

I. Evidencing a Human Act

I. Prospectant Evidence
- *A.* Moral Character
- *B.* Capacity, Skill, etc.
- *C.* Habit, Custom
- *D.* Design, Plan
- *E.* Emotion, Motive

II. Concomitant Evidence
- *A.* Opportunity
- *B.* Impossibility

III. Retrospectant Evidence
- *A.* Traces Mechanical
- *B.* Traces Organic
- *C.* Traces Mental

II. Evidencing a Human Quality, etc.

Facts to be proved
- I. Moral Character
- II. Physical Capacity
- III. Mental Capacity
- IV. Design, Plan
- V. Intent
- VI. Knowledge, Belief
- VII. Habit, Custom
- VIII. Emotion, Motive
- IX. Identity

May be evidenced by
- Conduct exhibiting
- Circumstances causing
- Prior or subsequent condition
- [Repute; see Hearsay Rule]
- [Personal Opinion; see Opinion Rule]

III. Evidencing a Fact of Inanimate Nature

Facts to be proved
- I. Identity
- II. Occurrence
- III. Existence, Persistence
- IV. Tendency, Quality, Cause, Effect

May be evidenced by
- Similar Instances
- Sundries

4. TABULAR ANALYSIS OF BOOK I, PART I, TITLE II

TESTIMONIAL EVIDENCE

I. Testimonial Qualifications

Specific Qualifications

General Capacity

I. Organic Capacity
- *A.* Mental Derangement
- *B.* Mental Immaturity
- *C.* Moral Depravity

II. Experiential Capacity
- *A.* General Experience
- *B.* Special Experience

III. Partisan Capacity
- *A.* Pecuniary Interest
- *B.* Marital Relationship

IV. Observation
- *A.* Knowledge in general
- *B.* Specific Knowledge

V. Recollection
- *A.* Past (Recorded)
- *B.* Present (Refreshed)

VI. Narration
- *A.* Interrogated
- *B.* Dramatic, Pictorial
- *C.* Written
- *D.* Interpreted

II. Testimonial Impeachment

I. Persons Impeachable
- *A.* Defendant
- *B.* Own Witness

II. Impeaching Traits
- *A.* Moral Character
- *B.* Mental Incapacity
- *C.* Inexpertness
- *D.* Bias, Interest, etc.

III. Evidencing the Impeaching Traits
- *A.* Bias, Corruption, Interest
- *B.* Moral Character
- *C.* Inexpertness, Memory, etc.

evidenced by
- Conduct exhibiting
- Circumstances causing
- [Repute; see Hearsay Rule]
- [Personal Opinion; see Opinion Rule]

introduced through
- Extrinsic Testimony
- Cross-Examination

IV. Contradiction and Self-Contradiction
introduced by
- Extrinsic Testimony
- Cross-Examination

III. Testimonial Rehabilitation

- *A.* Moral Character
- *B.* Consistent Statements

IV. Parties' Admissions

- *A.* Implied Admissions
- *B.* Admissions in Pleadings
- *C.* Admissions by Third Parties

EVIDENCE

IN

TRIALS AT COMMON LAW

INTRODUCTION

SCOPE OF THE SUBJECT, AND PRELIMINARY DISTINCTIONS

CHAPTER I.

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

arrived at an issue, and it becomes the plaintiff's interest to demonstrate to the tribunal the existence of the legal relation (a right, as to him; a liability, as to the defendant) which he asserts, and the defendant's interest to show its non-existence.

(*a*) *Law and Fact, distinguished.* The material on which this claim of the plaintiff rests, if successful, is composite. Given certain facts or groups of facts, and the State predicates a legal relation between A and B, *i.e.* is ready to lend its force towards a more or less direct realization of that relation. The establishment of a given claim, then, involves the demonstration (1) that certain facts or groups of facts exist, (2) that to the contingency of their existence the State attaches the legal consequence now asserted by the claimant. He has thus to satisfy the tribunal in two respects, (1) as to these facts, (2) as to the legal consequence asserted to be attached. In one sense, both these matters are "facts", — in the sense that everything in the cosmos is a fact or phenomenon. But the popular distinction between "fact" and "law" is here as accurate as the situation requires. The requirement is for phrases which shall set off in one class the generality that the State sanctions and will habitually enforce a legal relation of a specific content, and in another class the specific occurrence constituting the contingency in which the State predicates this relation. In the former class we are dealing with the abstract formulated body of legal principles; in the latter, with all concrete phenomena, designated in the terms of the law.

That many phenomena (events, or facts) may not at first sight be simple to classify, or easy to deal with, does not affect the reality of the distinction. For instance, the circumstance that John Doe owns the farm Blackacre, upon analysis, resolves itself as follows: The legal relation of ownership exists as between John Doe and all others, because (a) John Doe's father, owner of Blackacre, died without a will leaving John Doe his only legitimate child, and (b) under such circumstances the above legal relation attaches as between John Doe and all others. Here (b) is clearly a fact of legal rule, while (a) is for practical purposes an ordinary fact, but (a) may be in turn resolved into facts of legal rule (ownership, legitimacy, and the like) in composition with ordinary facts. In judicial practice, and not in theory only, the distinction will be maintained, for the judge will instruct the jury upon the legal rules necessary for them to know and obey in reaching their ultimate determination. Thus, though such a question as ownership may be handed over for determination to the part of the tribunal usually dealing with ordinary facts alone, the distinction is none the less preserved between legal principles and the other phenomena which we ordinarily call "facts."

No closer distinction is here necessary. It is apparent that the claimant has here two classes of material very different for the purposes of his demonstration. To persuade the tribunal of the existence of the asserted rule of law is a process having its own separate rules, not here involved. To persuade the tribunal of the existence of the required state of facts is the process

with which the rules of Evidence, or Proof, so called, are for the most part concerned.

(*b*) *Argument and Evidence, distinguished.* Within this line, however, must be distinguished two separate processes employing different classes of expedients. The claimant may conceivably offer to the tribunal the very phenomenon in its entirety which is to be the basis of the legal rule asserted ; but an instance could hardly occur in practice. Ordinarily, the demonstration can be accomplished only by the use of a number of facts, the final logical result being the establishment of the total fact. The process would consist in the presentation of these elemental facts and in the piecing of them together so as to reach the conclusion. This process of presentation is a different one from the process of piecing together. The latter is Argumentation. The legitimate quality of Argumentation is the invocation, by counsel, of ordinary rules of logic and rhetoric in the combination of assumed facts. The rules governing this sub-process in the general process of judicial proof form a separate subject of law. It is sufficient here to note that Argument is to be distinguished from the presentation of Evidence.[1]

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

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

Of the definitions of legal evidence that have been proposed from time to time, some have been framed merely in view of emphasizing partial aspects

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

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

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

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

1824, Mr. *Thomas Starkie*, Evidence, I, 9: "That which is legally offered by the litigant parties to induce a jury to decide for or against the party alleging such facts, as contradistinguished from all comment and argument on the subject, falls within the description of evidence."

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

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

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

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

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

1823, Mr. Justice *Edward* LIVINGSTON, Draft Code, Book of Definitions (Works, ed. 1872, II, 646): "Evidence is that which brings to the mind a just conviction of the truth or falsehood of any substantive proposition which is asserted or denied. Illustrations and developments of the different parts of this definition: I. A conviction produced by evidence

which ought not according to the rules of true reason to have that effect is not a just conviction; the law therefore declares what effect different species of evidence ought to have in producing such conviction, and that evidence in its different degrees is called 'legal evidence.' . . . II. The word 'substantive,' in the definition is intended to exclude all such abstract propositions as can be demonstrated to be true or false by the reasoning power, without having recourse to the establishment of other facts. The propositions intended by the definition are either of fact or of law."

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

1889, Professor *James Bradley Thayer*, "Presumptions and the Law of Evidence", 3 Harvard L. Rev. 142: "What is our law of evidence? It is a set of rules which has to do with judicial investigations into questions of fact. . . . These rules relate to the mode of ascertaining an unknown, and generally a disputed, matter of fact. But they do not regulate the process of reasoning and argument. . . . When one offers 'evidence', in the sense of the word which is now under consideration, he offers to prove, otherwise than by mere reasoning from what is already known, a matter of fact to be used as a basis of inference to another matter of fact. . . . In giving evidence we are furnishing to a tribunal a new basis for reasoning. This is not saying that we do not have to reason in order to ascertain this basis; it is merely saying that reasoning alone will not, or at least does not, supply it. The new element which is added is what we call the evidence. Evidence, then, is any matter of fact which is furnished to a legal tribunal — otherwise than by reasoning or a reference to what is noticed without proof — as the basis of inference in ascertaining some other matter of fact."[3]

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

(1) Evidence is *always a relative term.* It signifies a relation between two facts, the 'factum probandum', or proposition to be established, and the 'factum probans', or material evidencing the proposition. The former is necessarily to be conceived of as hypothetical; it is that which the one party affirms and the other denies, the tribunal being as yet not committed in either direc-

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

tion. The latter is conceived of for practical purposes as existent, and is offered as such for the consideration of the tribunal. The latter is brought forward as a reality for the purpose of convincing the tribunal that the former is also a reality.

No correct and sure comprehension of the nature of any evidential question can ever be had unless this double or relative aspect of it is distinctly pictured. On each occasion the questions must be asked, What is the Proposition desired to be proved? What is the Evidentiary Fact offered to prove it?

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

(3) *Permitting a Fact to become a Proposition, i.e.* open to be evidenced, *is not an evidentiary process.* A ruling of substantive law or of pleading is often discussed as if it were a ruling upon a question of evidence. For example, on an action of battery, upon a plea of not guilty, the defendant offers evidence to prove that the plaintiff used insulting words to the defendant before the attack, and this is rejected; here the ruling is in truth that insults constitute no excuse or no ground for mitigation of damages, — a ruling of substantive law ; or, perhaps, that such a defence is not available upon a plea traversing the battery, — a ruling of pleading. It is certainly not a ruling upon a question of evidence; it is a ruling that the proposition desired to be proved is either not tenable, by the substantive law, or not issuable, by the law of pleading.

This contrast is indicated by the terms Materiality and Admissibility, the former defining the status of the Proposition in the case at large, and the latter defining the relation of an Evidentiary Fact to some Proposition. The two problems are wholly distinct, and yet the inaccuracy of our usage tends constantly to confuse them. Although in some legal treatises the confusion has been perpetuated, yet the most careful modern writers have repeatedly called attention to the impropriety and the harmfulness of this inveterate error :

1827, Mr. *Jeremy Bentham,* Rationale of Judicial Evidence, b. IX, pt. VI, c. V (Bowring's ed. vol. VII, p. 560: "The question, on what facts the decision turns, is a question, not of evidence, but of the substantive branch of the law: it respects the 'probandum', not the 'probans': it does not belong to the inquiry, by what sort of evidence the facts of the case may be proved; it belongs to the inquiry, what are the facts of which the law has determined that proof shall be required, in order to establish the plaintiff's claim. This circumstance, obvious as it is, might easily be overlooked by one who had studied the subject only in the compilations of the English institutional writers; who, not content with directing that the evidence be confined to the points in issue, have farther proceeded, under the guise of laying down rules of evidence, to declare, on each occasion, what the points in issue are. One whole volume out of two which compose Mr. Phillipps's treatise on the Law of Evidence, — with a corresponding portion of the other treatises extant concerning that branch of the law, — is occupied in laying down rules concerning the sort of evidence which should be required in different sorts of actions or suits at law. But why should different forms of action require different sorts of evidence? The securities by which the trustworthiness of evidence is provided for, and the rules by which its probative force is estimated, if for every sort of cause they are what they ought to be, must be the same for one sort of cause as for another. The difference is not in the nature of the proof; it is in the nature of the facts required to be proved. There is no difference as between different forms of action, in reason, or even in English law, in respect of the rules relating to the competency of witnesses; nor, in general, to the admissibility or the proof of written documents; nor in respect of any other of the general rules of evidence. What Mr. Phillipps (I mention him only as a representative of the rest) professes, under each of the different forms of action, to tell you, is, what facts, in order to support an action in that form, it is necessary that you should prove. . . . But, to enumerate the facts which confer or take away rights, is the main business of what is called the civil branch of the law; to enumerate the acts by which rights are violated — in other words, to define offences — is the main business of the penal branch. What, therefore, the lawyers give us, under the appellation 'law of evidence', is really, in a great part of it, civil and penal law. . . . Under the title Burglary, Mr. Starkie begins by saying, that on an indictment for burglary, it is essential to prove, 1st, A felonious breaking and entering; 2dly, of the dwelling-house; 3dly, in the night time; 4thly, with intent to commit a felony. He then proceeds to inform us, that there must be evidence of an actual or constructive breaking; for if the entry was obtained through an open door or window, it is no burglary. . . . Who does not see that all this is an attempt — a lame one, it must be confessed (which is not the fault of the compiler), but still an attempt — to supply that definition of the offence of burglary which the substantive law has failed to afford?"

1881, Mr. Justice *Oliver Wendell* Holmes, The Common Law, 120: "The principles of substantive law which have been established by the courts are believed to have been somewhat obscured by having presented themselves oftenest in the form of rulings upon the sufficiency of evidence. When a judge rules that there is no evidence of negligence, he does something more than is embraced in an ordinary ruling that there is no evidence of a fact. He rules that the acts or omissions proved or in question do not constitute a ground of legal liability, and in this way the law is gradually enriching itself from daily life, as it should. Thus, in Crafton *v.* Metropolitan Railway Co., the plaintiff slipped on the defendant's stairs and was severely hurt. The cause of his slipping was that the brass nosing of the stairs had been worn smooth by travel over it, and a builder testified that in his opinion the staircase was unsafe by reason of this circumstance and the absence of a handrail. There was nothing to contradict this except that great numbers of persons had passed over the stairs and that no accident had happened there, and the plaintiff had a verdict. The Court set the verdict aside, and ordered a nonsuit. The ruling was in form that there was no evidence of negligence to go to the jury; but this was obviously equivalent to saying, and did in fact mean, that the railroad company had done all that it was bound to do in maintaining such a staircase as was proved by the plaintiff. A hundred other equally concrete instances will

be found in the text-books. On the other hand, if the Court should rule that certain acts or omissions coupled with damage were conclusive evidence of negligence unless explained, it would, in substance and in truth, rule that such acts or omissions were a ground of liability or prevented a recovery, as the case might be. Thus, it is said to be actionable negligence to let a house for a dwelling knowing it to be so infected with small-pox as to be dangerous to health, and concealing the knowledge."

1898, Professor *James Bradley Thayer*, Preliminary Treatise on Evidence, 511–514: "A great portion of these rules [of Evidence], as laid down by the Courts and by our text writers, are working a sort of intellectual fraud by purporting to be what they are not. To the utter confusion of all orderly thinking, a Court is frequently represented as passing on questions of evidence when in reality it is dealing with some other branch, either of substantive law or procedure. . . . What is the result of this? Utter confusion of thought, and frequent injustice in decision. Of course when in reality men are discussing a question in the law of partnership, agency, or bankruptcy; or the ground and scope of equity jurisdiction in dealing with fraud, mistake, trusts, or the reforming of documents; or the rules for the construction and interpretation of language; and yet, out of an imagination that they are dealing with rules of evidence, go on to clothe their ideas in the phraseology of that subject; although a right result may be reached, it is not rightly reached, and bewilderment attends the process. . . . This error is deeply ingrained in our cases; and it is a subtle one. But you cannot possibly deal thoroughly and scientifically with this part of our law until the error is cast out, until it is purged of that mass of substantive law, and of mere rules of procedure, and reason, and logic which overloads it. There was a time when all that was said or read to the jury was spoken of as said 'en evidence al jury.' The contrast in mind, when this was said, was between saying something to the Court, in pleading (in the days of oral pleading), and saying it to the jury. But now, for two or three centuries, we have been discussing the admissibility of what is offered in evidence, under a new branch of law, called the rules of evidence; as contrasted with its admissibility under the law of pleading and practice, and the substantive law. . . . It is then fundamental that not all determinations admitting or excluding evidence are referable to the law of evidence. Far the larger part of them are not. An innumerable company of questions, of the sort just alluded to, very often — more often than not, nay, much oftener than not — are dealt with in our text-books and cases as belonging to the law of evidence, when in real truth they ought to be carried to the border line of this subject and respectfully deposited on the other side."

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

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

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

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

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

The first and the second of these classes clearly do not involve the law of Evidence. The third class is concerned with judicial admission and their congeners; such are really equivalent to a pleading, because they formally waive proof; they are therefore no part of the law of Evidence except for the

necessity of distinguishing them from other things miscalled admissions. The fourth class alone concerns intrinsically the law of Evidence. It rests on the self-evident corollary that, since any Evidentiary Fact may in its turn become a Proposition (*supra*, par. (1)), evidence to prove it may then be offered.

Thus the law of Evidence is legitimately concerned solely with the relation between Evidentiary Facts and Propositions; how a given Proposition comes to be eligible for proof is not a part of the law of Evidence.

§ 3. **Topical Analysis of the System of Evidence.** The Propositions of which evidence may be offered being thus given by the rules of substantive law and of pleading, and the law of evidence concerning itself solely with the relation between Evidentiary Facts and such Propositions, the settlement of that relation involves obviously four distinct questions :

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

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

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

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

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

There are, indeed, still other topics which, because their material is partly or chiefly evidential, might by a broad treatment be included in a system of evidence.

For example, the rules of *procedure in preparation for trial* may raise the question whether an expected witness may be detained or bonded before trial begun, or whether testimony can be preserved by deposition taken before trial, or whether documents needed for evidence can be prevented from being carried out of the jurisdiction. So far as any of these rules of procedure affect the subsequent admissibility of the evidence, they plainly belong here ; but as rules of procedure — *i.e.* telling whether a thing can or cannot be done before trial — they are in strictness not rules of Evidence.

Again, the *deliberations of the jury* are governed by certain rules, prescribing the place of retirement, the behavior during retirement, the form of the verdict, and the like. Among these rules may be some which prescribe what effect of persuasion is to be attached to different sorts of evidence, and how the total strength or sufficiency of the jurors' persuasion is to be measured. All these rules belong together, and it is only incidentally that some of them concern evidential material.

Still again, a verdict and *judgment may on appeal be set aside* for various errors and defects ; some of these errors may involve the circumstance that improper evidence has been considered. But only as a part of the general system of appeal and revision can such rules be satisfactorily dealt with. They are a part of that system and not of the system of Evidence.

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

The ensuing schedule of topics will serve to show in compact form the general scheme of the rules and their relation to each other:

BOOK I

ADMISSIBILITY (WHAT FACTS MAY BE PRESENTED AS EVIDENCE)

A. RELEVANCY

I. *CIRCUMSTANTIAL EVIDENCE*

HUMAN ACT, EVIDENCE TO PROVE

Prospectant Evidence

MORAL CHARACTER; PHYSICAL CAPACITY; HABIT; DESIGN; EMOTION

Concomitant Evidence

OPPORTUNITY; ALIBI

Retrospectant Evidence

MECHANICAL, ORGANIC, MENTAL TRACES

HUMAN QUALITY OR CONDITION, EVIDENCE TO PROVE

Moral Character; Physical Capacity; Mental Capacity; Design; Intent; Knowledge; Habit; Emotion; Identity

EXTERNAL INANIMATE NATURE (CONDITIONS, CAUSES, ETC.), EVIDENCE TO PROVE

Identity; Occurrence of Event; Existence in Time; Tendency, Cause, etc.

II. *TESTIMONIAL EVIDENCE*

TESTIMONIAL QUALIFICATIONS

Organic Capacity

MENTAL DEFECT OR DERANGEMENT; MENTAL IMMATURITY; MORAL DEPRAVITY

Experiential Capacity

Emotional Capacity

INTEREST; MARITAL RELATIONSHIP

Testimonial Observation

GENERAL PRINCIPLES; HEARSAY KNOWLEDGE; HYPOTHETICAL QUESTIONS

SPECIAL SUBJECTS

Medical Matters; Foreign Law; Reputation; Handwriting; Value

Testimonial Recollection

IN GENERAL; PAST RECOLLECTION RECORDED; PRESENT RECOLLECTION REVIVED

Testimonial Narration

INTERROGATION; NON-VERBAL TESTIMONY; WRITTEN TESTIMONY; INTERPRETED TESTIMONY; CONFESSIONS

TESTIMONIAL IMPEACHMENT

Introductory

GENERAL THEORY; PERSONS IMPEACHABLE

General Qualities

MORAL CHARACTER; MENTAL DEFECTS, ETC.

Evidencing Bias, etc. by Particular Instances

Evidencing Moral Character, etc. by Particular Instances

Specific Error (Contradiction)

Self-Contradiction

Admissions

TESTIMONIAL REHABILITATION

III. *AUTOPTIC PROFERENCE (REAL EVIDENCE)*

B. RULES OF AUXILIARY PROBATIVE POLICY

I. *PREFERENTIAL RULES*

PREFERENCE FOR DOCUMENTARY ORIGINALS

Rule Itself; Exceptions; Rules about Secondary Evidence

PREFERRED TESTIMONY

Provisional Testimonial Preferences

ATTESTING WITNESS; SUNDRY PREFERENCES

Conclusive Testimonial Preferences

II. *ANALYTIC RULES (HEARSAY RULE)*

HEARSAY RULE SATISFIED

By Cross-examination; By Confrontation

EXCEPTIONS TO THE RULE

Dying Declarations; Statements of Facts against Interest; Declarations about Family History; Attesting Witness; Regular Entries; Sundry Deceased Persons; Reputation; Official Statements; Learned Treatises; Professional Lists; Affidavits; Voters' Statements; Mental Condition; Spontaneous Exclamations

HEARSAY RULE NOT APPLICABLE (VERBAL ACTS)

APPLICATION TO COURT OFFICERS

III. *PROPHYLACTIC RULES*

OATH

PERJURY PENALTY

PUBLICITY

SEQUESTRATION

PRIOR NOTICE (Discovery)

IV. *SIMPLIFICATIVE RULES*

ORDER OF PRESENTING EVIDENCE

SUNDRY RULES

OPINION RULE

General Principle; Insanity; Value; Insurance Risk; Conduct; Law; State of Mind; Character; Handwriting

V. *QUANTITATIVE RULES*

NUMBER OF WITNESSES REQUIRED (Corroboration)

Rules depending on the Kind of Issue

TREASON; PERJURY; WILLS; ETC.

Rules depending on the Kind of Witness

ACCOMPLICE; SURVIVOR; WOMAN COMPLAINANT; ETC.

KINDS OF WITNESSES REQUIRED

Eye-witness to Crime, Marriage, etc.

VERBAL COMPLETENESS

COMPULSORY; OPTIONAL

AUTHENTICATION OF DOCUMENTS

AGE; CONTENTS; CUSTODY; SEAL.

C. RULES OF EXTRINSIC POLICY

I. *RULES OF ABSOLUTE EXCLUSION*

ILLEGALITY IN OBTAINING EVIDENCE

II. *RULES OF OPTIONAL EXCLUSION*

PRIVILEGE IN GENERAL

VIATORIAL PRIVILEGE

TESTIMONIAL PRIVILEGE

Privileged Topics

SUNDRIES; ANTI-MARITAL FACTS; SELF-CRIMINATING FACTS

Privileged Communications

CONFIDENCES: ATTORNEY AND CLIENT; HUSBAND AND WIFE; JURORS; OFFICIAL SECRETS; PHYSICIAN AND PATIENT; PRIEST AND PENITENT

D. PAROL EVIDENCE RULES

CREATION OF JURAL ACTS

INTEGRATION OF JURAL ACTS

SOLEMNIZATION OF JURAL ACTS

INTERPRETATION OF JURAL ACTS

BOOK II

BY WHOM EVIDENCE MUST BE PRESENTED

BURDEN OF PROOF

SPECIFIC PRESUMPTIONS

BOOK III

TO WHOM EVIDENCE MUST BE PRESENTED

JUDGE; JURY

BOOK IV

OF WHAT PROPOSITIONS NO EVIDENCE NEED BE PRESENTED

JUDICIAL NOTICE

JUDICIAL ADMISSIONS

§ 4. **Rules of Evidence in Chancery; in Criminal Trials; in Ex Parte Proceedings; in Interlocutory Proceedings; in Grand Jury Inquiries; in Extradition Proceedings.** (1) *Chancery.* The system of evidence in the Chancellor's court would form of itself a subject of broad scope. As a historical system it is independent of that of the common law in jury trials. It was built upon the ecclesiastical or canon law, and thus involves the whole story of Continental systems of proof.[1] Down to the middle of the 1700s, the relation between the chancery and the common law systems seems not to have been questioned, — not so much because their independence was conceded, as because the common law until that time was hardly conscious of possessing a system. With the appearance of Chief Baron Gilbert's treatise on Evidence — the first of its kind — about 1726, that consciousness becomes more apparent, and the question of the relations of the two begins to arise. But it seems to have been conceded or professed from the first by the court of chancery (according tc its maxim that Equity follows the Law) that it accepted the rules of the common law as to the admissibility of evidence.[2] Its own methods of taking evidence continued, as of course; but it recognized the bindingness of the common law rules, and professed to apply them except so far as the method of written deposition made modification necessary. There was in truth comparatively little field for controversy, partly because the rules of Evidence at common law were then not yet numerous, and partly because criminal cases and many civil issues which might raise common questions of evidence were wholly withdrawn from the cognizance of chancery. The orthodox and broad proposition, then, always was and has continued to be that the rules of Evidence at common law trials obtained also in chancery.[3]

But a comprehensive and accurate statement of the practice of chancery would show important qualifications of this. The variances in chancery practice may be classed under four heads. (a) The required mode of *taking testimony in writing*, instead of orally, was of course in itself a totally con-

§ 4. [1] A masterly analysis and contrast of the Canon Law and Chancery methods is given in Professor Langdell's Equity Pleading, §§ 1–56. The historical relation between the Chancery methods and the system of the Canon or ecclesiastical courts (which gave form to the entire Continental system) can be seen by comparing Professor Langdell's exposition with the following works: A. Engelmann, History of Continental Civil Procedure (translated by Robert W. Millar, 1923); A. Esmein, History of Continental Criminal Procedure (translated by John Simpson, 1913); both of these in the Continental Legal History Series.

[2] 1740, Henly *v.* Phillips, 2 Atk. 43 (said of witnesses).

[3] 1817, Grant, M. R., in Wood *v.* Strickland, 2 Meriv. 461, 464 (said to be in general the same; here slightly different as to notice to produce a document, because the depositions had already showed its need); *circa* 1846, Mr. C. P. Cooper, Notes to Reports of Lord Cottenham's Cases in Chancery, I. 509 ("Conclusions drawn by the author from the various authorities in the books: Conclusion 1. That what is evidence in a court of law is evidence in a court of equity, and that evidence which is admissible in a court of law is admissible in a court of equity. Conclusion 2. That when it is said in some of the cases that the Court rejected evidence or held evidence to be inadmissible which would have been received or would have been held admissible at common law, it must not be understood that such evidence was absolutely rejected or was held entirely inadmissible, but only that it was laid aside, that it was put out of consideration, as regarded any decree or order binding the interest of the party against whom it was adduced"); Tenn. Shannon's Code 1916, § 6271.

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

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

(2) *Criminal Trials.* The rules of admissibility are in general the same for the trial of civil and of criminal causes. Not only in practice, but in principle and in spirit, there is no occasion for a distinction. The relation between an Evidentiary Fact and a particular Proposition is always the same, without regard to the kind of litigation in which that proposition becomes material to be proved.

It is true that certain rules of admissibility are applicable in criminal cases only, — such as the rule of corroboration in perjury ; but this is because the issues thereby evidenced arise in criminal cases only. It is also true that certain rules are modified or created for certain kinds of criminal issues, — such as the rules for admitting and corroborating an accused's confession, the rule for ' corpus delicti ', the rule for bigamous marriage, and the rule for a party's character; but these are few in number, and are due to special considerations affecting a particular issue or a particular sort of evidence, rather

than to general policy involved necessarily or usually in criminal cases. Still further, it is true that in the related branches of procedure concerned chiefly with evidence, particularly the burden of proof and the measure of the jury's persuasion, a different policy obtains for criminal cases in general ; but this does not affect the rules of admissibility.

There are, then, by no means two systems of rules, distinct in history and in method, as was the case with the chancery practice.[4] There is but one system of rules for criminal and for civil trials. This is the more worth emphasizing, because the occasional appearance, in works on the law, of the title 'Criminal Evidence' has tended to foster the fallacy that there is some separate group of rules or some large number of modifications. On the contrary, much is lost in utility by attempting a separate treatment; for most of the large principles of Evidence are equally illustrated in both kinds of trials, and cannot be adequately followed, either in theory or in authority, if the precedents in either class of cases are ignored.

The fallacy, however, is an inveterate one, and has had repeatedly to be repudiated by judicial utterances :

1806, *Lord Melville's Trial*, 29 How. St. Tr. 746. Prosecution for the misapplication of public funds as Treasurer of the Navy; certificates were offered, signed by the paymaster, the defendant's subordinate, acknowledging the receipt of £45,000 from the Exchequer; these were objected to as not competent in a criminal case to affect the defendant with responsibility. Mr. Serjeant *Best*, for their reception : "We must first prove that the money

[4] *Accord:* ENGLAND: 1788, Eyre, C. B., in Att'y-Gen'l *v.* LeMerchant, 2 T. R. 201, 202 (documentary evidence); 1796, Lawrence, J., in Stone's Trial, 25 How. St. Tr. 1314; 1817, Abbott, J., in R. *v.* Watson, 32 How. St. Tr. 492, 2 Stark. 116, 155; 1820, Best, J., in Queen Caroline's Trial, Linn's ed. I. 490; 1828, Best, C. J., in Strother *v.* Barr, 5 Bing. 136, 155; 1837, Coleridge, J., in R. *v.* Murphy, 8 C. & P. 306; 1839, Parke, B., in Leach *v.* Simpson, 5 M. & W. 309, 312; 7 Dowl. Pr. 513, 515; 1860, Lefroy, C. J., in R. *v.* Towey, 8 Cox Cr. 331; 1878, Grove, J., in Blake *v.* Assur. Soc., 14 Cox Cr. 252.

UNITED STATES: *Fed.* 1840, McLean, J., in U. S. *v.* Winchester, 2 McLean U. S. 135, 138; *Ariz.* Rev. St. 1913, P. C. § 1042, 1225; *Cal.* P. C. 1872, §§ 1102, 1321; *Colo.* Comp. St. 1921, § 7099; *Del.* 1873, Gilpin, C. J., in State *v.* Carter, 1 Houst. Cr. C. 402, 411; *Fla.* Rev. G. S. 1919, § 6018; *Ida.* Comp. St. 1919, §§ 8950, 9129; *Ind.* Burns Ann. St. 1914, § 2110 (quoted *post*, § 488); *Ia.* Code 1919, § 9470; *Mich.* St. 1917, No. 208, May 10 (rules of Evidence in the Judicature Act 1915, being c. 234 of Comp. L. 1915, to govern criminal and quasi-criminal proceedings "insofar as the same are applicable"); *Mont.* Rev. C. 1921, § 11977, 12175; *Nev.* Rev. L. 1912, §§ 7451, 7454; *N. J.* 1849, Green, C. J., in West *v.* State, 22 N. J. L. 212, 242; *N. D.* Comp. L. 1913, § 10838; *Oh.* 1856, Bartley, C. J., in Summons *v.* State, 5 Oh. St. 325, 352; *Or.* Laws 1920, § 1533; *Pa.* 1875, Agnew, C. J., in Brown *v.* Schock, 77 Pa. 477; *S. C.* 1820, Nott, J., in State *v.* Rawls, 2 Nott & McC. 331, 333; *S. D.* Rev. C. 1919, § 4880; *Tenn.* Shannon's Code 1916, § 7354; *Tex.* Rev. C. Cr. P. 1911, §784; *Utah:* Comp. L. 1917, §§ 9275, 9276 (like Cal. P. C. §§ 1321, 1102); *Vt.* 1879, Barritt, J., in State *v.* Potter, 52 Vt. 33, 38 (documentary evidence); *Va.* 1817, White, J., in Warner *v.* Com., 2 Va. Cas. 95, 105; 1878, Staples, J., in Trogdon's Case, 31 Gratt., 862, 874; *Wash.* R. & B. Code 1909, §§ 2147, 2152; *Wyo.* Comp. St. 1920, § 7511.

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

has been received, and after we have satisfactorily proved that, then comes the evidence to prove what has been its application after it has been received. . . . The learned counsel have endeavored to distinguish between civil and criminal cases. . . . There is a considerable distinction between civil and criminal cases, but that distinction consists rather in the number of facts to be proved than in the manner of proving any of them. It is necessary that more facts should be proved, for the purpose of showing that a man has money in his possession or has had money come into his possession, than to make him civilly responsible; but though more facts should be proven in one case than is necessary to be proved in the other, each particular fact is to be proved by precisely the same evidence." Mr. *Plumer*, on the opposite side: "I desire it may be distinctly understood that I do not dispute that the rules of evidence are the same in both. . . . What is the distinction, then? . . . It is not that the rules of evidence are at all altered, but that when you are looking at the individual who stands in a civil relation, and are pursuing it with that view, there is an identity of persons between the agent and principal, and all that one has done or said is done or said by the other; . . . [but otherwise for criminal responsibility]. We are not contending that the rules of law are different in the two cases, but that the ultimate result of the inquiry makes that which is competent, legal, and proper in one case not so in the other." Lord Chancellor ERSKINE took the view that the certificate was admissible to show the authorized reception of the monies by the agent, but not that the money actually reached the defendant; and proceeded: "This first step in the proof must advance by evidence applicable alike to civil as to criminal cases; for a fact must be established by the same evidence, whether it is to be followed by a criminal or a civil consequence. But it is a totally different question, in the consideration of criminal as distinguished from civil justice, how the noble person now on trial may be affected by the fact when so established. The receipt by the paymaster would in itself involve him civilly, but could by no possibility convict him of a crime."

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

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

1883, *Sir* JAMES FITZJAMES STEPHEN, History of the Criminal Law, 1, 437: "The rules as to the relevancy of the facts and as to the proof of relevant facts are, speaking generally, the same in relation to criminal as in relation to civil proceedings; for the manner in which a fact is to be proved has no necessary connection with the use to which it is to be applied when it has been proved. If it is necessary to show that a man is dead, the fact must be proved in the same way, whether it is proved in a criminal trial for murder or on the trial of a civil action for the recovery of an estate. Moreover the principles which determine whether or no a given fact is either in issue, or is or is not relevant to the issue, are the same whatever may be the nature of the case. Some of the more detailed rules of evidence, however, apply exclusively, and others most frequently, to criminal cases"; and he then names the presumption of innocence, the defendant's disqualification, confessions, dying declarations, and the defendant's character.

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

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

(3) *Proceedings Ex Parte.* Evidence is constantly being offered to a judge in establishing the grounds of a motion made and heard 'ex parte' only. In such cases the usual system of rules of Evidence is not applied, partly because there is no opponent to invoke them, partly because the judge's determination is usually discretionary, and partly because it is seldom final. Occasionally the analogy of the ordinary rules is followed, but no regular practice seems to have developed except as prescribed by the local rules of court:

1841, *R.* v. *Ryle*, 9 M. & W. 227; commission issued under St. 33 H. VIII, c. 39, and long usage, to find whether a debt was due from the defendant to the crown, with a view to levy execution for the debt. The only evidence before the jury was an affidavit of Capt. Hill that the money had been deposited with defendant for the regiment and was due. The Commissioner stated that it had been "the invariable practice from the most ancient period" to use affidavits when the witness' attendance to give evidence 'viva voce' could not conveniently be had. On objection, it was pointed out that "the debt is not conclusively found by the inquiry before the jury under the commission, but the party is at liberty to traverse the debt in the proceedings which subsequently take place." It was argued to the contrary that there cannot be "one species of evidence for the crown and another for the subject." Lord ABINGER, C. B., discharging the rule: "The notion of legal evidence on trials before juries, in our law, is the effect of long practice . . . and a very important part of the law of the land. But where is the analogy that binds us to apply that practice to 'ex parte' proceedings on inquests for particular purposes, which are mere matter of form? There is no case that decides that, on inquests to be taken under provisions of this nature, there shall be none but 'viva voce' evidence, or none but that which, in common law trials before juries, may be considered as legal evidence." PARKE, B.: "I agree with my Lord Chief Baron that the rules of Evidence, as applicable to trials between party and party and criminal trials, have been the result of practice established, not by the law of the land; but the judges, seeing that the species of evidence given in cases between party and party, and between prosecutor and the accused, was much more lax than in the present day, have prescribed certain rules which have been adhered to. But the question is, whether the practice has laid down any such rule with regard to inquests of this description, which are not final in their nature, but are only preliminary, and may be [later] traversed by any person whose rights are affected thereby. . . . I apprehend that it would be difficult to produce any authority to show that, in a proceeding which was not finally binding upon the rights of parties, juries have been tied down to hear only such evidence as would be received in cases binding between party and party. That being so, according to established usage, I apprehend this affidavit would be admissible in evidence."

1807, *Shortz* v. *Quigley*, 1 Binn. Pa. 222 (motion to open a judgment entered on a bond; after evidence as to the liability, counsel for the obligor offered to prove facts showing the obligation void; the judge refusing "to hear this evidence or to open the judgment," the issue on appeal was whether "the Court was bound to receive the same evidence that would be competent upon a trial by jury"); TILGHMAN, C. J.: "In hearing these motions, Courts are not tied down to those strict rules of evidence which govern them in trials by jury; because it is presumed that their knowledge of the law prevents their being carried away by the weight of testimony not strictly legal. I never heard it supposed that a bill of exceptions lies to the Court's opinion in receiving or rejecting testimony upon motions for summary relief. . . . If it did, the delay of justice would be infinite. . . . I consider the point too well settled to need discussion."

The most notable deviation, in 'ex parte' proceedings, from the ordinary rules of Evidence is seen in the use of *affidavits*, the cross-examination being dispensed with; and the proceeding of *habeas corpus* is that in which the question assumes the greatest importance.[5]

(4) *Interlocutory Proceedings.* So too, in all interlocutory proceedings, even when responsory and not 'ex parte', the usual system of rules is ignored, again partly because of the subsidiary and provisional nature of the inquiry, but chiefly because there is no jury, and the rules of Evidence are, as rules, traditionally associated with a trial by jury.[6]

(5) *Grand Jury.* Proceedings before a grand jury are both 'ex parte' and interlocutory; moreover, the grand jury only seeks for a "probable cause"; hence, on all principles, the jury-trial rules of Evidence should not apply. Moreover, in point of policy, no rules should hamper their inquiries, nor need a presentment amounting only to probable cause be based on a system of rigid sifting of evidence.

In point of principle, the common law, oddly enough, seems not to have arrived at a state of equilibrium.[7] But the vigorous development in the

[5] The authorities are scanty, and local unrecorded practice doubtless varies; for *affidavits* expressly admissible by statutes, see *post*, § 1710:

Minnesota: 1906, Kipp *v.* Clinger, 97 Minn. 135, 106 N. W. 108 (affidavit on motion to open a judgment; rule of personal knowledge applied); *Montana:* 1897, Liter's Estate, 19 Mont. 474, 48 Pac. 753; *New Hampshire:* 1906, Goodwin *v.* Blanchard, 73 N. H. 550, 64 Atl. 22 (the trial judge has discretion to refuse oral examination of jurors who have made affidavits, on a motion for a new trial); *New Jersey:* 1789, State *v.* Lyon, Coxe N. J. 403 (habeas corpus for a negro alleging free status; some 'viva voce' testimony being offered, it was objected that affidavits were necessary; Smith, J. (overruling the objection); "The general principle in the admission of evidence is not that Courts are restricted by narrower rules in receiving testimony than juries are, but that they, being able to discriminate between that which ought to be listened to and that which should be disregarded, are not prohibited from hearing any evidence which they may think calculated to illustrate the subject before them"); 1795, State *v.* McDonald & Armstrong, Coxe N. J. 332 (habeas corpus for a negro alleging free status; hearsay testimony of the deceased owner being objected to, it was admitted, the case not being before a jury), 1916, Bull *v.* International Power Co., 87 N. J. Eq. 1, 99 Atl. 111 (discharge of a receiver; said that "the same rules, as far as may be, apply to 'ex parte' testimony as to that in litigated matters"); 1916, Re McCraven, 87 N. J. Eq. 28, 99 Atl. 619 (application for order to take deposition; "the rules of evidence . . . apply as well to 'ex parte' cases as to ligitated ones"; *Pennsylvania:* 1807, Shortz *v.* Quigley, 1 Binn. 222 (quoted *supra*).

[6] 1841, Parke, B., in R. *v.* Ryle, quoted *supra;* 1917, Semidey *v.* Izquierdo, 10 P. R. 114, 129 ("Even hearsay evidence may be received upon application for preliminary injunction").

[7] *England:* 1795, R. *v.* Willet, 6 T. R. 294 (affidavit based on hearsay, not received as a ground for an information; "the Court refused to grant the rule, because the affidavit on which it was prayed for was not legal evidence; they said that in these cases they were placed in the room of a grand jury", and this affidavit would not be legal evidence before a grand jury); 1819, R. *v.* Dickinson, R. & R. 401 ("witnesses had attended before the grand jury without having been sworn"; whether an objection after conviction was too late, not decided, by all the Judges; but a pardon was recommended); 1842, R. *v.* Russell, Car. & M. 247 (witnesses not properly sworn before the grand jury; two judges, citing also a third, held that this would not "vitiate the indictment, as the grand jury were at liberty to find a bill upon their own knowledge merely, and were anciently in the habit of doing so"); 1872, R. *v.* Bullard, 12 Cox Cr. 353 (the grand jury asked for the deposition of an absent witness; "Byles, J., granted the application, and stated that the grand jury were not bound by any rules of evidence; they were a secret tribunal, and might lay by the heels in jail the most powerful man in the country by finding a bill against him; and for that purpose might even read a paragraph from a newspaper"); *United States:* 1852, U. S. *v.* Redy, 5 McLean 358, Fed. Cas. 16, 134 (objection that affidavits were used before the

United States of the institution of public prosecutor (unknown to the common law) seems to have developed a technique which led to abuses ; and the Legislatures of many States, moved by experiences and motives of public policy not easy to detect, have limited the grand jury to the use of "legal evidence"; this being of course, in effect, a handicap on the public prosecutor.[8]

(6) *Extradition.* For the same reasons of principle, extradition proceedings are not governed in strictness by the jury-trial rules of Evidence ; moreover, here the additional reason obtains that the evidence is brought from outside the jurisdiction, and the procurement of evidence is thus likely to be hampered by the lack of power or practicability, as well as by the possible differences of law in another system.[9]

§ 4*a*. **Jury-Trial Rules of Evidence as Applicable to Administrative Tribunals** ; (I) **Theory of the Question.** Is the system of rules of Evidence, by law in force for trials by jury in the ordinary judiciary system, also legally applicable as such to inquiries of fact determinable by administrative tribunals or officers?

The answer is, speaking generally, that the system is not applicable, either by historical precedent, or by sound practical policy ; but that it has been declared or assumed, in several jurisdictions, to be applicable to some types of

grand jury, the affiants being personally present; Nelson, J., ruled that "the mode of conducting the examination of witnesses who are before the grand jury" would not be revised; also ruled that "evidence before a grand jury must be competent legal evidence, such as is legitimate and proper before a petit jury"; also that, on grounds of policy, there would be no revision "of the grand jury upon the evidence, for the purpose of determining whether the finding was founded upon sufficient proof," or whether there was "any evidence as to any particular point"); 1920, U. S. *v.* Silverthorne, D. C. W. D. N. Y., 265 Fed. 853 (new trial; motion to quash indictment because of hearsay received, "merely hearsay or incompetent evidence tantamount to insufficiency of proof of material matters" would justify quashing); 1916, State *v.* Fox, 122 Ky. 197, 182 S. W. 906; 1890, People *v.* Lander, 82 Mich. 109, 46 N. W. 956; 1865, State *v.* Logan, 1 Nev. 509; 1850, State *v.* Dayton, 23 N. J. L. 49; 1881, Hope *v.* People, 83 N. Y. 418.

1717, Sir John Hawkins, Pleas of the Crown, b. II, c. 25, § 145; 1826, Joseph Chitty, Criminal Law, 20 ed. I, 318; 1918, Wharton, Criminal Procedure, 10th ed., § 1291.

[8] *Ariz.* Rev. St. 1913, P. C. § 918 (grand jury may hear only evidence of "witnesses produced and sworn before them, or furnished by legal documentary evidence", or depositions); *Ark.* Dig. 1919, § 2988 (only "legal evidence"); *Cal.* P. C. 1872, § 919 ("The grand jury can receive no other evidence than such as is given by witnesses produced and sworn before them, or furnished by legal documentary evidence, or the deposition of a witness in the cases mentioned in the third subdivision of section six hundred and eighty-six. The grand jury can receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay, or secondary evidence"); *Ida.* Comp. St. 1919, § 8793 (substantially like Cal. P. C. § 919); *Ky.* C. Cr. P. 1895, § 107 (only "legal evidence"); *Mont.* Rev. C. 1921, § 11823 (like Cal. P. C. § 919); *Nev.* Rev. L. 1912, § 7024: *N. Mex.* Annot. St. 1915, § 3129 ("can receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence"); *N. D.* Comp. L. 1913, §§ 10659, 10660 (like Cal. P. C. § 919, omitting "or the deposition, etc."); *S. D.* Rev. C. 1919, §§ 4681, 4682 (like Cal. P. C. 1915, § 919, omitting the clause for depositions).

[9] 1922, Collins *v.* Loisel, — U. S. —, 42 Sup. 469 (extradition; "the phrase 'such evidence of criminality', as used in the treaty, refers to the scope of the evidence or its sufficiency to block out those elements essential to a conviction; it does not refer to the character of specific instruments of evidence or to the rules governing admissibility; . . . it is clear that the mere wrongful exclusion of specific pieces of evidence, however important, does not render the detention illegal").

administrative tribunals, while in other jurisdictions or for other kinds of tribunals the orthodox attitude has been maintained.

It will be convenient (I) first, to define the precise question, by noticing the constitutional relation of the regular courts to administrative tribunals, and then (II) to examine the bearings of history and practical policy, and finally (III) to note the state of the law in the several jurisdictions and for the different kinds of tribunals.

(I) At the outset it is necessary to define the precise question, and for that purpose to discriminate other principles related in practice but distinct in law. That question is, whether *the jury-trial rules of evidence are by law applicable* to control the proceedings of administrative officers in inquiries of fact falling within their jurisdiction to be determined? But two other and broader questions must have been answered before that question arises; viz. (*a*) Whether an administrative official's *determination is reviewable on the facts* by the regular Courts? (*b*) Whether an administrative official's determination, under the constitutional requirement of due process of law, must be *based on certain fundamentals of fair and adequate procedure?* An affirmative answer to both these questions signifies that the Courts may set aside administrative findings on one or the other ground; but does not signify necessarily that the jury-trial rules of evidence are applicable by law in administrative tribunals.

Speaking generally, the affirmative answer has everywhere been given to the above two questions. The peculiar traditions of Anglo-American justice and politics look upon the supremacy of the Courts as a necessary safeguard of civic liberties. Nevertheless, no part of our law is more incoherent and confused, both in theory and in terminology. It has grown up by rulings delivered under various headings of the law; and the largest part of it is disguised under procedural rulings about certiorari, mandamus, and other unrelated remedies, applied without consistency of principles to numerous administrative officials of the most varied types of independence and authority. Meanwhile, the last few decades have seen a great multiplication of adminisrative offices by legislative creation; and the Courts have had to solve this new and vast extension of problems without any equipment of systematic theory ready in our law for the purpose. Hence a tangled mass of inconsistent rules representing a transitional stage of development; and this must endure for a long period without hope of clarification.[1]

§ 4a. [1] Amidst the voluminous materials dealing with the tendencies and problems of administrative subjection to judicial review, the following are notable: F. J. Goodnow, "The Growth of Executive Discretion" (1905; American Political Science Ass'n. Proceedings, II, 29); E. M. Parker, "Executive Judgments and Executive Legislation" (1906; Harvard Law Rev., XX, 116); T. R. Powell, "Conclusiveness of Administrative Determinations in the Federal Government" (1907; American Political Science Review, I, 583); "Judicial Review of Administrative Action in Immigration Proceedings" (1909; Harvard Law Rev., XXII, 360); "Administrative Exercise of the Police Power" (1911; Harvard Law Rev. XXIV, 268, 333, 441); Roscoe Pound, "Executive Justice" (1907; American Law Register, O. S., LV, 137); Nathan Isaacs, "Judicial Review of Administrative Findings" (1921; Yale Law J., XXX, 781); E. F. Albertsworth, "Judicial Review of Administrative Action by the Federal Supreme Court" (1921; Harvard Law Review, XXXV, 127).

This much needs to be brought to mind here, in order to discriminate (as the Courts sometimes forget to do) between these two general and fundamental questions above noted, viz. the extent of the control of the Courts over the due process and the finality of findings of administrative tribunals, and the precise question of the law of Evidence, viz. whether the jury-trial rules are by law applicable to inquiries by administrative tribunals. The control may and does exist, without requiring an affirmative answer to the latter question.[2]

§ 4*b*. **Same**: (II) **History and Policy**. The history and the policy of treating the jury-trial rules of Evidence as applicable to inquiries by administrative officials deserve careful reflection.

(A) *Historically*, the distinction is fundamental, *i.e.* the common-law rules of Evidence grew up exclusively in jury trial, and do not apply 'ex stricto jure' in any tribunal but a jury-court. This was long ago pointed out by the master of the history of jury-trial:

1898, Professor *James Bradley Thayer*, A Preliminary Treatise on Evidence at the Common Law, cc. IV–VI, pp. 180, 266, 270, 509: "The rejection on one or another practical ground of what is really probative is the characteristic thing in the law of Evidence; stamping it as the child of the jury system. . . . In the shape it has taken, it is not at all a necessary development of the rational method of proof; so that, where people did not have the jury, or having once had it did not keep it (as on the continent of Europe although they, no less than we, worked out a rational system), they developed under the head of Evidence no separate and systematized branch of the law. . . . The greatest and most remarkable offshoot of the jury was that body of excluding rules which chiefly constitute the English 'Law of Evidence.' . . . This judicial oversight and control of the process of introducing evidence to the jury was what gave our system birth; and he who would understand it must keep this fact constantly in mind. . . Our Law of Evidence . . . is concerned with the operations of courts of justice, and not with ordinary inquiries 'in pais.' . . . It is a term of

[2] Merely as illustrations of the distinctness of the questions of finality and due process, the following judicial opinions are noted:

Due Process principle, in general: 1889, Chicago M. & St. P. R. Co. *v.* Minnesota, 134 U. S. 418, 457, 10 Sup. 462 (railroad commission).

Finality, in general: 1911, Borgnis *v.* Falk Co., 147 Wis. 327, 364, 133 N. W. 209 (industrial commission).

U. S. Treasury Department: 1893, Passavant *v.* U. S., 148 U. S. 214, 13 Sup. 1016 (board of general appraisers); 1855, Murray's Lessee *v.* Hoboken Land & I. Co., 18 How. 272 (Treasury officer's warrant); Geo. S. Brown, "Judicial Review in Customs Taxation" (The Forum, July, 1918).

U. S. Postmaster-General: 1902, American School of Magnetic Healing *v.* McAnnulty, 187 U. S. 94; 1921, U. S. ex rel. Milwaukee Social Dem. Pub. Co. *v.* Burleson, 255 U. S. 407, 41 Sup. 352; 1922, Leach *v.* Carlile, 258 U. S. 138, 42 Sup. 227 ("fraud order" excluding matter from the mails; the finding of the Postmaster-General is conclusive, "where it is fairly arrived at and has substantial evidence to support it").

U. S. Land Office: 1896, Burfenning *v.* Chicago St. P. M. & O. R. Co., 163 U. S. 321; 1901, Gardner *v.* Bonestell, 180 U. S. 362.

U. S. Treasury, Immigration Bureau: 1892, Nishimura Ekiu *v.* U. S., 142 U. S. 651, 12 Sup. 336; 1893, Fong Yue Ting *v.* U. S., 149 U. S. 698, 713, 742; 1903, Japanese Immigrant Case, 189 U. S. 86, 23 Sup. 611; 1905, U. S. *v.* Ju Toy, 198 U. S. 753, 25 Sup. 645; 1912, Zakonaite *v.* Wolf, 226 U. S. 272, 33 Sup. 31.

State Industrial Accident Commission: 1917, Northern Pacific S. S. Co. *v.* Ind. Acc. Com., 174 Cal. 500, 163 Pac. 910; 1918, Ind. Com. *v.* Johnson, 64 Colo. 461, 172 Pac. 422; 1918, Peterson *v.* Ind. Board, 281 Ill. 326, 117 N. E. 1033; 1918, Phil Hollenbach Co. *v.* Hollenbach, 181 Ky. 262, 284, 204 S. W. 152; 1915, Milwaukee *v.* Ind. Com., 160 Wis. 238, 151 N. W. 247.

State Public Utilities Commission: 1920, Ohio Valley Water Co. *v.* Ben Avon Borough, 253 U. S. 287, 40 Sup. 527.

State School Board: 1920, Hopkins *v.* Buckport, 119 Me. 437, 111 Atl. 734.

forensic procedure, and imports something put forward in a court of justice. . . . Our Law of Evidence is a piece of illogical, but by no means irrational, patchwork, — not at all to be admired, nor easily to be found intelligible, except as a product of the jury system." [1]

It is true, to be sure, that in the course of English administrative development in the 1800s, a few administrative subjects were committed to the judges as reviewing tribunals, for example, taxation and electoral controversies; and the members of the bar, in practicing in those fields, naturally invoked, or at least observed in the main, the rules of Evidence. Thus, here and there, the modern English law can be found using the rules of Evidence in administrative inquiries. How far this practice extended cannot be said with certainty, — not far enough, however, to constitute any general change of spirit or method.[2] Standing off at a distance to analyze general features,

§ 4b. [1] In Edmund Burke's speech protesting against the House of Lords' rulings upon evidence in the trial of Warren Hastings will be found a similar allusion to the peculiar needs of the jury as the reason for rules of Evidence (Cobbett's Parliamentary Hist., XXXI, 347–358).

[2] The following notes of English practice represent the result of a partial search among a variety of sources selected at random:

Taxing Bodies: Assessed Taxes, Cases determined on Appeal (two volumes, 1823–1834, covering 1016 cases; only twice is a rule of Evidence invoked, viz. in Cases 974, 1016, where the Crown representative offered hearsay evidence of the assessee's having pursued game, and argued that the burden was on the assessee to disprove the fact; this contention was overruled; virtually only a question of burden of proof was involved, and not a question of admissibility); Board of Inland Revenue, Tax Cases, 1875–1915, 6 vols. (no title Evidence in the Index): 1892, R. *v.* Marsham, 2 Q. B. 371 (apportionment of paying expense by local board of works; the magistrate, in an action by the board for payment, declined to allow cross-examination of the board's clerk as to the disbursement of the moneys; Lord Halsbury, L. C., allowing mandamus: "No doubt a magistrate may improperly reject evidence, and the Court may be unable to set him right, and the question is whether this case comes within that category; I think that it does not; the act of the magistrate was not a mere rejection of evidence, but amounted to a declining to enter upon an inquiry which he was bound to enter: he has not merely rejected evidence, but has declined jurisdiction"; Lord Esher, M. R. agreed that here the magistrate had virtually ruled "that whether the evidence would prove the subject-matter or not, the subject-matter was one into which he had no jurisdiction to inquire"; *Pauper Settlement* (Justices of the Peace): Burrow's Settlement Cases 1732–1776 (only two cases on Evidence in the Index); *Industrial Inventions:* Cutler's Reports of Patent, Design, and Trademark Cases, 1884 + (a few rulings on Evidence); *Liquor Licenses:* 1898, R. *v.* Sharman, 1 Q. B. 578 (licensing Justices may "determine what course of procedure they will adopt" as to swearing witnesses, etc.); *Railway Rates:* Neville and others' Railway and Canal Traffic Cases, 1856 + (no rulings on Evidence); *Parliamentary Committee on Private Bills:* Clifford and Rickards' Locus Standi Cases, 1873–1884 (virtually no evidence rulings); *Election Contests (Revising Barristers):* Welsh's Registry Cases, Dublin, 1841 (no Evidence rulings); Smith's Registration Cases: 1909, Storey *v.* Town Clerk, Smith's Registration Cases, II, 179 (evidence of canvassers not based on personal knowledge; the revising Barrister's ruling was affirmed at first, in the King's Bench Division, on the ground that the practice in election inquiries had been not to insist on the "strictest rules of evidence", per Alverstone, L. C. J., Channell, J., and Coleridge, L. J.; but in the Court of Appeal, the appeal was allowed, on the ground among others that the language of the Act implied that the revising Barrister must act on "legal evidence" only, per Vaughan Williams, L. J., and *semble*, Buckley, L. J., and Kennedy, L. J.); *Summary Magistrate:* 1910, The King *v.* Mahony, 2 Ir. R. 695 (conviction of a betting offence by a divisional magistrate acting summarily, but reviewable on certiorari; the evidence was insufficient; held that though "the essentials of justice must be observed", including the opportunity to make defence, etc., yet "mere want of evidence sufficient to warrant conviction" did not amount to want of jurisdiction; the opinions exhaustively consider all prior rulings in England and Ireland, and justify the remark of L. C. J. O'Brien that "never in the history of the law, at least so far as relates to this country, did a case receive more careful, more exhaustive consideration, than the one with which we are dealing"); *Executive Commissions in general:* 1922, Wilson *v.* Esquimalt &

we find it still true (in Professor Thayer's words) that, 'Our Law of Evidence is concerned with the operations of courts of justice; it is not at all to be admired, nor easily to be found intelligible, except as a product of the jury system.'

Historically, also, we have the advantage of a critical judgment upon it from a comparative point of view, — the judgment of an enlightened English jurist who was fully aware of its peculiar origin and had observed the futility of an attempt to transplant it amidst unsuitable conditions :

1873, Sir *Henry Sumner Maine*, The Theory of Evidence (in "Village Communities in the East and West"; being a review of Sir James Stephen's "Indian Evidence Act"): "It must always be recollected that the affirmative or positive method of arrangement followed in the Indian Evidence Act does not represent the historical growth of the English law of Evidence. So far as it consisted of express rules, it was in its origin a pure system of exclusion, and the great bulk of its present rules were gradually developed as exceptions to rules of the widest application, which prevented large classes of testimony from being submitted to the jury. The chief of these were founded on general propositions of which the approximation to truth was but remote. Thus the assumptions were made that the statements of litigants as to the matter in dispute were not to be believed; that witnesses interested in the subject-matter of the suit were not credible; and that no trustworthy inference can be drawn from assertions which a man makes merely on the information of other men. . . . A complete account of it cannot in fact be given, unless the mode of its development be kept in view. . . .

"Another important reason, too, for remembering that our law of Evidence is historically a system of exclusion, is that we cannot in any other way account for its occasional miscarriages. The conditions under which it was originally developed must still be referred to, in explanation of the difficulty of applying it in certain cases, or of the ill success which attends the attempt to apply it. The mechanism of judicial administration which once

Nanaimo R. Co., A. C. 202 (on appeal from British Columbia; in an action to establish the railroad's title to mineral lands, the validity of a grant to G. was in issue; by B. C. St. 1904, 3 & 4 Edw. VII, c. 54, § 3, a grant would issue from the Lieutenant-Governor in council to a settler upon application "accompanied by reasonable proof of such occupation", etc.; here the Lieutenant-Governor had held a hearing with full opportunity of cross-examination, etc., but the railroad company contended that there still was not "reasonable proof" made by G.; Duff, J., speaking for the Privy Council, held that "whether or not the proof advanced was 'reasonable proof' was a question of fact for the designated tribunal", viz. the Lieutenant-Governor, and proceeded, referring to the British Columbian Supreme Court: "But the Chief Justice . . . proceeded largely upon the view that generally the deponents seem to speak without personal knowledge of the facts to which they depose, and such statements he seems to put aside entirely as valueless if not altogether incompetent. Their Lordships think that the Lieutenant-Governor in Council was not bound by the technical rules of British Columbia law touching the reception of hearsay evidence, and they think there was nothing necessarily incompatible with the judicial character of the inquiry in the fact that such evidence was received"); *Court-Martial:* 1921, The King *v.* Murphy, 2 Ir. R. 190, 226 (the accused called for the proceedings of a court of inquiry, so as to cross-examine a witness for the prosecution to his former testimony therein, but this was refused, on the ground of privilege for such proceedings; the refusal being erroneous, held that the Court's error could not be availed of; Molony, C. J., "When the Court has jurisdiction to decide a matter, its jurisdiction is not ousted because it happens to give an erroneous decision; and it certainly cannot be deemed to exceed or abuse its jurisdiction merely because it incidentally misconstrues a statute, or admits illegal evidence, or rejects legal evidence: . . . up to the present no text-writer on court-martial law has suggested that this Court could set aside a decision of a court-martial on account of an incidental mistake in applying the law of evidence; however desirable it might be to be able to invoke the authority of this Court in dealing with cases of such gravity as that before us, in the period of over two centuries that courts-martial have existed, there has been no instance of any such exercise of jurisdiction"; examining the authorities).

extended over a great part of Europe, and in which the functions of the judge were distributed between persons or bodies representing distinct sources of authority — the King and the country, or the Lord and his tenants — in England gradually assumed the shape under which we are all familiar with it in criminal trials and at Nisi Prius. A body of men, whose award on questions of fact is in the last resort conclusive, are instructed and guided to a decision by a dignitary, sitting in their presence, who is assumed to have an eminent acquaintance with the principles of human conduct, whether embodied or not in technical rules, and who is sole judge of points of law, and of the admissibility of evidence. The system of technical rules, which this procedure carries with it, fails then, in the first place, whenever the arbiter of facts — the person who has to draw inferences from or about them — has special qualifications for deciding on them, supplied to him by experience, study, or the peculiarities of his own character, which are of more value to him than could be any general direction from book or person. For this reason, a policeman guiding himself by the strict rules of Evidence would be chargeable with incapacity; and a general would be guilty of a military crime.

"Again, the blending of the duties of the judge of law and of the judge of fact deprives the system of much, though not necessarily of all, of its utility. An Equity judge, an Admiralty judge, a Common Law judge trying an election petition, an historian, may employ the English rules of Evidence, particularly when stated affirmatively, to steady and sober his judgment. But he cannot give general directions to his own mind without running much risk of entangling or enfeebling it, and under the existing conditions of thought he cannot really prevent from influencing his decision any evidence which has been actually submitted to him, provided that he believes it. Englishmen are extremely prone to do injustice to foreign systems of judicial administration, from forgetting the inherent difficulty of applying the English law of Evidence when the same authority decides both on law and on fact, as is mostly the case in other countries. . . .

"When India came under British rule, there were many branches of law in which the political officers of the British Government could find few positive rules of any sort; or, if any could be discovered, they were the special observances of limited classes or castes. Thus there was no law of Evidence, in the proper sense of the words; hardly any law of Contract; scarcely any of Civil Wrong. . . . Whole provinces of law became exclusively, or nearly exclusively, English. The law of Evidence became wholly English; so did the law of Contract substantially; so did the law of Tort. . . . It is quite possible to hold a respectful opinion of many parts of English law, and yet to affirm strongly that its introduction by courts of justice into India has amounted to a grievous wrong. . . . No branch of law had become more thoroughly English at the time when it was first comprehensively dealt with by the Indian Legislature than the law of Evidence; and the practical evils which hence arose were even greater than those which ordinarily result from the adoption of an exotic system of legal rules, collected with difficulty from isolated decisions reported in a foreign language. The theory of judicial evidence is constantly misstated or misconceived even in this country. The English law on the subject is too often described as being that which it is its chief distinction not to be — that is, as an Organon, as a sort of contrivance for the discovery of truth which English lawyers have patented. In India, several special causes have contributed to disguise its true character. There is much probability that our English law of Evidence would never have come into existence if we had not continued much longer than other western societies the separation of the province of the judge from the province of the jury; and, in fact, the English rules of Evidence are never very scrupulously attended to by tribunals which, like the Court of Chancery, adjudicate both on law and on fact, through the same organs and the same procedure. Now, an Indian functionary, when he acts as a civil judge, and for the most part when he acts as a criminal judge, decides both on law and on fact. He it is who applies the rules of Evidence to himself, and not to a body distinct from himself; and he has often to perform the delicate achievement of preventing his decision from being affected by sources of information which in reality have been opened to him. . . .

"The effects of their peculiar experience on many distinguished Indian functionaries may be seen to be of two kinds. In some minds there is complete scepticism as to the value of the rules of Evidence; and though the man who for the time being is a judge may attempt to apply them, he is intimately persuaded that he has gone into bondage to a foolish technical system under compulsion from the Court of Appeal above him. With others, the consequences are of a different sort, but practically much more serious. They accept from the lawyers the doctrine that the law of Evidence is of the extremest importance, and unconsciously allow this belief to influence them, not only in their judicial, but in their executive and administrative duties. It is often said in India that the servile reliance upon the English law of Evidence, which nowadays characterizes many of the servants of Government, is producing a paralysis of administration; and though the assertion may be exaggerated, it is far from impossible that it may have a basis of truth."

These sagacious observations of Sir Henry Maine may serve to warn us that any attempt to apply the jury-trial rules of Evidence to an administrative tribunal acting without a jury is an historical anomaly, predestined to probable futility and failure.

(B) *Policy.* In considering the practical policy of applying the jury-trial system of rules in administrative tribunals, two extreme and antipodal opinions are found current.

1. One view — the popular view, it may be called — is that the jury-trial rules have had their day in our system of justice; that their obstructive and irrational technicalities have made the system nauseous and futile in its native habitat; and that to transplant it to new fields would be an error amounting to a folly. The adherents of this view point to the effective manner in which other tribunals of great responsibility have already managed to conduct their inquiries without the aid of the jury-trial rules; thus demonstrating that those rules are not indispensable in reaching the truth:

1920, Mr. *Louis Bartlett*, "The Newer Justice" (Atlantic Monthly, vol. 126, No. 3, p. 296): ". . . A very significant thing about this, and one which to my mind portends a great change in the administration of our Anglo-Saxon laws, is that in the Juvenile Court, the Domestic Relations Court, and the special tribunals, such as the Interstate Commerce Commission, the method of ascertaining the facts is departing more and more from that sanctioned by law in the courts. We are all tempted to laugh when the trial-lawyer jumps up to remark that a question is 'irrelevant, incompetent, and immaterial.' And yet that objection is responsible for a great many new trials, appeals and reversals, and failures of justice. The objection amounts to this: that the evidence, if given, should be disregarded in rendering a decision. And the distrust of our Courts seems to have reached the point that we fear that, if the answer is given, the judge or jury will not have sense enough to disregard it. Now the judge of the Juvenile Court listens to everything; finds out all about the child, his parents, his surroundings, and knows a lot about the relation of the child with others that he could never have learned sitting as a trial judge in a criminal case. . . . Another thing. The court itself collects in an expert way much of the evidence on which it acts, instead of depending on the testimony brought to it. The psychopathic expert, the social worker, the probation officer, are trained observers. Our Railroad Commission, through its engineering staff, collects most of the data on which it acts. It wastes little time in lawyers' wrangles over facts it has itself ascertained. These methods make for speedy judgments and fair ones. On the other hand, expert opinion, as used in the courts, is almost a byword; it is furnished by the interested parties, and experience has shown that, generally speaking, it is unreliable.

"This new method of getting information is sound common sense. It is the way we act in our ordinary affairs in reaching judgments; and used by trained minds, it presents little danger of injustice. It is the method of taking testimony used in Continental Europe, where the Roman Law furnishes the basis of the judicial systems. And we find that it is used in practice in our inferior courts, when the record is not taken by a court reporter, and that it promotes speed and, in the hands of able men, justice also.

"It is probable that this method of ascertaining the facts will find wider application as time goes on."

The other, or technical, view is that the jury-trial system of rules is the only safe method of investigation where liberty and property may be at stake; that the sound wisdom of caution which is the basis of that system is as valid for one kind of tribunal as for another; and that the judicial review of administrative officers' findings would be impracticable and ineffective without using that system as a standard for checking the regularity of the proceedings. — There is no need to quote representatives of this view; it preaches or lurks in almost every judicial opinion; and it echoes instantly in the breast of the orthodox legal practitioner.

2. The fallacy of the first, or popular, view does not lie in the assertion that the jury-trial system of rules has in its own home become technically over-developed to the point of inefficiency; for it is; and the repulsion against its excesses is natural and just. But the fallacy is rather in the second argument, viz. that the success of a few other tribunals in dispensing with the system permits the broad inference to be drawn that *administrative tribunals* in *general* (and even jury-courts) *could afford to dispense with it.* What are the conditions which have made this result possible in the Juvenile Courts, in the Federal Commerce Commission, and in a few other Federal tribunals? The answer must be uncertain. In the Juvenile Courts, the reason may be that there is usually no deep-seated controversy on issues of fact, and also that there are usually no professional lawyers to marshal the armed forces of technicality on either side of the issues. In the Commerce Commission, neither of these reasons applies; instead, however, it may be thought, first, that the habitually narrow range of the issue renders most of the technical rules inapplicable, and, secondly, that the smallness of the group of practitioners, and the unitary organization of the tribunal, tend to produce that personal acquaintance between bench and bar which permits most matters of proof to be taken for granted without insistence on the usual safeguards against chicanery. Similar conditions exist and may account for the similar result in the Federal Admiralty Courts, the Trade Commission, the Land Office, the Patent Office, and the Board of General Appraisers. And thus, not only do different sets of conditions exist in the Juvenile Courts and in the other tribunals, but none of these special conditions are true of the general mass of jury-trial courts; nor are they true, as a whole, of Industrial Accident Boards or of Public Utilities Commissions or of administrative tribunals in general. Therefore, a generalization from these peculiar instances cannot be made with certainty.

Moreover, the argument for the popular view forgets that there is a radical difference between conducting an inquiry of fact under the jury-trial system of Evidence and *conducting it under no rules at all.* Suppose that the jury-trial system be dispensed with, as proposed; what rules shall be used in their place? Certainly there are fundamental principles of caution and fairness which every serious investigator must be expected to observe. But what are they? Where are they defined? The danger in all political reform, now as always, is that we are too ready, when convinced of a fault in an institution, to abolish it without having a better substitute ready framed. And the unfortunate fact about our jury-trial system of Evidence is that there exists no other system to offer in competition for its place, — nor even the vestige of a system. No one has even proposed to condense the existing system to its essence, — to reduce it to its lowest terms of wisdom and prudence, — to define its minimum fundamentals. No such proposal is anywhere on record. And yet without it, the administrative official in general will be certain to run amuck, here and there.[2] The Federal Supreme Court has occasionally (*ante*, § 4*a*) pointed out what it considers to be the essentials of a fair trial of fact by administrative officials, — the opportunity to call witnesses, the opportunity to hear the evidence on the other side, and so on. But these casual designations do not cover even the fundamentals of a simple system of proof. Our administrative tribunals, in short, if we exempt them from the incubus of the jury-trial system of Evidence, can be pointed to nothing definite and knowable that will take its place. What has saved the situation, in administrative hearings, from a welter of inefficiency has been chiefly two circumstances, first, that the officials themselves have usually been lawyers whose professional experience has equipped them with the fundamentals of careful inquiry of fact; and, secondly, that the subjects of inquiry have been so limited in scope for each tribunal that a special and competent experience in that field has been soon built up.

On the whole, then, the popular view, viz. that the jury-trial system of Evidence can be generally dispensed with in administrative tribunals must be deemed to be unverified and premature.

3. On the other hand, the fallacies of the second, or technical view are plain. The jury-trial system of rules of Evidence is *not* the only safe system of investigation in matters of liberty and property; for other nations have had a long experience of successful justice without it. Nor is it correct to assume that the general wisdom of experience which is represented in the system at large is represented in all the detailed rules rigidly enforced; quite the con-

[3] That the likelihood of this danger to executive authority is not merely imaginative or fastidious may be seen from Ex parte Ung King Seng, D. C. N. D. Cal. (1914), 213 Fed. 119; here the inspector had refused to allow any cross-examination at all of the witnesses produced for the government; and to such a pitch of callous indifference had local deportation practice come that the government counsel on argument had the hardihood to suggest that "*it would be a nuisance to permit cross-examination.*" Cross-examination a nuisance! This amply illustrates the ease with which the best traditions of our justice can sometimes degenerate when the control of our Courts is withdrawn.

trary. What is commonly forgotten is that most of the rules — nineteen-twentieths, let us say — are merely rules of caution, *i.e.* they are based upon a *possibility* of error; so that the failure to observe the rule is perfectly consistent with a high probability of truth. The rule, for example, requiring the original of a document to be produced is merely a rule against possibilities; for thousands of banks and business houses daily deal with millions of wealth on the faith of copies, not originals; to assert that truth was certainly missed because a copy was used is an absurdity. So, too, with the hearsay rule; it aims to guard against possibilities, and is sound enough, as a rule; but all history of the past, and all public news of the present, is learned by hearsay; for less than a million of our population really knew, by personal observation, that our soldiers fought in a war with Germany; and the entire financial and economic operations of the country are built on a complex structure of hearsay which is as solid as a steel-and-concrete building.

And so, the question being whether each and all of the jury-trial rules, as a system, shall be imposed upon administrative tribunals to control their investigations, we should remember, that, however wise the rules be in themselves, they are merely rules of caution, excluding possible sources of error, and that therefore a great mass of truth will still be reached without them.

A second thing to remember is that the jury-trial rules are intended for a constantly changing tribunal of fact composed of inexperienced jurymen dealing with hundreds of types of cases. When the tribunal is composed of *experienced professional men*, habitually inquiring day after day into the *same limited class of facts* (as happens with most administrative boards), an expert weighing of evidence can generally be counted upon. The cautions represented by the exclusionary jury-rules can and will be applied by such a tribunal in weighing the evidence, without actual exclusion of it. Sir Henry Maine's comment on this feature (*ante*, § 4 *b*) represents a general truth. And in a community where the major part of such offices are filled by men already trained in the law, it is certain that the general wisdom of the cautions embodied in the jury-rules of Evidence will be employed by them. It is even amusing to read the solemn sermons on unreliable evidence preached by the lawyers on the supreme courts to the lawyers on the commissions, — as if the latter did not sense the dangers quite as well, by virtue of the professional training which was their common possession.

A third thing to remember is that the jury-trial system of Evidence-rules cannot be imposed upon administrative tribunals *without imposing the lawyers upon them also;* and this would be the heaviest calamity. The complex mass of Evidence-rules cannot be applied except by technically trained lawyers; and, furthermore, many of these technical lawyers will belong to the over-technical type. No one can wish that the petty snarling contentiousness over technicalities of trial tactics, so typical of jury-trial, should be transferred to the administrative tribunals. And yet, how can the system be transferred without transferring the only persons who can use it? Sermonize as

we may on the wisdom of the system in the abstract, it cannot be used in the abstract; and in the concrete it reeks of futile professional contentiousness. Yet one of the universally desired objects in vesting the powers of decision over new industrial and commercial problems in modern administrative boards was to avoid hampering them with the technical methods enforced by the judges in jury-trials; the language of the legislative enactments demonstrates this plainly. A survey of the practice in different States before such boards gives the impression that their failure or success in this respect may be fairly measured by the extent to which the professional assistance of lawyers has or has not continued to be necessary before them as formerly before the jury-courts. Certainly, then, to impose the Evidence-rules on administrative tribunals will inevitably mean the imposition also of the handicap of a professional body of lawyers to conduct the practice.

4. On either side of the argument from practical policy, then, fallacies appear. And yet, here as in every great question calling for action, a choice must be made; and that choice is likely to turn on the relative risk of danger, and the relative need of education, involved in the opposing fallacies.

For this particular question, the greater risk of danger, and the greater need of education, seems to be in the fallacy of the technical view, viz. the assumption that the jury-trial system of Evidence is the only safe system that can be tolerated, and therefore that it must be imposed equally on administrative tribunals. This assumption permeates the judicial opinions. It is attributable to the narrow experience of the trial lawyers who have become judges. The inveterate habit of mind cannot easily be altered when the judicial function comes to be exercised. It eulogizes reverently the mint, anise, and cummin of every detail of the system. It enshrines with sanctity each exception to an exception to an exception of a rule. It scans the findings to detect a slip in the practice, and when found it fervently dwells on the particular virtues of the violated rule. In short, it acts upon the assumption that no truth ever has been or ever can be discovered, in human controversy, except by the rigid employment of the jury-trial rules.

In this assumption that those rules are necessary safeguards of truth, the implication conveyed is that, without strict adherence to those rules, erroneous findings will abound — false claims will be sanctioned, or just liabilities will escape enforcement. But is this assumption correct? Is it certain that the jury-trial rules of Evidence do guarantee correct findings? Can any one maintain that those rules, as enforced to-day, do not constantly permit false claims of fact to stand, or do not constantly permit guilty culprits to escape? Far from it. It is tolerably obvious to practitioners that the jury-trial rules of Evidence do not have a necessary relation to correctness of verdicts, as to-day administered. Why should Courts of law assume that they do? Suppose, for example, that the lax use of Evidence rules before an industrial accident board would result occasionally in erroneous findings in favor of the claimant; is not this matched by the more than occasional

sanction of false personal injury claims in jury-trials through the strict enforcement of those same rules of Evidence? Under the industrial accident laws, the physician-patient privilege is eliminated, but it applies (in most States) in jury trials of insurance-claims and personal-injury claims ; and if a balance were to be struck, by divine omniscience, between the false claims of the former sort that failed for lack of the privilege and the false claims of the latter sort that succeeded by reason of the privilege, the debit balance might easily show against the jury-trial rules. Can any jury-trial criminal court in the country assert that its verdicts, strictly reached through the rules of Evidence, touch the bull's eye of truth as often as the findings of juvenile courts? Can any commercial jury-court in the country maintain that its verdicts are more often correct than the findings of the Interstate Commerce Commission?

In short, the jury-trial rules of Evidence, as to-day enforced in courts of law, are in the position of parties throwing stones from glass houses, when they cast doubt upon the more informal evidence-methods of administrative boards. The former have no reason for setting themselves up over the latter, as a cynosure of efficiency. If this is the fact, Courts should not approach this question as though the cause of Truth were being jeopardized by the proposal to relax the rigid system of jury-trial rules before administrative boards.

5. It remains to notice a compromise attitude, adopted by some Courts in a spirit of supposed liberality, and promising to become more widely accepted, viz. the New York "residuum rule", *i.e.* the rule that the administrative tribunal, on the one hand, need not actually in its inquiries be limited by the jury-trial rules, but that, on the other hand, there must somewhere be found, in the mass of evidence accepted, sufficient evidence legally acceptable by jury-trial rules to sustain the finding. This rule was well expounded in the following opinion:

1915, WOODWARD, J., in *Carroll* v. *Knickerbocker Ice Co.*, N. Y. Sup. App. Div., 155 Suppl. 1: "This section, obviously designed to promote informality and directness and eliminate technicality in procedure, cannot be construed to warrant the commission to make a finding and award *without legal evidence to sustain it.* The commission was, of course, entitled, in all its hearings relative to claims, to go to the very right of the matters at issue, and summarily search out the full facts concerning them. It would be a misfortune were the inquiry of such a board narrowly constrained by harassing formalities of procedure or insubstantial technicalities as to the admissibility of proffered proof. Both the letter and the spirit of this salutary statute excludes the idea of technicality in its administration or fettering constraints on the commission's purpose to glean all the facts and do substantial justice under the law. Accordingly the commission had the right and power, in its untrammeled discretion, to receive and admit proffered proof freely and liberally, with a view to developing all of the facts. . . . But after the commission has gathered all this data, all this information, unfettered by 'technical rules of evidence', then must come sifting and sorting; then must come assortment of wheat from chaff, demonstration from gossip, proof from 'hearsay'; and then the ascertainment of what facts have been fairly proved, under 'the maxims which the sagacity and experience of ages have established as the best means of discriminating truth from error.' (Bouvier's Law Dictionary.) No matter what proffered testimony has been taken, no matter how extraneous and immaterial many portions of the record ultimately appear, it is the *residuum of legal evidence* which must be decisive. There

must be in the record some evidence of a sound, competent, and recognizedly probative character to sustain the findings and awards made, else the findings and award must in fairness be set aside by this court. Section 68 of the Act, then, cannot be given any force as emancipating the commission from all legal restraints as to the presence of duly proved facts as essential basis for findings. Section 68 enunciates no rule as to the *probative force* of testimony at all. It sanctions no departure from the traditional basis on which money or property may be awarded under legal mandate. Its scope and purpose is procedural merely; it frees the commission, in its hearings, from the haunting fear of reversible error through failure to hold the proof to technical legal requirements, both as to evidence received and evidence rejected. In other words, it does little, if any, more than to write into the procedure of this commission, and into the powers of the courts in review of awards, the wholesome standard embodied by Mr. Justice Stephen in his Indian Evidence Act of 1872 (section 167): 'The *improper admission or rejection* of evidence shall not be ground of itself for a new trial or reversal of any decision in any cases, if it shall appear to the court before which such objection is raised that, *independently* of the evidence objected to and admitted, there was *sufficient evidence to justify the decision*, or that, if the rejected evidence had been received, it ought not to have varied the decision.' . . . The absence of a residuum of legal proof is fatal."

Plausible as this rule seems, from the liberal point of view, yet it cannot be accepted. In the first place, it still virtually requires the tribunal to test its proceedings by the jury-trial rules, and thus holds out the temptation to practitioners to employ the whole arsenal of technical weapons and secure a record full of "errors"; thus involving the heavy handicap already pointed out (par. 3). This shortcoming has been emphasized in another judicial opinion in the same case:

1915, HOWARD, J., in *Carroll* v. *Knickerbocker Ice Company*, N. Y. Sup. App. Div., 135 N. Y. Suppl. 1 (holding sufficient a finding based on hearsay): "If we were to look at this case as we would look at an action in court, or if we were to adhere to the substantive law of evidence, it is entirely clear that the award should be instantly revoked. The proof offered was of such a character that no court would have hesitated a moment to reject it. All the rules of Evidence, the accumulation of centuries of experience and wisdom, were ignored by the commission. But was the commission not authorized to ignore them? Indeed, in order to keep step with the spirit of the law, was the commission not bound to ignore them? It is clearly evident that the great bulk of the testimony in this case was hearsay, and in some instances hearsay upon hearsay. . . . So that the question arises here whether the commission, under Section 68 of the Compensation Act, were authorized to receive the hearsay evidence and base their findings upon it. . . . As to proceedings before the commission, these two sections wholly abrogate the substantive law of Evidence — abrogate the common law, the rules of procedure formulated by the courts, and all the technicalities respected by the legal profession. The commission is authorized by this section, it seems, to make its investigation in any manner that it chooses, wholly unfettered by any law previously invented by man. This is the spirit of the statute. The commission is to be bound neither by custom nor by precedent. The trials before the commission are to be summary, speedy, and informal. The very instant that the old rules of Evidence are invoked, the informal character of the hearing disappears, and the rigid, formal rules of procedure and all the technicalities incident to the practice of the law will grow up around the commission, hampering and delaying it, working inconvenience and hardship upon the claimants, and defeating the intent of the law."

In the next place, the proposed rule rests logically on another of the fallacies already noted above, viz. that this "residuum of legal evidence",

which is to be indispensable, will have some necessary relation to the truth of the finding. But the "legal" rules have no such necessary relation. In the mass, they do tend to secure a reliable body of evidence; but, taken individually, it is obviously fallacious to assume that one or more pieces of "legal" evidence are 'per se' a sufficient guarantee of truth. Suppose, for example, in a workman's compensation claim, the issue is whether the claimant is entitled as wife of the deceased, and the industrial board finds in the affirmative. In the mass of evidence, there is found a declaration of the old grandmother, residing with the family, but since deceased, that her daughter, the mother of the workman's children, is the workman's wife. This is strictly "legal" evidence, under the jury-trial rules, and would suffice to sustain the findings, under the above rule. And yet the old grandmother *may* have had a canny thought of the possibilities, *may* have spoken chiefly in her daughter's material interests, and *may* have deliberately falsified. And the above rule, both in theory and in practice, would treat this obviously possible falsification as saving the board's finding. On the other hand, in the same mass of evidence accepted by the board, there is an "illegal" document to which the Court will give no heed, viz. a marriage certificate from an obscure town in Italy or Carnatia, loaded with certificates and seals of a purporting priest, a notary, a mayor, and a governor, but lacking the seal of a purporting American consul; or perhaps it is a bundle of Dalmatian postmaster's receipts showing payment of wages forwarded regularly to the wife of the workman in the home village in the mountains. These documents are solemnly rejected as "illegal" or "not duly proved", and become as weightless chaff to the judicial mind. And yet, in ordinary experience, it is impossible to say that the one sort of evidence has any greater intrinsic probability of truth than the other. Both may be true; both may be false; it depends in each case. But it does *not* depend on the one being "legal" and the other being "illegal", tested by the jury-trial rules of Evidence. Yet the rule for a "residuum of legal evidence" rests on the assumption that the "legal" evidence is *always* credible and sufficient, while the "illegal" evidence is *never* credible nor sufficient.

This "residuum" rule, then, is decidedly not the wise and satisfactory rule for general adoption.

6. After all, why may we not courageously concede that administrative tribunals can best be left to find their facts without formal rules? The functional theory of administration has done great things for the world in all times. The formal theory of administration, in contrast, is today too much admired. We praise ourselves for having a "government of laws, not men"; but the truth is that we trust too much to laws, and the structural fetters that we impose discourage acceptance of office by the most competent men, — "men who possess opinions and a will; tall men, sun-crowned, who live above the fog, in public duty and in private thinking, — God, give us men!"

And if there is any part of administrative activity to which this independence of formal rules can most readily be conceded, it is the task of weighing evidence and deciding on facts. For there do not yet exist any known rules for controlling the correctness of that mental process. The jury trial rules merely determine what evidence may be considered; they tell us nothing as to the mental process of weighing it. The great ultimate process of reaching a conviction is not one for which we can offer the administrator any sure guide. Why not trust his expert intelligence and good faith? Let us remember that the greatest part of the community's industrial, commercial and financial activity already functions on a solid basis of fact determined without any formal rules of proof. Let us, here too, put our trust in men and minds, rather than in rules.

The wisdom of such an attitude, as harmonizing with the needs of the times, has been well expounded by a modern American thinker who never fails to voice accurately the best standards of his profession:

1922, Mr. *George W. Alger*, "The Letter Law and the Golden Rule" (Atlantic Monthly, Sept., p. 296): "Primitive law, the jurists tell us, was in all countries technical and formal. It dealt in ceremonies and procedures. Form came first, while justice lagged and came last. Perhaps it was the failure of law in old times to make approximation to justice, that leaves to us two great figures of personal justice: Harun-al-Rashid, and Saint Louis. Down the ages they have come to us, each called by the same undying name, 'The Just.' In themselves they unite the power of the law, and the will to do justice, not according to procedure long since gone and forgotten, but according to the Golden Rule. Under the big tree at Vincennes, history pictures to us Saint Louis dispensing the high justice, the middle justice, and the low, to those who flocked to him appealing for the righting of their wrongs. It pictures Harun as the protector of the poor, going about among his people, punishing the wrongdoer and giving justice to the oppressed.

"The Puritan, and later the Anglo-Saxon, ideal of justice resolutely supplanted the type which these historic figures embody. Ours was to be, as the ancient Charter of Massachusetts solemnly stated, a government 'of laws and not of men.' Laws should be made so that the people could read and understand them; so that standards should be set, which judges should follow and enforce. Personal justice, justice dependent alone or mainly upon the personal concept of right in the heart of the judge — a concept varying with the moral calibre of judges — was to be discarded. The law was to be, in the main, a book, — enforced, to be sure, by a person, but in accordance with the book. The whole history of Law is the struggle for a working compromise between two ideals: judicial discretion and the Saint-Louis ideal, on one hand, and the letter law, superior to and binding upon the judge, and he its sworn servant, on the other. . . .

"However much the letter law extends its precedents, however much the statute law may seek to make the standards of law concrete and definite, there is an instinct in the soul of man which bids him look, not to the unending scrolls of the law, but to a Saint Louis and a Harun; to some good man whom he knows and respects, and has confidence in, more for his character than for his learning, however great. As society became complicated, this personal ideal grew so remote as to seem altogether lost in the mazes of the letter law. It never wholly disappeared.... The question is this: How long will it be before the pendulum will swing to the other extreme — the return of the Cadi, the search for Saint Louis, the demand for personal justice administered by the good man as a substitute for our endless barren wilderness of precedents in law and a maze of indigestible statutes? . . .

"The final hope for democracy must be, not in its letter law, but in its leadership. The day must come when the people's trust must be less in law and more in men. In the last

analysis, the main test that will determine the survival of democracy will be its capacity for the wise selection of men — men sufficient in character and wisdom to be trusted with the powers of the State."

§ 4c. **Same: (III). State of the Law in the Various Jurisdictions; Applicability of rules in Federal Land Office, Patent Office, Commerce Commission, etc., and in State Industrial Commissions, Utilities Commissions, etc.** On the foregoing grounds, therefore, both of history and of policy, it may be concluded that *at common law* the body of jury-trial rules of Evidence does not, as such, control the inquiries made by administrative officials, *i.e.* executive officials classified outside of the Judiciary department and functioning without a jury. Furthermore, a *declaration*, in the statute creating such officials, that their jurisdiction includes the *power to make the rules of their own procedure* is an implied sanction of their independence of the jury-trial rules, and removes any possible common-law doubt. And finally, a *legislative declaration* that such officials *need not be bound by the "common law rules of Evidence"*, or by the "technical rules of Evidence", is an express exemption from the enforcement of that body of rules upon such officials by the Courts.

These general principles, however, have not been logically and completely carried out. In point of practice, as enforced by the Courts, the law varies with the State and with the kind of administrative tribunal; and this is natural enough, in view of the wide variances, in origin and traditions, of the several bodies.

A. Federal Officials. If one were to reflect on the extent of the transactions presented for adjudication to the Land Office, the Patent Office, the Commerce Commission, the Trade Commission, the Treasury Appraisers, the Pension Bureau, and other Federal officials, it would be apparent, even on a rough estimate, that the bulk of the quasi-judicial business done by these administrative bodies forms a respectable rival to that of the entire Federal judiciary system, — whether tested by numbers of transactions, by value of property involved, or by influence on daily welfare of the community. Virtually all of these adjudications are reached without the enforcement of the jury-trial rules of Evidence. No doubt the parties are commonly represented by professional lawyers, at least in contested cases deemed important; and no doubt there is a general and instinctive use, in such cases, of the common rules of the jury-trial system. But, in point of law, the rigid and perfunctory enforcement of the body of rules, as observable in jury-trials, is on the whole, substantially absent.

1. *Patent Office.* In the Patent Office (Department of the Interior), the jury-trial rules are nominally in force, by departmental regulation, — abstractly so declaring, but permitting undefined flexibility.[1] But the Federal

§ 4c. [1] 1916. Rules of Practice in the U. S. Patent Office (Rule 159: "Evidence touching the matter at issue will not be considered on the hearing which shall not have been taken and filed in compliance with these rules. But notice will not be taken of merely formal or technical objections which shall not appear to have wrought a substantial injury to the party raising them. . . . This rule is not to be so construed as to modify established rules of evidence, which will be applied strictly in all practice before the office."

Courts do not appear to regard the rules as compulsory;[2] and in practice they are rarely invoked.[3]

2. *Land Office.* In the Land Office (Department of the Interior), the jury-trial rules are not nominally in force by regulation.[4] Nor do the Courts apparently regard the jury-trial rules as binding on the Land Office;[5] and only occasionally do the Office decisions find it worth while to invoke them.[6]

3. *Board of General Appraisers.* The Board of General Appraisers (which is in effect a nisi prius Court of Customs Claims), and other officials of the Treasury Department, possess in various fields a finality of decision on matters of fact. The Courts seem not to have imposed the jury-trial rules of Evidence on these officials;[7] nor does their practice exact it.[8]

[2] 1859, Spear *v.* Abbott, C. C. D. C., Fed. Cas. 13, 222 (appellant maintained that the commissioner of patents had erroneously received in rebuttal certain depositions due to be offered in chief; Dunlop, C. J.: "Appellant invokes the protection of the rules of practice in the courts of England and this country in the trial of common-law causes before a jury; . . . but the rule has no application in equity or admiralty, or in any other than a common-law tribunal in jury causes").

[3] The following was the only gleaning from a few volumes of Patent Office Decisions, taken up casually: 1913, Goldschmidt *v.* Von Schutz, 192 Off. Gaz. 743, Decisions Com. Patents, 1913, p. 159 (rule admitting only rebuttal testimony in rebuttal).

A few others will be found at the appropriate places in the ensuing text and notes; see, for example, § 2065*a*, *post* (corroboration of claimant of prior invention).

[4] Rules of Practice in Cases before the U. S. District Land Offices, the General Land Office, and the Department of the Interior, with Amendments to July 13, 1921, Washington, 1921 (a few fundamental rules are prescribed, including the right of cross-examination, etc.).

[5] 1894, Parsons *v.* Venzke, 4 N. D. 452, 61 N. W. 1036 (land-office cancellation of entryman's certificate; held, "there is nothing in the point that there was no evidence before the commissioner that the entry was fraudulent, or at least no competent evidence; the Courts cannot review the decisions of the land department on the ground that the evidence was insufficient, or that only incompetent evidence was before it; the power to try questions of fact necessarily embraces the power to pass upon the weight and competency of evidence)."

[6] The following are gleaned from a few volumes taken casually: 1895, Peacock *v.* Shearer's Heirs, 20 Dec. Public Lands p. 213 (survivor's testimony to deceased opponent's admissions); 1900, Burton *v.* Howe, 29 Dec. Public Lands p. 581 (depositions taken by one party may be used by the other); 1914, Sarah Merkle's Case, 19 Dec. Pension and Bounty-Lands p. 181 (presumption of death after 7 years).

[7] 1885, Hadden *v.* Merritt, 115 U. S. 25 (import value of Mexican dollar as determined by the Secretary of the Treasury under Rev. St. § 3564; the Treasury Department's act held to be "the performance of an executive function, requiring skill and the exercise of judgment and discretion, which precludes judicial inquiry into the correctness of the decision"); St. 1890, June 10, St. 1897, July 24, and St. 1909, Aug. 5, Customs Administrative Act, § 14, Code 1919, § 1163 (Court of Customs Appeals may "establish rules and regulations"); 1890, Auffmordt *v.* Hedden, 137 U. S. 310, 11 Sup. 376 (suit to recover excess import duties paid; appellant contended that it was error for the appraiser did not afford him opportunity to confront the opposing witnesses nor "to sift evidence secretly or openly heard in opposition to him", etc.; held, that "under the statute the question of the dutiable value of the merchandise is not to be tried before the appraisers as if it were an issue in a suit in a judicial tribunal; . . . no government could collect its revenues or perform its necessary functions, if the system contended for by the plaintiffs were to prevail"); 1892, Re Muser, C. C. S. D. N. Y., 49 Fed. 831 (appraisers' consideration of evidence "in two other cases with which these importers had no concern", held not to be error); 1893, Passavant *v.* U. S., 148 U. S. 214, 13 Sup. 1016 (U. S. St. 1890, June 10, 26 Stat. c. 407, created a board of general appraisers, to review rulings of Treasury officials in levying duties on imports, and providing for a review of the board's decision as to "the law and the facts", but also providing that as to dutiable value the board's decision should be "final and conclusive"; held that on an issue of dutiable value the statute was valid, due provision having been made for notice and hearing by the board); 1907, Knauth *v.* U. S., C. C. S. D. N. Y., 155 Fed. 144 (similar evidence from other cases used before the appraisers; held that "such testimony . . . should not have been admitted", but that it did not constitute error, though it would be given very slight weight).

[8] See a pamphlet "Judicial Review in Customs Taxation", by Geo. Stewart Brown,

4. *Interstate Commerce Commission.* The Interstate Commerce Commission presides over a vast practice handled almost entirely by professional lawyers; and no doubt the appropriate jury-trial rules for its special kinds of issues are commonly and instinctively observed in principle. But its decisions reveal little controversy that turns on those rules.[9] Nor do the Federal Courts deem that the Commission is bound in law to follow that body of rules as such; although occasionally, where an important controversy turns essentially on the observance of some fundamental rule of fair and thorough inquiry, there appears a disposition to scrutinize the Commission's observance of it.[10]

Esq., of the Board of General Appraisers (reprinted from The Forum, July, 1918).

[9] H. C. Lust, Digest of Decisions under the Interstate Commerce Act, 1913 ff.; Interstate Commerce Reports, vol. I, App. I (Rules of Practice; no reference is made to the jury-trial rules of Evidence).

"It is perhaps not too much to say that not a single case arising before the Commission could be properly decided if the complainant, the railroad, or the Commission were bound by the rules of Evidence applying to the introduction of testimony in courts" (22d Annual Report of the Commission, p. 10).

[10] U. S. St. 1887, Feb. 1, Code 1919, § 7038 (interstate commerce commission may prescribe common carrier's rates "after full hearing"); 1903, Interstate Commerce Com. *v.* Baird, 194 U. S. 25, 24 Sup. 563 (rates of transportation of coal: certain contracts of purchase were refused to be produced before the Commission because irrelevant; held, that "the Commission had a right to demand their production", and that "the inquiry of a board of the character of the Interstate Commerce Commission should not be too narrowly constrained by technical rules as to the admissibility of proof; its function is largely one of investigation, and it should not be hampered in making inquiry pertaining to interstate commerce by those narrow rules which prevail in trials at common law where a strict correspondence is required between allegation and proof"); 1912, Interstate C. Com. *v.* Louisville & N. R. Co., 227 U. S. 88, 93, 33 Sup. 185 (under St. 1906, c. 3591, amending St. 1887, c. 104, and authorizing the I. C. C. to set aside a rate if after a hearing "the Commission shall be of the opinion that the charge was unreasonable", held (1) that though the Commission's conclusions of fact will not be reviewed "by passing upon the credibility of witnesses, or conflicts in the testimony", yet the legal effect of the evidence is a question of law; a finding without evidence is beyond the power of the Commission; . . . it cannot "capriciously make findings by administrative fiat"; (2) it is "not limited by the strict rules as to the admissibility of evidence which prevail in suits between private parties"; (3) it must nevertheless "preserve the essential rules of evidence by which rights are asserted or defended"; (4) this includes the parties' right to be "fully apprised of the evidence submitted or to be considered", and an "opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in rebuttal or explanation"; and (5) that the evidence considered must therefore appear in the record to have been duly presented, to the knowledge of the parties; (6) here the evidence was held sufficient by the above tests); 1920, Spiller *v.* Atchison T. & S. F. R. Co., 253 U. S. 117, 40 Sup. 466; 8th C. C. A. 246 Fed. 1 (action to recover damages consisting in loss of receipts from sale of cattle, due to an illegal excess rate charged by defendant carriers; the plaintiff was the secretary of a cattle-raisers' association, acting on behalf of some 2000 shippers, who had assigned to him their claims; the shipments covered a period of two years, and went over some ten railroads; to obtain the data for proving the plaintiff's case, he caused the assistant secretary of the association to visit the various cattle-shippers and commission agents, inspect their books, and compile a schedule showing, in each instance of the illegal rates the consignor, origin, destination, car, weight, and rate paid; this compilation being shown to defendants for verification from their own books, they admitted the correctness of large numbers of the items as to cattle transported and money received by them at the illegal rate, but refused to admit the fact that any particular person had paid any of these amounts as owner or agent, or that the claims represented by the plaintiff had been duly assigned to him; the former set of facts was evidenced before the Commerce Commission solely by the assistant secretary W., who testified that he obtained his data from the original books of the original shippers and commission merchants, and was ready to procure and produce the books if necessary, though they would "almost fill a farm-wagon"; the Commission on this evidence found for the plaintiff on all items as to which the defendants admitted the movement of the freight and the receipt of the moneys; this finding was affirmed in the District Court; the Eighth

5. *Immigration Bureau.* The Immigration Bureau (Department of Labor) has been a storm-center for the question of finality of decision by administrative officials (*ante*, § 4 *a*). What sets it apart as anomalous in this aspect is that it deals mainly with aliens, whose rights to invoke judicial remedies may stand on a different footing from those of citizens; so that a judicial license to be more independent than other administrative officials might be expected. However, its exercise of jurisdiction also affects citizens — by birth and constitutional right — who seek entrance to the country, and thus its subjection to judicial review is in this aspect no different from other officials. Strictly distinguishing the questions of finality of ruling and of due process (*ante*, § 4 *a*), and looking only at the question of enforcement of jury-trial rules of Evidence, we may deduce from the Federal Court's utterances that those rules, as a body, are not expected to be binding on the Immigration Bureau.[11]

Circuit Court of Appeals held that the Commission's finding was not based on sufficient evidence; its opinion termed the assistant secretary's testimony "the worst kind of hearsay"; but that opinion itself showed "the worst kind" of stubborn insistence on rules of evidence in a case where their enforcement would have been almost a denial of justice because of the expense, and where substantial accuracy of the testimony affected by the rules was not disputed nor open to doubt; the Supreme Court reversed the Appellate judgment, and affirmed the District Court judgment; the opinion handsomely recognizes the Interstate Commerce Commission's moral and political right to be considered as responsible expert officials who understand the technical subject within their jurisdiction as well as or better than circuit judges, and whose estimate of the sufficiency of evidence in that technical field is entitled to a large presumption in its favor, a presumption not to be overthrown automatically whenever evidence is received that does not satisfy the artificial rules obtaining in jury trials).

[11] 1902, Lee Lung *v.* Patterson, 186 U. S. 168, 22 Sup. 795 (exclusion of a Chinese merchant; held (1) that the decision of the U. S. officer's ruling was conclusive, (2) that the officer's disregard of the official consular certificate, made 'prima facie' evidence by U. S. St. 1884, July 5, § 6, did not make his ruling invalid: "We cannot assent to the proposition that an officer or tribunal, invested with jurisdiction of a matter, loses that jurisdiction by not giving sufficient weight to evidence, or by rejecting proper evidence, or by admitting that which is improper"); 1906, Ex parte Watchorn, C. C. S. D. N. Y., 160 Fed. 1014 ("Doubtless the determination of the immigration authorities upon all questions of fact, even if made upon legally incompetent or inconclusive evidence, is final"; here, an alien was sought to be deported as a convict); 1912, Frick *v.* Lewis, 6th C. C. A., 195 Fed. 693 (deportation of alien convicted of crime: "it is not open to courts to consider either admissibility or weight of proof, according to the ordinary rules of evidence"); 1914, U. S. ex rel. Gegiow *v.* Uhl, 20 C. C. A., 215 Fed. 573 (habeas corpus for immigrants deported as likely to become a public charge; the immigration officer had used some information obtained from newspapers as to conditions of non-employment at the place of destination; held, not improper; "we do not assert that all of this evidence would be admissible in a court of law or equity; it is not necessary that it should be, no immigration act could be enforced which required all these facts to be established with the same formality and certainty which is required in the courts"); 1915, Healy *v.* Backus, 9th C. C. A., 221 Fed. 358 (deportation of an alien as likely to become a public charge; held, that the use of "affidavits, interviews, letters, and newspaper clippings", etc., as evidence, did not make the finding invalid); 1908, Lin Hip Fong *v.* U. S., 209 U. S. 453, 28 Sup. 576 (deportation of an alien claiming a treaty right to reside here by virtue of a certificate issued under § 3 of the Treaty of 1894 with China; the executive officer held that the certificate-right had been forfeited by failure to observe its provisions, and by fraud in obtaining it; held that there must be "some competent evidence to overcome the legal effect of the certificate", and that the absence of any recital of that evidence in the record was fatal to the ruling, although the executive officer did in fact give a hearing and evidence was presented on both sides); 1910, Re Jem Yuen, D. C. Mass., 788 Fed. 350 (deportation of a Chinese claiming to be the son of a merchant; held, that the error if any in considering "a record of proceedings of similar character" in 1908 was immaterial; whether such a record was admissible or not according to the rules of evidence observed elsewhere, is immaterial; . . . officers . . . to whom the determination of questions of

6. *Sundry Officials.* The Trade Commission, the Pension Bureau, and other Federal officials, adjudicate great numbers of disputed claims of various sorts; but it does not appear that the jury-trial rules of Evidence, as such, are deemed binding.[12]

The Great War produced a vast volume of disputes calling for administrative adjudication, both during and since the period of hostilities.[13] The

this kind is entrusted under statutes like those governing these proceedings are not bound by the rules of criminal procedure, nor by rules of evidence applied in courts"); 1916, Ex parte Owe Sam Goon, D. C. N. D. Cal., 230 Fed. 654 (confrontation with the principal witness required, where the Chinese alien had been resident here for 40 years); 1916, Backus *v.* Owe Sam Goon, 9th C. C. A., 235 Fed. 847, 853 (on the best evidence principle, the testimony to a Chinese person having entered from Mexico was held not sufficient, since better evidence was obviously available, the Court not weighing the evidence, but using the principle to reach the conclusion that "the order of deportation was arbitrary and unfair", and subject to judicial review); 1917, Chin Ah Yoke *v.* White, 9th C. C. A., 244 Fed. 940 (opportunity of cross-examination, held to be satisfied); 1920, U. S. *v.* Uhl, 20 C. C. A., 266 Fed. 34 (deportation proceedings by the commissioner of immigration under St. Oct. 16, 1918, 40 Stats. pt. 1, p. 1012; right of cross-examination not essential); 1921, White *v.* Chan Wy Sheung, 9th C. C. A., 270 Fed. 764 (claim to be son of U. S. citizen of Chinese race; certain statements of claimant's grandfather having been received against him, held, that "it is not open to the Courts to consider either the admissibility or the weight of proof according to the ordinary rules of evidence, and the fact that the rules of evidence as applied in courts of law are violated does not show that the hearing was unfair"); 1922, Kaneda *v.* U. S. 9th C. C. A., 278 Fed. 694 (exclusion as a person of moral turpitude; the board of special inquiry had considered a false sworn statement of the applicant as to having no relatives in U. S.; held, the scope of inquiry was "a matter within their sound administrative discretion; it is not for the Courts to prescribe rules of evidence for such an investigation").

P. I. 1918, Bayani *v.* Collector, 37 P. I. 468 (collector of customs; immigrant is entitled to a hearing, but "the procedure is not technically judicial, nor are the proceedings defined by any particular rules or statutes").

[12] In the Decisions of the Department of the Interior in Appealed Pension and Bounty Land Claims (usually cited P. D.), the rulings are made by the Assistant Attorney-General for the Interior Department, and on a few subjects — *e.g.* marriage — there is a close adherence to the jury-trial rules; but no general or automatic application of the body of rules is apparent.

[13] Report of the Secretary of the National War Labor Board for the 12 months ending May 31, 1919, App. II; Abstract of Awards, by Robert P. Reeder (Washington, 1920), and later reports.

The Rules of Procedure of this Board (drawn up by a professor of law, and approved by ex-President Taft, one of the joint chairmen of the Board) may be taken as samples of what an administrative board, manned by professional lawyers of liberal spirit, regards as a necessary and sufficient skeleton to control an inquiry which should be both prompt and thorough; the following passages are those dealing with Evidence (Washington, Government Printing Office, 1919, p. 14):

"*Hearings.* At all hearings before the full Board, before a Section of the Board, or before examiners appointed to hear the case, evidence may be introduced by oral testimony of witnesses or by depositions. Should the Board, Section, or examiners deem cross-examination necessary in case of deposition, the deponent should be summoned for the purpose and the deposition not considered as evidence until such cross-examination has been had. All testimony of witnesses shall be taken under oath or affirmation. Examiners, Sections of the Board, and the full Board shall have power to administer such oaths or affirmation.

"*Hearings by Examiners.* The hearing by the examiner shall be conducted in accordance with the proper course of judicial proceedings. The evidence for the complainant shall be presented, then the evidence for the respondent, and then the evidence, if any, in rebuttal. The examiner shall follow as near as may be the rules of evidence prevailing in common-law courts, with such departures therefrom as in his discretion may seem to be necessary in the cause of speedy justice. The examiner shall require witnesses to confine their testimony to statements of facts within their personal knowledge. The examiner may exercise the authority to exclude evidence palpably incompetent or irrelevant to the issue. But the party aggrieved by such ruling may save his exceptions to such exclusion of evidence or other ruling by the examiner by a writing filed with the examiner. Should the examiner deem the evidence of any person necessary who is not called by either party, he may

awards of the National War Labor Board represented an effective adjudication of controversies having convulsive possibilities, but were conducted upon simple and direct methods without insistence upon jury-trial rules. The Board of Contract Adjustment was vested with powers to adjudicate upon post-war claims mounting into billions of dollars, and its volumes of opinions expounding the findings of fact and law are models of clarity and directness,—refreshing in their contrast to the futile display of technique upon Evidence rules so often seen in the opinions of Supreme Courts upon every-day cases of mercantile disputes over broken contracts.

In sum, therefore, the jury-trial rules of Evidence do not play a compulsory part, either in theory or in practice, in that extensive area of justice committed to Federal administrative officials.

B. State Officials. In the complex activities of State government, multiplied tenfold as they have been in the last generation, a survey reveals that the area of adjudication of controversies committed to administrative officials is much more extensive than we are apt to assume. These varied fields (enumerating only those in which the claims of an individual citizen may be disputed and may require adjudication) include County Government in general, Schools, Taxes, Civil Service, Eminent Domain, Drainage, Irrigation, Fences, Public Health, Highways, Professional Licenses, Public Lands, Railroads, Industrial Accidents, Public Utilities, Insurance, Banks, Fish and Game, — in short, they affect a large share of the vital processes of agriculture, commerce, and industry, having constant relation to personal security and welfare.

In most of these fields, the original tradition found them solely in administrative hands. The Courts had never had to do with them. Thus, the finality of the administrative action was almost universally recognized ; and the doctrines of certiorari, in refusing to interfere by judicial review, were carried to an almost unbelievable extent, — yet not, apparently with any untoward consequences, in spite of the common repute as to inefficiency in our local government. Thus, also, the instances in which any jury-trial rule of Evidence has even been invoked, for controlling such officials, are extremely rare.

But more recent times have seen the transfer, by legislative fiat, of two large fields of adjudication from the ordinary judicial tribunals to new administrative tribunals, viz. the service and rates of common carriers and public utilities in general, and the liabilities of employers for industrial accidents.

summon such person, examine him, and permit cross-examination.

"*Continuances.* The hearing, due notice of which has been given both sides, shall proceed until the case is closed. Should either party desire a continuance on the ground of inability to produce witnesses, and make a showing of due diligence, it shall be within the discretion of the examiner to grant such time as may be reasonably necessary to procure the evidence. It is of the utmost importance, however, that cases brought before the National War Labor Board should be promptly decided, and therefore this discretion to continue cases or hearings should be sparingly exercised."

The Decisions of the War Department Board of Contract Adjustment (vol. I, 1919, and later) were formulated by officials most of whose names are recognizable as those of civilian lawyers.

These two fields had of yore been left to normal judiciary disposition; and their extensive transfer (beginning in 1880 with the Federal Interstate Commerce Act, and about 1910 with the numerous State measures upon Employers' Liability) seems to have stung the Judiciary from its lethargic complacency about the certiorari writ, and to have awakened it to a sense of its duty to protect the properties and liberties of citizens in the fields which had thus been withdrawn from its jurisdiction. Hence, a stirring zeal to supervise the adjudications of these new administrative bodies, and a highly sensitive regard for the soundness of their probative processes. Hence, also, presumably, the anomaly that the judicial decisions upon jury-trial rules of Evidence before those two kinds of officials, rendered in the past decade or so, are more numerous than all the judicial rulings of a similar sort for the entire army of other kinds of officials in the previous hundred years, — although the fundamental principle involved seems to be precisely the same.

Meantime, however, the problem was complicated (for the judiciary) by expressions of legislative intention which plainly indicated that one of the deliberate legislative objects in view in this transfer of jurisdiction was the elimination of the jury-trial system of rules from the procedure of these new administrative bodies. The delays and shortcomings in the original practice of rate regulation and employers' liability involved, of course, many and complex considerations; but the obstruction caused by jury-trial rules of Evidence was (chiefly in the second field) one which plainly played an important part, in popular esteem; hence this proviso. At least a dozen Legislatures adopted it for industrial accident boards, and almost as many adopted it for public utilities commissions. The remainder (except a few, expressly retaining for public utilities commissions the usual rules of Evidence in courts) contented themselves with giving to the boards the power to make their own rules of procedure for investigations. Thus, the applicability of the body of jury-trial rules will vary, in the several States (as noted above, at the outset) according to the judicial interpretation of the common-law principle and the statutory proviso if any, and according to the kind of administrative official involved.

1. *Public Utilities Commissions.* Here the Legislature[14] has generally

[14] The statutes are as follows: CANADA: *Alberta:* St. 1915, c. 6, § 46 (public utility board may adopt its own rules for hearings, etc., "and in the conduct thereof the board shall not be bound by the technical rules of legal evidence");
British Columbia: St. 1919, c. 71, § 61 (public utilities commission "shall make its decision upon the real merits and justice of the case, and shall not be bound to follow strict legal precedent").

UNITED STATES: *Alabama:* Code 1907, § 5643 (State railroad commission may "regulate the mode and manner of all investigations");
Arkansas: Dig. 1919, § 1683 (State corporation commission "shall prescribe the rules of procedure and for taking of evidence"; in its hearings etc., "the Commission may not be bound by the strict technical rules of pleadings and evidence; but in that behalf it may exercise such discretion as will facilitate their efforts to understand and learn all the facts bearing upon the right and justice of the matters before them");
Colorado: Comp. St. 1921, § 2988 (State railroad commission may make rules "for its government and proceedings"); § 2947 (State public utilities commission; its hearings shall be governed "by rules of practice and proce-

given to the commission the power to make its own rules; it has often declared expressly that the common-law body of rules does not bind the commission's inquiries; but it has sometimes declared exactly the contrary. (Let it be said, at this point, that nothing need turn upon the form of words used in such a declaration. The statutory phrase is sometimes that "the *common law and statutory* rules of Evidence" shall not apply, and sometimes that "the *technical* rules of Evidence" shall not apply. But the purpose is identical in all forms of the phrase. It is indefinite, to be sure; for obviously the

dure to be adopted by the commission, and in the conduct thereof neither the commission nor any commissioner shall be bound by the technical rules of evidence. No informality in any proceeding or in the manner of taking testimony shall invalidate any order", etc.);
Florida: Rev. G. S. 1919, § 4416 (State railroad commission; in its jurisdiction over telegraphs and telephones, "in all matters of practice and procedure and all matters of evidence and the rules of evidence and all matters involving the effect of evidence", the law of regulation of railroads shall control); § 4618 (State railroad commission may "prescribe all rules and regulations"); § 4652 ("In all cases under the provisions of this chapter the rules of evidence shall be the same as in civil cases", except as otherwise provided);
Georgia: Rev. C. 1910, § 2641 (State railroad commission; "in all cases under the provisions of this article the rules of evidence shall be the same as in civil cases", except as provided);
Hawaii: Rev. L. 1915, § 2232 (public utilities commission may make rules, "and shall not be bound by the strict rules of the common law relating to the admission or rejection of evidence, but may exercise its own discretion in such matters with a view to doing substantial justice");
Idaho: Comp. St. 1919, § 2478 (State public utilities commission in investigations may adopt "rules of practice and procedure", and "in the conduct thereof" they shall not be "bound by the technical rules of evidence");
Kansas: Gen. St. 1915, § 8336 (State public utilities commission may "adopt reasonable and proper rules and regulations" and may "regulate the mode and manner of all investigations . . . not specifically provided for herein"); § 8392 (similar, for State railroad board);
Maine: Rev. St. 1916, c. 55, § 59 (State public utilities commission; "the practice and rules of evidence shall be the same as in civil actions", except as provided);
Maryland: St. 1910, c. 180, § 10, Ann. Code 1914, Art. 23, § 422 (State public service commission; hearings "shall be governed by rules" made by the commission; the commission "shall not be bound by the technical rules of evidence");
Michigan: Comp. L. 1915, § 8135 (State railroad commission; "the practice and the rules of evidence" shall be as in equity);
Minnesota: Gen. St. 1913, § 4177 (State railroad and warehouse commission may make rules for proceedings, "which shall conform as nearly as may be to those in use in courts, and shall conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice"); § 4182 (the commission "shall hear evidence and otherwise investigate the matter");
Missouri: Rev. St. 1919, §§ 10433, 10520 (State public service commission may prescribe its own rules and "shall not be bound by the technical rules of evidence"; "no informality . . . in the manner of taking testimony" shall invalidate its orders);
Montana: Rev. C. 1921, §§ 3882, 3894, 3934 (State public service commission "shall have power to prescribe rules of procedure");
Nebraska: Rev. St. 1922, § 5519 (State railway commission; "in all suits arising under this chapter the rules of evidence shall be the same as in ordinary civil actions, except as otherwise provided herein"; query, whether this applies to the commission's inquiries?);
New York: Cons. L. 1909, Public Service Commissions § 20, as amended by St. 1910, c. 480, § 20 and St. 1919, c. 263 (State public service commission; hearings shall be governed by rules adopted by commission, and "in all investigations, inquiries, or hearings the commission or a commissioner, deputy commissioner or duly authorized examiner of a commission shall not be bound by the technical rules of evidence");
North Carolina: Con. St. 1919, § 1023 (State corporation commission "shall be a court of record"); § 1093 (its "rules of evidence shall be the same as in civil actions", except as otherwise provided);
North Dakota: Comp. L. 1913, § 4713 (railroad rates; hearing before railroad commissioners); § 4730 (same; violation of schedule; "the commissioners shall receive whatever evidence, statements, or arguments either party may offer pertinent to the matter; . . . the commissioners shall add . . . whatever information they may then have or can secure from any source whatsoever"); St. 1919, Feb. 25, c. 151, § 5 (State industrial commission may "make rules and regulations for its own procedure");

Legislature neither specified nor had in mind any particular rules; and to that extent the fiat was futile, in that it left the phrase to the interpretation of the very Courts whose practice it was virtually reproaching. But the general spirit is plain enough, and is identical in all instances.)

The interpretation of these statutes by the Courts has led to comparatively few utterances.[15] Apparently, the practice under them is fairly satisfactory,

Pennsylvania: St. 1913, July 26, Art. VI, § 1, Dig. 1920, § 18162, Public Service Companies (public service commission's hearings shall be governed by such rules as it adopts and prescribes);
South Dakota: Rev. C. 1919, § 9497 (State railroad commissioners' proceedings "shall conform as nearly as may be to those in use in the courts of this State"); § 9518 (State railroad commissioners, on complaint against common carrier, shall investigate "in such manner and by such means as the board shall deem proper");
Tennessee: Shannon's Code 1916, §§ 3059*a*23, 3079*a*18 (State railroad commission may "regulate the mode and manner of all investigations and hearings", and make "such rules and regulations and modes of procedure as it may deem proper for the hearing and determination of all complaints");
Texas: Rev. Civ. St. 1911, § 6655 (State railroad commission has power to adopt rules for "the mode and manner of all investigations and hearings");
Utah: Comp. L. 1917, § 4820 (State public utilities commission shall make its own rules of practice and procedure, and "the technical rules of evidence need not be applied"; "no informality . . . in the manner of taking testimony shall invalidate any decision");
Virginia: Const. 1902, § 155 (State corporation commission "shall prescribe its own rules of order and procedure", except as specified in the Constitution); § 156 (it shall give notice of hearings, with "reasonable opportunity to introduce evidence"); Code 1919, § 3711 (State corporation commission before making an order must give notice and "a reasonable opportunity to introduce evidence"); § 3723 (the said commission, on hearing of all complaints "in which it shall be called upon to decide or render judgment in its capacity as a court of record, shall observe and administer the common and statute law rules of evidence, as observed and administered by the Courts of this Commonweath"; query, whether the Legislature has power thus to control the Commission, in view of the constitutional clause *supra*?);
West Virginia: Code 1914, § 637, St. 1913, c. 9, § 2, as re-enacted by St. 1915, c. 8, § 2 ("2. The [State public service] commission shall prescribe the rules of procedure and for taking evidence in all matters that may come before it, and enter such final orders as may be just and lawful. . . . In the investigations, preparations and hearings of cases, the commission may not be bound by the strict technical rules of pleading and evidence, but in that behalf it may exercise such discretion as will facilitate their efforts to understand and learn all the facts bearing upon the right and justice of the matters before them");
Wyoming: Comp. St. 1920, § 5502 (public utilities commission; all hearings, etc. "shall be conducted under such rules as the commission may prescribe and adopt").

Distinguish statutes prescribing rules for *proceedings in courts on appeal* from the orders or rulings of boards:
Indiana: Burns' Ann. St. 1914, § 5536, St. 1913, p. 820 (in proceedings by or against the State railroad commission, in courts, "the rules of evidence shall be the same as in the trial of civil cases", except as otherwise provided);
Ohio: Gen. Code Ann. 1921, § 552 (similar).

[15] *Colorado:* 1918, Denver & S. L. R. Co. *v.* Chicago B. & O. R. Co., 64 Colo. 229, 171 Pac. 74 (railroad rates; following I. C. C. *v.* L. & N. R. Co., U. S., *supra*, as to the commission being "not limited by the strict rules" of Evidence but being bound to "preserve the essential rules" of Evidence);
Idaho: 1914, Federal Mining & Sm. Co. *v.* Public Util. Com., 26 Ida. 391, 143 Pac. 1173 (reasonableness of rates for power furnished; discovery of opponent's books, refused on the facts, the scope of inquiry not being sufficiently specified);
Illinois: 1915, Farmers' Elevator Co. *v.* Chicago R. I. & P. R. Co., 266 Ill. 567, 107 N. E. 843 (order of State Public Utilities Commission compelling track connections, under St. 1913, p. 460, objected to because made without adequate hearing; held (1) that since the hearing must be public, and upon notice and opportunity to present evidence, "while the technical rules of evidence are not required to be followed", the statutory procedure was adequate, citing the Federal rule of I. C. C. *v.* Baird; but (2) that in the present case the lack of opportunity to cross-examine witnesses, and to present rebuttal evidence, and the resort to a report of an anonymous investigator of the commission visiting the premises, rendered the hearing inadequate and the decision void); 1915, Chicago M. & St. P. R. Co. *v.* State Public U. Com., 268 Ill. 49, 57, 108 N. E. 732 (railroad rate-order sustained; "the order had a substantial basis in the evidence");
Pennsylvania: 1920, Schuylkill R. Co. *v.* Pub.

judged by those results. What that practice is, of course, varies widely with the different commissions.

2. *Industrial Accident Boards.* Here the Legislature [16] has generally

Service Com., 268 Pa. 430, 112 Atl. 5 (counsel offered a copy, verified by himself, of a contract, the original being in his client's files; held, that "the commissioners not being considered as judges learned in the law, the Legislature necessarily did not contemplate that the strict rules of evidence should be applied to their hearings");
Wisconsin: 1914, Chicago & N. W. R. Co. *v.* Railroad Commission, 156 Wis. 47, 54, 63, 66, 145 N. W. 216 (unreasonable rates; the Commission had used as evidence certain data contained in annual reports of other railroads on file with the commission; held, not improper; "the Commission is not required to proceed, in this as in other respects, with the strict formalities which obtain in courts of common law and equity jurisdiction"; whether the Commission could have used certain reports of its own examiners, without formal introduction in evidence, not decided).

[16] The statutes are as follows:

ENGLAND: St. 1919, c. 69, Industrial Courts Act, § 4 (the Minister of Labour "may make rules regulating the procedure of any court of inquiry, including rules as to the summoning of witnesses", discovery of documents, etc.).

UNITED STATES: *Arizona:* St. 1921, c. 103, § 9 (State industrial commission "may adopt its own rules of procedure"); § 92 (rules of evidence not to bind; like Ohio Code § 1465);
California: Here the successive amendments came as efforts to overcome the narrow judicial interpretation; St. 1913, May 26, p. 279 (Workmen's Compensation, Safety & Insurance Act; § 77, "All hearings and investigations before the commission or any member thereof, or any referee appointed thereby, shall be governed by this act and by the rules of practice and procedure adopted by the commission, and in the conduct thereof neither the commission nor any member thereof, nor any referee appointed thereby shall be bound by the technical rules of evidence. No informality in any proceeding or in the manner of taking testimony shall invalidate any order, decision, award, rule or regulation made, approved or confirmed by the commission"; St. 1915, June 3, p. 1102; in consequence of the ruling in Englebretson *v.* Ind. Acc. Com., *infra*, the foregoing § 77 was amended by adding: "nor shall any order, award, rule or regulation be invalidated because of the admission into the record, and use as proof of any fact in dispute, in the discretion of the commission, of any hearsay or testimony not competent to be admitted in a trial in court; provided, that such hearsay or testimony be or refer to the statements, written or oral, of a person who is dead or who cannot after diligent search be found, and relate directly to the injury in question"); St. 1917, May 23, p. 831 (Workmen's Compensation, Insurance, & Safety Act, revising the 1913 statute, and re-enacting § 77, with strengthened phraseology, as § 60; "All hearings and investigations before the commission or any member thereof, or any referee appointed thereby, shall be governed by this act and by the rules of practice and procedure adopted by the commission, and in the conduct thereof neither the commission nor any member thereof, nor any referee appointed thereby, shall be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in such manner, through oral testimony and written and printed records, as is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this act. No informality in any proceeding or in the manner of taking testimony shall invalidate any order, decision, award, rule or regulation made, approved or confirmed by the commission; nor shall any order, award, rule or regulation be invalidated because of the admission into the record, and use as proof of any fact in dispute, of any evidence not admissible under the said common law or statutory rules of evidence and procedure"; the same statute also specified as follows: § 19*a*: "The commission may, with or without notice to either party, cause testimony to be taken, or inspection of the premises where the injury occurred to be made, or the time-books and pay-roll of the employer to be examined by any commissioner or referee appointed by the commission, and may from time to time direct any employee claiming compensation to be examined by a regular physician; the testimony so taken and the results of any such inspection or examination to be reported to the commission for its consideration"; § 19*b*: "The commission may receive as evidence, either at or subsequent to a hearing, and use as proof of any fact in dispute, the following matters, in addition to sworn testimony presented in open hearing: (1) Reports of attending or examining physicians; (2) Reports of special investigators appointed by the commission or a commissioner or referee to investigate and report upon any scientific or medical question; (3) Reports of employers, containing copies of time sheets, book accounts, reports and other records, properly authenticated; (4) Properly authenticated copies of hospital records of the case of the injured employee; (5) All publications of the commission; (6) All official publications of state and United States governments; (7) Excerpts from expert testimony received by the commission upon similar issues of scientific fact in other cases and the prior decisions

of the commission upon such issues; provided, however, that transcripts of all testimony taken without notice and copies of all reports and other matters added to the record, otherwise than during the course of an open hearing, be served upon the parties to the proceeding, and opportunity be given to produce testimony in explanation or rebuttal before decision is rendered").

Colorado: Comp. St. 1921, § 4346 (State industrial commission "shall not be bound by the usual common law or statutory rules of evidence or by any technical or formal rules of procedure, other than as herein or by the rules of the commission provided; but may make such investigations in such manner as in its judgment are best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of this Act"); § 4468 (ex parte testimony shall be subject to cross-examination later);

Connecticut: Gen. St. 1918, § 5364 (workmen's compensation; commissioner "shall not be bound by the ordinary common law or statutory rules of evidence or procedure, but may make inquiry in such manner, through oral testimony or written or printed records, as is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit of this Chapter"); St. 1919, April 15, c. 142, § 10, amending Gen. St. § 5358 (State compensation commissioners may "adopt and change such common rules, procedure and forms as they shall deem expedient for the purposes");

Hawaii: St. 1915, Apr. 28, No. 221, § 29 (industrial accident board may make rules; "process and procedure under this Act shall be as summary and simple as reasonably may be");

Idaho: Comp. St. 1919, § 6261 (State industrial accident board; "process and procedure under this chapter shall be as summary and simple as reasonably may be and as far as possible in accordance with the rules of equity");

Iowa: Code 1919, § 833 (State industrial commissioner; "the commissioner may make rules and regulations. . . . Process and procedure under this chapter shall be as summary as reasonably may be; . . . neither the commissioner nor the arbitration committee shall be bound by common law or statutory rules of evidence, or by technical or formal rules of procedure, but may hold such arbitrations or conduct such hearings and make such investigations and inquiries in the manner best suited to ascertain the substantial rights of the parties");

Kentucky: St. 1916, Mar. 23, p. 354, Stats. § 4930 (State workmen's compensation board may make rules; "processes and procedure under this Act shall be as summary and simple as reasonably may be");

Maine: Rev. St. 1916, c. 50, §§ 29, 34, St. 1919, c. 238, §§ 34, 37 (State industrial accident commission may make rules and regulations; on the hearing "from the evidence thus furnished the chairman shall in a summary manner decide the merits of the controversy"; "his decision, in the absence of fraud, upon all questions of fact shall be final"; the commission's procedure shall "secure a speedy, efficient, and inexpensive disposition of all proceedings");

Maryland: St. 1914, c. 800, Ann. Code 1914, Art. 101, § 10 (State industrial accident commission; "the commission shall not be bound by the usual common law or statutory rules of evidence or by any technical or formal rules of procedure");

Massachusetts: Gen. L. 1920, c. 152, § 5 (State department of industrial accidents "may make rules"; "process and procedure shall be as simple and summary as reasonably may be"; there shall be "no appeal on questions of fact");

Michigan: Comp. L. 1915, § 5457 and St. 1921, No. 60, p. 91 (State industrial accident board; "process and procedure under this Act shall be as summary as reasonably may be");

Minnesota: St. 1921, c. 82, § 53 ("The Commission, or a commissioner or a referee in making an investigation or conducting a hearing under this act shall not be bound by common law or statutory rules of evidence or by technical or formal rules of pleading or procedure, except as provided by this act; and shall make such investigation or inquiry or conduct such hearing in such manner as to ascertain the substantial rights of the parties. But all findings of fact shall be based only upon competent evidence");

Missouri: Rev. St. 1919, §§ 13643, 13655 (workmen's compensation; State commission may adopt rules and regulations for all proceedings; "all proceedings . . . shall be simple, informal, and summary, and without regard to the technical rules of evidence"); St. 1921, Mar. 28, p. 425, § 51 (like Rev. St. § 13643, 13655, which are superseded);

Montana: Rev. C. 1921, § 2938 (State industrial accident board; in the conduct of investigations and hearings "neither the board nor any member thereof shall be bound by the technical rules of evidence"; "no informality in any proceedings or in the manner of taking testimony shall invalidate any order", etc.);

Nebraska: St. 1917, p. 219, Rev. St. 1922, § 3080, par. *a* (compensation commissioner shall regulate "the nature and extent of the proofs and evidence and the method of taking and furnishing the same"); par. *b* (the commissioner "shall not be bound by the usual common law or statutory rules of evidence or by any technical or formal rules of procedure", but shall so investigate as "to ascertain the substantial rights of the parties and to carry out justly the spirit" of the statute);

Nevada: St. 1913, Mar. 15, p. 137, § 12 (State industrial commission "shall adopt reasonable and proper rules to govern its procedure,

vested the board with power to make its own rules of procedure; in one half or more of the statutes it has expressly declared that the "technical" rules, or the "usual common law or statutory" rules, shall not be applicable; and in some instances it has emphasized its purpose by authorizing the board to

regulate and provide for . . . the nature and extent of the proofs and evidence and the method of taking and furnishing the same, . . . the method of making investigations", etc.);
New York: St. 1914, c. 41, § 67 ("The commission shall adopt reasonable rules, not inconsistent with this chapter, regulating and providing for . . . 2. The nature and extent of the proofs and evidence, and the method of taking and furnishing the same, to establish the right to compensation"); § 68 ("The commission or a commissioner or deputy commissioner in making an investigation or inquiry or conducting a hearing shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to ascertain the substantial rights of the parties");
N. Dakota: St. 1919, Mar. 5, c. 162, § 4 (State workmen's compensation bureau may make rules; "process and procedure under this Act shall be as summary and simple as reasonably may be. The Bureau shall not be bound by the usual common law or statutory rules of evidence or by any technical or formal rules of procedure, other than as herein provided; but may make investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of this Act");
Ohio: Gen. Code Ann. 1921, § 871–9 (State industrial commission may adopt its own rules of procedure"); § 1465–44 (State industrial commission "shall adopt reasonable and proper rules to govern its procedure"); § 1465–91 ("Such board shall not be bound by the usual common law or statutory rules of evidence or by any technical or formal rules of procedure; but may make the investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of this act");
Oklahoma: St. 1915, c. 246, Mar. 22, Act. 4, § 7 (the State industrial commission shall "adopt reasonable rules" regulating "2, the nature and extent of the proofs and evidence, and the method of taking and furnishing the same");
Pennsylvania: St. 1919, July 21, § 15, Dig. 1920 Workmen's Comp. § 21943 (State workmen's compensation board shall make rules "for the legal and judicial procedure of the board"); St. 1919, June 26, § 6, Dig. 1920, Workmen's Comp., § 22044 (State workmen's compensation board; "neither the board nor any referee shall be bound by the technical rules of evidence in conducting any hearing or investigation, but all findings of fact shall be based only upon competent evidence");
Texas: Rev. Civ. St. 1911, § 5246–42, St. 1917, c. 103 (State industrial accident board; "process and procedure shall be as summary as may be under this Act");
Utah: Comp. L. 1917, § 3077 (State industrial commission shall give a hearing); § 3149 (it shall "not be bound by the usual common law or statutory rules of evidence or by any technical or formal rules of procedure, other than as herein provided; but may make the investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of this title"); St. 1919, Mar. 13, c. 63, adding Comp. L. § 3130x (State industrial commission shall adopt "regulations governing the procedure");
Vermont: Gen. L. 1917, § 5761, and St. 1919, April 8, No. 158 (State commissioner of industries "shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure except as provided in this chapter, but may make such investigation or inquiry or conduct such hearing or trial in such manner as to ascertain the substantial rights of the parties");
Virginia: St. 1920, Mar. 15, c. 176, amending Code § 55 (State industrial commission may make rules; "processes and procedure shall be as summary and simple as reasonably may be");
West Virginia: Code 1914, § 664, St. 1913, c. 10, § 8, as amended by St. 1915, c. 9, § 8 (State compensation commissioner, in administering workmen's compensation, "shall adopt reasonable and proper rules to govern its procedure, . . . the nature and extent of the proofs and evidence, and the method of taking and furnishing the same, . . . the method of making investigations", etc.); Code 1914, § 664, St. 1913, c. 10, as amended by St. 1915, c. 9, and St. 1919, c. 131, § 44 ("The commissioner shall not be bound by the usual common law or statutory rules of evidence, but shall adopt formal rules of practice and procedure, as herein provided, and may make the investigation in such manner as in his judgment is best calculated to ascertain the substantial rights of the parties and to carry out the provisions of this act");
Wisconsin: Stats. 1919, §§ 2394–14, 2394–51 (State industrial commission "may adopt its own rules of procedure").

"make investigation in such manner as *in its judgment* is best calculated" to carry out the spirit of the Act.

In judicial review, however, this broad charter of independence has not always been given literal effect by the Courts. In some States the spirit and letter is observed. In others, the mental habits of the Courts are too strong to permit them to give full faith and credit to those provisions; and some of the rulings are mere treadmill applications of the jury-trial rules in a manner defeating the legislative purpose. In still other courts, the pseudo-liberal rule of "a residuum of legal evidence" (already considered, *ante*, § 4*b*) finds favor; and these are at present the most numerous.[17]

[17] ENGLAND: 1912, Amys *v.* Braton, 1 K. B. 40 (cause of employee's injury; doctor's testimony to employee's statement that he had been stung by a wasp, held inadmissible); no attempt has been made to collect here the numerous English rulings below the appellate Courts.

UNITED STATES: *California:* 1915, Englebretson *v.* Ind. Acc. Com., 170 Cal. 793, 151 Pac. 421 (cause of employee's injury; deceased employee's statements during illness, admitted by the Commission, were the only evidence; held (1) that the Compensation Act, 1913, § 77, providing that "the technical rules of evidence" shall not bind the Commission, did not avail to make the above evidence admissible, the hearsay rule not being a "technical rule"; (2) that the Commission's power under § 75 of the Act to "prescribe the nature and extent of the proofs and evidence" was void, as an unconstitutional delegation); 1915, Employers' Ass. Co. *v.* Ind. Acc. Com., 170 Cal. 800, 151 Pac. 423 (cause of employee's injury; evidence as in the Englebretson case, and same ruling); then the statute of 1915, quoted *supra*, intervened; 1916, Frankfort Gen. Ins. Co. *v.* Pillsbury, 173 Cal. 56, 159 Pac. 150 (percentage of cases of a specific sort of physical disability, as a basis for rating; certain cross-examination of an expert witness was disallowed by the Board's referee; held, under St. 1915, amending the Compensation Act § 77, that this was "a mere error in the taking of testimony", and would not be made a ground for review); 1916, Carstens *v.* Pillsbury, 172 Cal. 572, 158 Pac. 218 (evidence received without notice to the party opponent, held not "legal evidence", and the award void as to him); 1916, Connolly *v.* Ind. Com., 173 Cal. 405, 160 Pac. 239 (whether an employee was working by the day; "his status as an employee is sought to be proven by hearsay evidence, which may not be considered"); 1919, Employers' Liability Ass. Co. *v.* Ind. Acc. Com., 179 Cal. 432, 177 Pac. 273 (employee's death; the "evidence consisted in part of his hearsay declarations; the amendment to the law passed in 1915 expressly permits such testimony, and the evidence therefore is sufficient"); 1917, Western Indemnity Co. *v.* Ind. Acc. Com., 174 Cal. 315, 163 Pac. 60 ("The hearsay testimony complained of relative to the statements of the deceased employee relating directly to his injury was competent under the provisions of § 77*a* of the Workmen's Compensation, Insurance, and Safety Act, as amended in 1915, St. 1915, p. 1102; we are satisfied that such provisions cannot be held invalid as opposed to any provision of our Constitution"; a curt seven-line opinion, as befitted a Court which had just received so direct a legislative rebuke as the Act of 1915); then came the statutory amendment of 1917, quoted *supra;* 1919, Ocean Accident & G. Co. *v.* Industrial Commission, 180 Cal. 389, 182 Pac. 35 (applying Stat. 1917, p. 831, § 60, to authorize the Industrial Commission to admit, in a claim of employee against employer, a deposition of a physician taken in an action by the employee against a third person);

Connecticut: 1919, Riccio *v.* Montano, 93 Conn. 289, 105 Atl. 625 (certain admissions before the commissioner, held receivable; referring to the informal nature of evidential inquiries provided in St. 1913, c. 138, § 25, being G. S. 1918, § 5364);

Illinois: 1916, Victor Chemical Works *v.* Ind. Board, 274 Ill. 11, 113 N. E. 173 (whether deceased employee had contributed to support of a relative; held, (1) "there must be evidence that is competent and legal, as tested by the usual rules for producing evidence in any legal proceeding, to sustain their findings; . . . such evidence must also be preserved and incorporated into the record"; (2) the Board should have rejected certain statements of the deceased as to sending money, this being objected to as hearsay; (3) there was "sufficient competent evidence", otherwise received, to sustain the finding); 1916, Munn *v.* Ind. Board, 274 Ill. 70, 113 N. E. 110 (cause of employee's injury; the Court is bound by the Board's decision "if there is any legal evidence to support it"); 1917, Goelitz Co. *v.* Ind. Board, 278 Ill. 164, 115 N. E. 855 (deceased employee's dependent widow; the finding's basis must "be shown by competent legal evidence, and not be based upon mere con-

jecture or surmise"; here the only illegal evidence was a telegram, to which no objection had been made); 1918, Peoria Cordage Co. *v.* Ind. Board, 284 Ill. 90, 119 N. E. 996 (cause of an employee's injury; the deceased's statements as to the cause of his finger-cut, even when made to a physician, held inadmissible); 1918, Mueller Constr. Co. *v.* Ind. Board, 283 Ill. 148, 159, 118 N. E. 1028 (extent of employee's disability; "there was evidence to support the finding"); 1919, Bailey *v.* Ind. Com. 286 Ill. 623, 626, 122 N. E. 107 (extent and cause of employee's injury; the Commission's ruling stands "if there is any legal evidence to support it"); 1919, Chicago Steel Foundry *v.* Ind. Com. 286 Ill. 544, 122 N. E. 550 (cause of employee's injury; "there was competent evidence in the record fairly tending to sustain the finding"); 1919, Keystone Steel & Wire Co. *v.* Industrial Commission, 289 Ill. 587, 124 N. E. 542 (under the Workmen's Compensation Act, the fact of deceased's contribution to the support of mother and wife in Serbia was evidenced by (1) a witness to the mother's statement that she had received $100 from her son, (2) a witness to the son's statement that he had sent $50 to the old country, and (3) a witness who saw the son get a postal order for $110 and mail the letter to his mother; the first two were held "objectionable", the third was not ruled upon); 1920, Vulcan Detinning Co. *v.* Ind. Com., 295 Ill. 141, 128 N. E. 917 (cause of employee's injury; though the coroner's verdict was erroneously received in evidence, held that there was sufficient other evidence; the opinion, however, goes to the point of actually weighing the evidence); 1921, Old Ben Coal Co. *v.* Ind. Com., 296 Ill. 229, 129 N. E. 772 (extent of disability; "the award must rest on competent legal evidence, and not on conjecture or surmise"); 1922, Republic Iron & Steel Co. *v.* Ind. Com., 302 Ill. 401, 134 N. E. 754;

Indiana: 1917, United Paperboard Co. *v.* Lewis, 65 Ind. App. 356, 117 N. E. 276 (employee's disability; "appellant also bases error on the admission of certain evidence. In doing this, it seeks to apply the strict rules in that regard adopted and enforced in courts of law. This should not be done. The Industrial Board is not a court, but an administrative body, and should not be held to the same strict rules with respect to the admission of evidence. The general rule seems to be that the admission of incompetent evidence by such boards will not operate to reverse an award, if there be any basis in the competent evidence to support it"); 1919, Hege & Co. *v.* Tompkins, 69 Ind. App. 273, 121 N. E. 677 (deceased's statements as to cause of injury, admitted by the Board, no objection being made; held not error, the rule being at least as liberal even in ordinary courts as to permit hearsay to be admitted in case of objection; the employer's report of the accident, received without objection, held also properly received);

Iowa: 1920, Reid *v.* Automatic E. W. Co., 189 Ia. 964, 179 N. W. 323 (under the statute providing that "common law or statutory rules of evidence" shall not bind commissioners in award of workmen's compensation claims, held, (1) that testimony, based on hearsay statements from an absent person injured at the same time could be considered; "we think it was the purpose of the Legislature to relax somewhat the rules of evidence"; held also (2) that an affidavit could be considered, the affiant being in military service); 1921, Flint *v.* Eldon, 191 Ia. 845, 183 N. W. 344 (under Code 1897, Suppl. 1913, § 2477*m*, 33, the State industrial commissioners findings of fact are final; held that (1) there must at least be evidence to support the finding, and (2) that a rule of burden of proof, requiring proof beyond a reasonable doubt as to plaintiff's death being caused by the accident, was erroneous, and that therefore the cause must be remanded "with instructions to proceed under the correct rule"); 1921, Renner *v.* Model Laundry C. & D. Co., 191 Ia. 1288, 184 N. W. 611 (commenting on the statute's provision as to "common law or statutory rules of evidence"; holding that a rule of burden of proof as to receipt of money, etc., was not within that provision; narrow and unsound);

Kentucky; 1918, Phil Hollenbach Co. *v.* Hollenbach, 181 Ky. 262, 204 S. W. 152 (there must be "competent and credible evidence"); 1921, Valentine *v.* Weaver, 191 Ky. 87, 228 S. W. 1036 (death of employee by blood-poisoning; on his arrival home from night-work he breakfasted and took a nap, then said "his finger was awful sore", because he "got a splinter in it down to the shop last night"; held, (1) that this statement was not admissible as a spontaneous declaration; (2) that since there was no other evidence of the cause of the injury, the award could not stand; the opinion notes that the legislative intention was to avoid "technical rules", but not that "the elementary and fundamental principles of a judicial inquiry should not be observed"; it admits that the deceased's statement as to "the how and the when of the accident" would have been admissible, but not "the where of the accident"; so that, according to the opinion, the foundations of reliable judicial inquiry into truth are not shaken by a statement that "I got a splinter in my finger last night", but at the words "down to the shop" those foundations of verity begin to rock and totter; this sort of conviction about the boundaries between fundamentals and incidentals shows how artificial and unpractical the legal mind can be);

Maine: 1919, Mailman's Case, 118 Me. 172, 106 Atl. 606 (workman's compensation; cause of injury; witnesses had been "permitted to rehearse the story of the accident as told by the deceased; this was

hearsay testimony, plainly inadmissible; but the allowance of hearsay evidence by the commissioner does not require this Court to reverse his decree unless such decree was based in whole or in part upon such incompetent testimony"; here the commissioner "wholly disregarded the hearsay evidence"); 1921, Larabee's Case, 120 Me. 242, 113 Atl. 268 (cause of employee's injury; deceased's statements that "the gas almost killed me", held inadmissible; but "the receipt of hearsay evidence alone is not sufficient to require a reversal of the findings, if there is otherwise a legal basis for the conclusions of the commissioner"); 1921, Patrick *v.* Hain Co., 119 Me. 510, 111 Atl. 912 (there must be "sufficient evidence"); 1922, Ballou's Case, — Me. —, 116 Atl. 591 (the only question is "whether there was any legal evidence upon which the decision of the chairman could be based"; but the opinion then advances a different criterion, viz. "if it has appeared that the commissioner did not take into consideration the evidence illegally admitted, and that there is sufficient evidence outside the illegal testimony to sustain his finding of fact");
Massachusetts: 1913, Pigeon's Case, 216 Mass. 51, 102 N. E. 932 (a finding of the State industrial board will not be reversed for error of ruling on evidence, unless "the substantial rights of the parties appear to have been affected"; nevertheless, the Court then proceeded to determine a question of admissibility in point of law; here the question was whether the deceased's statement of intention was admissible under Rev. L. 1902, c. 175, § 66);
Michigan: 1914, Reck *v.* Whittlesberger, 181 Mich. 463, 148 N. W. 247 (cause of an employee's injury; the Board admitted the deceased employee's statement as to running a nail into his thumb; held (1) that "the rule against hearsay evidence is more than a mere artificial technicality of the law", (2) that the findings may be supported if "any competent legal evidence is produced"; (3) that here there was other legal evidence sufficient); 1915, Fitzgerald *v.* Lozier Motor Co., 187 Mich. 660, 154 N. W. 67 (cause of employee's injury; statements of the deceased, inadmissible as hearsay, had been received by the Board; held that "without considering the purely hearsay testimony", the question was whether there was "any competent evidence" sufficient to support the finding; following Reck *v.* Whittlesberger); 1917, Kinney *v.* Cadillac M. C. Co., 199 Mich. 435, 165 N. W. 651 (injury to workman; Reck *v.* Whittlesberger followed); 1921, Bresee *v.* Clark Eq. Co., 214 Mich. 235, 183 N. W. 19 (cause of employee's injury; finding approved, although there was "hearsay evidence in the testimony"); 1921, Kostamo *v.* Christman Co., 214 Mich. 652, 183 N. W. 903 (dependency; the evidence for the Board need not be direct; circumstantial evidence suffices);
Nebraska: 1920, Venuto *v.* Carter Lake Club, 104 Nebr. 782, 178 N. W. 760 (whether deceased left dependents; "the declarations of the deceased were incompetent as hearsay evidence");
New York: 1915, Carroll *v.* Knickerbocker Ice Co., Sup. App. Div., 155 N. Y. Suppl. 1 (cause of employee's injury; deceased's statement and other hearsay was admitted by the Board: held that the findings were sufficiently supported; opinion by Howard, J., quoted *ante*, § 4*b*; Lyon and Woodward, J. J., diss., quoted *ante*, § 4*b*); 1916, Carroll *v.* Knickerbocker Ice Co., 218 N. Y. 435, 113 N. E. 507 (under N. Y. Laws 1914, c. 41, § 21, providing that in proceedings before an industrial commission "the commission . . . shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter", a finding of the mode of injury of C. "based solely on the testimony of witnesses who related what C. told them as to how he was injured", C. being now deceased, was reversed, on the ground that though hearsay evidence was made admissible, yet the statute did not "declare the probative force of any evidence", and that "there must be a residuum of legal evidence to support the claim"; which thus comes to holding that a statute which declares the legal rules to be no longer binding does nevertheless leave them binding; Seabury and Pound, J. J., diss.); 1917, Fogarty *v.* National Biscuit Co., 221 N. Y. 20, 116 N. E. 346 (cause of employee's death; the widow "stated what she had heard of the manner in which her husband was injured"; held, that the hearsay statement "is not affected by" Carroll *v.* K. I. Co., in view of the presumption here obtaining as to the cause of death); 1918, Belcher *v.* Carthage Machine Co., 224 N. Y. 326, 120 N. E. 735 (cause of employee's death; deceased's statements were received by the Board; held, the question being "whether an award . . . can be sustained upon hearsay evidence, uncorroborated by facts, circumstances, or other evidence", that "there is nothing to sustain the conclusion . . . other than deceased's own declaration", and that the finding could not stand; distinguishing Sorge *v.* Aldebaran Co., 218 N. Y. 636, and Fogarty *v.* National Biscuit Co., *supra*); 1920, Eldridge *v.* Endicott & Co., 228 N. Y. 21, 126 N. E. 254 (cause of employee's disease of anthrax; the place of work was a tannery, and the hides were from southern countries; held, that the Board "could not take judicial notice of the nature of these skins . . . or likelihood of inoculation of an employee", hence the finding was without "at least some evidence" to support it); 1920, Vassilakis *v.* Fairfax Hotel Co., N. Y. App. Div., 184 N. Y. Suppl. 774 (there must be legal evidence to sustain an award, though the Commission may also have used non-legal evidence; here the only evidence of the claim-

ants' relationship to deceased was a certificate of a Greek town mayor, a signed statement of the widow, and certificates of marriage and baptism, all of these authenticated, but in some details not with technical completeness; "the foregoing documents may constitute evidence in Greece, but no one will contend that they possess that dignity in New York", says the Court; this was a discourteous remark, also irrelevant; J. M. Kellogg, P. J., dissents; the features of the evidence recited in his opinion serve to illustrate the world of illusion which the judicial mind, represented by the majority opinion, has so built around itself in imagining technicalities to be fundamentals); 1920, State Industrial Com. *v.* Stiles Co., App. Div., 184 N. Y. Suppl. 598 (death in the course of employment; rule of Carroll *v.* Knickerbocker Ice Co., applied; here there was "legal" evidence additional to unspecified other evidence); 1921, Grills *v.* Sherman-Stalter Co., Sup. App. Div., 186 N. Y. Suppl. 810 (whether deceased employee left any dependents in Italy; three certificates of birth and marriage from Italy, held to be insufficiently authenticated under C. C. P. §§ 952, 953, 956, and not to "come up to the requirements of evidence", and the award therefore reversed; how finical the judicial mind was can be seen from its remark, as to one of the certificates, that "it does not show any certificate of birth of the decedent, although it is recited that he was 'born in this town'"; this ruling illustrates the incapacity of the ordinary courts to entertain any conception of proof not fulfilling all the technicalities of the jury-trial system of rules); 1921, Schermerhorn *v.* General Electric Co., Sup. App. Div., 186 N. Y. Suppl. 835 (extent of employee's partial disability; the medical witnesses placed the percentage of disability in the injured hand at 25 to 33⅓%; but the deputy commissioner, after seven or eight personal inspections of the injured hand placed the percentage at 40%; held, that the deputy commissioner was given no express power by statute to use the evidence of his own senses obtainable by inspection, nor to base his finding on such evidence in so far as variant from the medical testimony, and the award was reversed; J. M. Kellogg, P. J., diss.; this ruling is the apotheosis of judicial arrogance and technicalism; whether the New York Commission is or is not too liberal in its findings does not appear; but their over-liberality would be more endurable than such jealous technical control by this Court);

Ohio: 1918, Roma *v.* Ind. Com., 97 Oh. 247, 119 N. E. 461 (workmen's compensation; under Gen. Code §§ 1465–91, providing that "the usual common law or statutory rules of evidence" shall not bind, said 'obiter' that "it is not to be understood that this section countenances the making a farce or mockery of a judicial proceeding; for instance, it would not justify the admission of hearsay evidence");

Oklahoma: 1921, Associated Employers' Reciprocal *v.* State Ind. Com., — Okl. —, 200 Pac. 862 (there must be "some evidence to support such finding");

Pennsylvania: 1918, McCauley *v.* Imperial Woolen Co., 261 Pa. 312, 104 Atl. 617 (whether an employee's death occurred in the course of employment; findings may be set aside if "there was no legal evidence whatever to warrant them"; deceased's statement that something "in the wool which he was carrying had torn him in the neck", had been held by the Board to be "hearsay, and, standing alone, insufficient to sustain the findings" of the referee; held, (1) that there was here sufficient other evidence on the facts; (2) that the statutory provision, St. 1915, § 428, that "the technical rules of evidence" shall not bind the Board, "do not mean that either the referee or the Board has the right to find material facts on hearsay alone; . . . for, in the first place, the rule which forbids the making of material findings on hearsay alone is more than a technical rule of evidence; and, next, there is nothing in the Act before us which justifies the conclusion that the legislature intended any such loose method for determining material facts. The Act permits liberal investigation by hearing and otherwise; but, after all the data have been gathered without regard to technical rules, then the proofs must be examined, and that which is not evidence within the meaning of the law must be excluded from consideration"); 1919, Wolford *v.* Geisel M. & S. Co., 262 Pa. 454, 105 Atl. 831 (declarations of deceased on the day of the accident; rule of McCauley *v.* Woolen Co. applied);

Rhode Island: 1922, Dugan *v.* Simas, — R. I. —, 116 Atl. 753 (a finding "entirely without legal evidence to support it" will not be sustained);

South Dakota: 1920, Day *v.* Sioux Falls Fruit Co., 43 S. D. 65, 177 N. W. 816 (appeal from an award of the Industrial Commissioner for death of an employee; evidence had been received contrary to the rules about opinion and leading questions; award affirmed; awards "should not be reversed for failure to observe the formal rules of evidence applicable on trials before law courts; unless it clearly appears that the appellant has been prejudiced thereby to such an extent as to deprive him of some substantial right");

Utah: 1918, Garfield Smelting Co. *v.* Ind. Com., 53 Utah 133, 178 Pac. 53 (where there is "substantial evidence" to support the findings, they will be affirmed on appeal); 1920, Ogden *v.* Industrial Com., 57 Utah 221, 193 Pac. 857 ("As there was some substantial competent evidence before the commission to justify its conclusion", the award stands); 1921, Rockefeller *v.* Ind. Com., — Utah —, 197 Pac. 1038 (death of employee; Garfield Smelting Co. *v.* Ind. Com. followed; here, (1) "at least four witnesses were permitted to testify to the statements made by the deceased before he

3. *Sundry Officials.* In the other fields of administrative adjudication there has never been any general legislative interest aroused in their procedure. Hence statutes rarely make specific provision.[18] There are indeed multifarious statutes — for example, those creating licensing boards for the professions — which make conventional provisions that a hearing shall be given, that the party may produce witnesses, that he may hear the testimony against him, and that depositions may be taken. But such statutes are concerned merely with outlining a basis of procedure, and do not purport to deal with the body of Evidence-rules as such.

In judicial review, a few Courts — chiefly in very modern times — have seen fit to test the procedure of *taxing bodies* by their observance of the jury-trial system of Evidence.[19] And for *sundry officials* — civil service boards,

died; this was improper"; (2) "some of the witnesses were permitted merely to state their conclusions or inferences; this was also improper"; thus it does seem that industrial commissions are going to be almost human in their search for the facts, and are distressingly likely to shock some genuinely lawyerlike thinkers by the improprieties of mind which will no doubt be committed, unless rigid checks be imposed by the sole guardians of Truth in the Seeking, viz. the Supreme Courts of the Land); 1921, Spring Canyon Coal Co. *v.* Ind. Com., — Utah —, 201 Pac. 173 (rulings reviewable "if there is no substantial evidence in support of any material fact found"; 1921, Moray *v.* Ind. Com., — Utah —, 199 Pac. 1023 (cause of injury; there must be "some substantial legal evidence");

Wisconsin: 1915, First National Bank *v.* Ind. Com., 161 Wis. 526, 154 N. W. 846 (cause of employee's death; the employee had made statements to certain persons that he had pricked his thumb; whether admissible, "we need not and do not decide", because there was "ample competent evidence", and because the Commission "is not held to the same strict rule with respect to rulings on the admission of evidence as courts of law"); 1919, Eggers V. S. Co. *v.* Ind. Com., 168 Wis. 377, 170 N. W. 280 (that certain evidence was not "formally offered", held not error; "the proceedings before the commission are not to be hampered by useless formalities nor technicalities"); 1921, Porter *v.* Ind. Com., — Wis. —, 181 N. W. 317 (commission's findings accepted, "if there is any evidence to support them").

[18] *Cal.* St. 1913, June 13, p. 1035, No. 606, § 5 (State civil service commission, at its hearings, "shall not be bound by the technical rules of evidence");

Conn. Gen. St. 1918, § 2748 (revocation of liquor license; county commissioners shall apply "the same rules of law and evidence as the courts of this State");

Mo. Rev. St. 1919, § 12541 (State prison board of pardons may "examine witnesses according to the rules of evidence"); § 12637 (State dental board may revoke certificate after notice and public hearing; "the evidence in support of the charges shall be given by competent witnesses", and the accused may present witnesses; "the board may take oral and written proof for and against the accused", and may make "all reasonable and necessary rules and regulations for the speedy and full hearing of all complaints"); § 12683 (official court reporter may be removed by the Court upon cause shown "by competent evidence");

Nebr. St. 1921, c. 182, § 11 (State board of pardons; "the Board shall have the power to determine by its own rules what evidence it will receive");

N. Y. Court of Claims Act 1920, § 26 ("No award shall be made on any claim against the State except upon such legal evidence as would establish liability against an individual or corporation in a court of law or equity");

Wyo. Comp. St. 1920, § 699 (State land board proceedings shall be governed by rules prescribed by the board, which "shall have the same legal force and effect . . . as the code of civil procedure bears and has to civil actions").

[19] *Federal:* 1920, Turner *v.* Wade, 254 U. S. 64, 41 Sup. 27 (Ga. St. 1913, p. 123, providing for a mode of disputing tax assessments, held unconstitutional, because not requiring notice and hearing before assessment, although providing for notice and hearing afterwards before arbitrators; approving Central of Ga. *v.* Wright, 207 U. S. 127);

Massachusetts: 1873, Farmington R. W. P. Co. *v.* County Com'rs, 112 Mass. 206, 213 (county board; on certiorari, the review may include "an objection taken to the evidence for incompetency, so as to raise a legal question"); 1891, Haven *v.* County Com'rs, 155 Mass. 467, 29 N. E. 1083 (county board erroneously received evidence of sales of other land; held that the use of the incompetent evidence required that the proceedings be quashed);

Nebraska: 1886, State ex rel. Goff *v.* County Board, 20 Nebr. 595, 31 N. W. 117 (the board in reviewing assessments acted in part on their own

licensing boards, county commissioners, and others — instances of like exercise of control are found, — also chiefly in very modern times.[20]

On the whole, it would seem that the vast body of disputed claims and charges, dispatched monthly and yearly by these numerous cohorts of ad-

knowledge of the premises; held, that "the board is a judicial tribunal, and so far as possible must be governed by the rules relating to evidence"); 1907, Western Union Tel. Co. *v.* Dodge Co., 80 Nebr. 18, 113 N. W. 805 (county board of equalization received a computation of appellant's stock and bonds taken from "Poor's Manual and other standard publications"; held, that "boards of equalization are not governed in their investigation of the values of taxable property by the strict rules of evidence applied by courts of law in the trial of ordinary cases");
New Hampshire: 1912, Boston & M. R. Co. *v.* State, 76 N. H. 515, 85 Atl. 616 (tax commission; on appeal, "the same rules apply . . . insofar as the production of evidence is concerned, as in other judicial proceedings");
Wisconsin: 1901, State ex rel. Giroux *v.* Lien, 112 Wis. 282, 87 N. W. 1113 (city board of review of assessments; the reception of affidavits, held error, under a statute requiring such boards to "hear and examine any person", etc.)

[20] *California:* 1901, Stumpf *v.* Board of Supervisors, 131 Cal. 364, 63 Pac. 663 (county board's decision on formation of a sanitary district; certain witnesses before the board were not sworn; held, "as the statute did not prescribe the character of the proof by which the questions should be determined, they must be established in accordance with the rules of evidence recognized by the courts and the common law"); 1918, Lanterman *v.* Anderson, 36 Cal. App. 472, 172 Pac. 625 (State board of medical examiner's revocation of a license; rule about corroboration of accomplice held not applicable; "irregular method of procedure not going to the question of jurisdiction", said to be not reviewable on certiorari);
Illinois: 1884, People ex rel. Shepard *v.* Dental Examiners, 110 Ill. 180 (under St. 1881, May 30, authorizing the State board of dental examiners to issue licenses on certain conditions, the decision of the board as to the facts is conclusive, being a judicial determination of facts, and mandamus will not lie);
Iowa: 1920, Fronsdahl *v.* Civil Service Commission, 189 Ia. 1344, 179 N. W. 874 (discharge of police officer by chief of police, sustained by city civil service commission; hearsay evidence is admissible; "It is not requisite that he should have before him competent evidence, in a technical sense, of the criminal guilt of a policeman in order to justify an order of removal; . . . whether it would be competent in such a case for a civil service commission to sustain a discharge wholly upon hearsay evidence, we shall have no occasion to determine");
Minnesota: 1918, State ex rel. Burrows *v.* Truax, 139 Minn. 313, 166 N. W. 339 (certiorari to county commissioners, reviewing an order to establish a ditch; the board had refused to swear the witnesses; held not fatal; "the county board is not a court; its proceedings . . . are necessarily informal; the members are usually not lawyers; they are not governed by legal rules of evidence; . . . parties appear usually without attorneys"); 1919, State ex rel. Grubbs *v.* Schulz, 142 Minn. 112, 171 N. W. 263 (revocation of teacher's license by State superintendent of education; the witnesses were not sworn; State *v.* Truax, *supra*, approved);
Missouri: 1921, State ex rel. Johnson v. Clark, 288 Mo. 659, 232 S. W. 1031 (plaintiff's license as a physician had been suspended for 5 years by the State Board of Health, under Rev. St. 1919, § 7336, after a full hearing on a charge of unlawfully causing an abortion; order quashed, because the Board admitted (1) the attendant physician's testimony to the woman's declaration naming the relator, made 36 hours before death, but not fulfilling the rule for dying declarations, (2) a physician's testimony to the relator's repute as an abortionist; unsound; two judges diss.);
New York: 1920, Appeal of Bronx Parkway Commission, App. Div., 182 N. Y. Suppl. 760 (land-condemnation; the commissioners of appraisal are "untrammeled by any technical rules of evidence, and unrestricted to their sources of evidence"); 1921, Martin *v.* O'Keefe, Sup. App. Div., 187 N. Y. Suppl. 153 (dismissal of policeman for insubordination in refusing to obey an order of the police commissioner as to wearing his uniform at the trial of the former on charges, with a view to identification; dismissal reversed, on the ground that the trial was not fair); 1922, People ex rel. Packwood *v.* Riley, — N. Y. —, 133 N. E. 891 (city commissioner of public safety; rules of evidence applied to proceedings for discharge of chief of police);
Oklahoma: 1920, Muskogee Gas & El. Co. *v.* State, — Okl. —, 186 Pac. 730 ("the strict rule applicable to law courts does not prevail in legislative proceedings"; said of corporate records, offered before a commission);
Rhode Island: 1921, Glass *v.* State Board, — R. I. —, 115 Atl. 244 (revocation of a motor vehicle license by State board of public roads; proof held insufficient; "the bulk of the testimony in this case was mere hearsay testimony; . . . it must clearly appear that after excluding such testimony there is sufficient legal testimony to satisfy the requirement of proof by a fair preponderance of evidence").

ministrators in varied fields, manage to get adjudicated satisfactorily without enforcement by the Courts of the jury-trial rules of Evidence. Whether this can be explained without impairing the credit of that system, could not be answered without an extensive inquiry into the practice at these various tribunals in the different States.

§ 4*d*. **Admiralty Courts; Military Courts; Juvenile Courts; Commercial Courts and Conciliation Courts.** 1. *Admiralty Courts.* That the common-law jury-trial rules of Evidence are not in force for admiralty courts, either in theory or in practice, is sometimes broadly stated. More commonly, the statement is limited to prize causes only, where the practice undoubtedly reflects that liberal attitude. Historically, the absence of a jury sufficiently explains this absence of the jury-trial rules. But, in point of policy, the reasons for maintaining the practice unfettered have been from time to time expounded in ample array by eminent authorities :

1855, Dr. LUSHINGTON, in *The Franciska*, Spinks 287; 2 Eng. P. C. 346: "With regard to the evidence to be produced in the Admiralty Courts with respect to blockades, and, indeed, I may say all other questions of prize, I believe the practice to have been, not to entertain objections to the admissibility of the evidence offered, but to receive all that might be tendered: and certainly we have in this case the license of evidence of every kind and description which could well be offered to the consideration of the Court. I apprehend that this, so far as I know, the universal practice of the Court, was adopted for several reasons. First, because the Prize Court being, not a municipal Court, but a Court for the administration of public law, was not restrained, with regard to evidence, by those rules which are applicable to questions of municipal law. Secondly, it would be most difficult, even if possible, to have laid down any rules of evidence, because this Court, having to concern itself with the transactions of various nations, could never construct a code in conformity with all their various rules, and consequently injustice might be done by excluding, in transactions in which they were interested, proofs recognized by themselves. Thirdly, because of the extreme difficulty of procuring what we are accustomed to call the best evidence, when such evidence is to be obtained from distant countries. Fourthly, because, though the Court may receive all, it will form its own judgment, according to the circumstances of the case, of the weight to be attributed to each species of evidence, and is not supposed to be liable to the error of giving undue importance to any evidence, merely because it does not exclude it."

1922, Hon. HARRINGTON PUTNAM, of New York City, former President of the Maritime Law Association of the United States. Ms. Memorandum. "How far are the common law rules of Evidence modified in Admiralty, and particularly in causes of prize? Roughly, I should say that four influences help let down the bars in Admiralty. These are: 1. The Continental origins of Prize courts, whence we have Roman procedure; 2. The basic need for dispatch in admiralty trials; 3. Greater flexibility in dealing with foreign documents and proof; 4. The consideration that admiralty appeals can correct any errors of admission. I will try, by instances, to show my idea better.

"1. Sir Travers Twiss tells us how prize courts came into being, when the needs of civilization demanded some adjudication, so that what armed cruisers took should be subjected to open judgment in the Admiral's Court, which thus became an international court of prize: 'The process of these courts was formed after the best models which the Roman law afforded; and the regulations for prize proceedings of the fifteenth century are identical with the practice of the present time.'[1] Accordingly, on the issue of lawful prize, the

§ 4*d*. [1] Law of Nations, Vol. 2, p. 145.

proofs are primarily from the sealed papers and log books of the seized ship, with the depositions of those in its charge taken upon an inquiry before the three prize commissioners (one a retired naval officer, and one a member of the bar) under the full and searching questions known as the "Standing Interrogatories" prescribed by the Court (U. S. Rev. Stat. § 4622), the witnesses being examined without presence of counsel. Such testimony, with the log book and papers of the captured ship, forms the sole basis for condemnation. Very special circumstances only will justify allowing any proof from the captors to support their cause.[2] Upon these peculiar issues it is considered that good results do come from the Civil Law practice (which Bentham would characterize, from the method taken, as 'extraction of evidence', and as 'confessorial testimony'). The log-book and papers from the suspected vessel alone may be incriminatory as showing fraud or deception.

"2. In The Peerless [3] Dr. Lushington said in 1860: 'In matters of evidence, I must look to the practice of my predecessors, and the great distinction which prevails between the description of causes which come under the cognizance of the court of Admiralty, and those in other courts. The causes over which the court of Admiralty exercises jurisdiction occur in all parts of the world, on the high seas, and in remote places. It is a well known principle confirmed by authority, that courts of Admiralty are to precede 'levato velo', that is, with the utmost expedition. In order to carry this principle into effect, this court has both in prize matters and civil suits, been accustomed to receive evidence which would not have been admitted in other courts. For instance, affidavits sworn almost in any way before justices of the peace, commissioners in clearing and so forth; even evidence not on oath, as where according to the custom of some of the States in the North of Europe the original evidence was not taken on oath, but the person giving it undertook to make oath afterwards if required. So, from the necessity of the case, all parties interested were, contrary to the laws of other courts at the time, admitted to give evidence in causes of collision, salvage and others.' (If this last sentence means that interest did not disqualify in admiralty causes, that is at variance with admiralty practice in the United States, before the disqualification was abrogated by statute.[4]) In The Franciska,[5] Dr. Lushington summed up his reasons for the greater freedom of receiving proof, the second of which was that this Court, 'having to concern itself with the transactions of various nations, could never construct a code in conformity with all their various rules; and consequently injustice might be done by excluding in transactions in which they are interested, proofs recognized by themselves.' This elasticity in admitting informal papers has been followed in the U. S. Admiralty courts, even in proceedings between private suitors.[6] In The Anna,[7] Sir Wm. Scott said of a captured vessel, brought from the Gulf of Mexico to England by a privateer: 'In such a case, if there is not the utmost formality of proof that might be required in other cases, I will not add the vexation of sending parties across the Atlantic to New Orleans, for further proof.'

"3. The feeling of the need to lower the requirements of proof in mercantile matters is shown in the Commercial Court, organized in London in 1895, to dispose of differences on contracts, such as to charter and to insure vessels. Juries may be called in, but that is the exception. By a set of liberal rules sympathetically availed of by the bar, a free and unfettered practice has been successfully maintained, which is thus described: 'In practice, logs, protests and average statements are constantly read in evidence of the facts stated therein; the evidence of foreign witnesses is received by sworn declarations or affidavit, usually communicated to the other side before an order is made for their admission as evidence, and commissions are very rarely granted, except on terms that their costs are reserved to

[2] The Aline and Fanny, Spinks 332, 10 Moore P. C. 491.

[3] Lushington, 41.

[4] See U. S. R. S. § 858; The Boston, 1 Sumner 328, Fed. Cas. No. 1673.

[5] Spinks 113, 140-141.

[6] The J. F. Spencer, 3 Ben. 337, Fed. Cas. No. 7315; The Bark Vivid, 4 Ben. 319, Fed. Cas. No. 16978; The Boskenna Bay, 22 Fed. Rep. 662, 667.

[7] C. Rob. 373, 389.

the judge at the trial and with the prospect of the party whose objection has rendered them necessary, having to pay the costs thereof in any event.' [8]

"4. In admiralty an appeal follows the civil law theory of being a new trial.[9] Thus, as a concluding ground for receiving informal evidence, Dr. Lushington contrasted the results upon appeal in his statement in The Franciska, *supra*: the appellate court could better correct an error 'from too great force being attributed to any species of testimony, than could remedy an evil arising from exclusion'; and the like consideration was referred to by Judge Brown, in The Baskenna Bay, *supra*. Of course these authorities are more applicable to informally authenticated documents than to other more irregular evidence."

In modern practice, and especially in the prize causes arising out of the World War, this special attitude of the Admiralty Court has been maintained without abatement.[10]

2. *Military Courts.* It might have been supposed that the military courts of the United States would have been most emphatically the ones in which the common-law jury-trial rules of Evidence would find least recognition. But the exact contrary is the case. Owing in part to the sturdy British tradition of the subordination of the military to the civil order; in part to the genius of a series of judge-advocates-general — including Holt and Crowder — who thoroughly infused a spirit of legality into the regulations, and to America's two great writers on military law — Lieber and Winthrop — whose works inculcated a similar spirit throughout the Army; in part to the constant watchful jealousy of Congress and the Congressional lawyers, to exercise control against the possibility of military abuses; and in part finally to the legalistic influence of the hundreds of civilian lawyers who helped to administer American military law in the World War, — owing to all these influences, criminal procedure in the Army has been more nearly assimilated than in any other independent court to that of the common-law courts. Moreover, because of the admirable measure (lacking in ordinary criminal trials) of recording the proceedings verbatim stenographically, it is possible for the appellate officers to check and control effectively the observance of the rules of Evidence.

[8] Scrutton, Charter Parties, Sect. XIV, p. 435 (10th edition).

[9] The Lucille, 19 Wallace, 73, 74.

[10] Besides the authority of Judge Putnam, above quoted, for American practice, the following citations show the English practice: 1908, Admiralty Short Cause Rules (Annual Practice, 1921, vol. II, p. 2372), Rule 6 ("The judge shall be at liberty to receive, call for, and act upon, such evidence, documentary or otherwise, whether legally admissible or not, as he may think fit"); 1914, The Berlin, Prob. 265 (capture of a maritime prize; Sir S. Evans: "The Prize Court is not bound by such confining fetters as our municipal Courts; . . . Dr. Lushington laid down the practice; . . . with respect to blockades, and indeed I may say all other questions of prize, I believe the practice to have been, not to entertain objections to the admissibility of the evidence offered, but to receive all that might be tendered"); 1921, The Lisa, Prob. 38. 50 (Duke, J.: "I am of opinion that the affidavit is receivable. This court is not bound by the rules of the common law as to evidence. A judge in prize may, I believe, be informed of the facts relevant to a question under trial before him by all available means of trustworthy information"). Comments on some Admiralty rules of Evidence in modern English practice may be found in the following articles: E. S. Roscoe, "Prize Court Procedure", British Year Book of International Law, 1921–22, p. 90; Thos. Baty, "Neglected Fundamentals of Prize Law", Yale L. J. XXX, 34, 47 (1920; notes radical modern changes in the World War period); H. R. Pyke, "The Law of the Prize Court" (1916; Law Quart. Rev. XXXII, 144, 165).

Before 1916, the entire body of jury-trial rules, as practiced by the Federal Courts, was the lawful guide for courts-martial. But in that year a wholesome and flexible independence was given by empowering the President to make the rules. The present status of the law is accurately stated in the following official passage:

1916, *A Manual for Courts-Martial* (War Department Doc. No. 560, Office of the Judge Advocate General): "§ 198. *Rules of evidence for courts-martial.* — Prior to the act of August 29, 1916 (Articles of War, 38), courts-martial followed in general the rules of evidence, including the rules as to competency of witnesses to testify, that are applied by Federal courts in criminal cases. These consisted of the rules of the common law as they existed in the several States at the adoption of the Federal Constitution in 1789, as modified from time to time by subsequent acts of Congress. But courts-martial were, however, not required by express *statute* to follow these rules, and have always been allowed to pursue a more liberal course in regard to the admission of testimony than do, habitually, the civil tribunals. Their purpose was to do justice; and if the effect of a technical rule was found to be to exclude material facts or otherwise obstruct a full investigation, it was deemed that the rule may and should be departed from. Proper occasions, however, for such departures were regarded as exceptional and unfrequent. It was believed that 'courts-martial had much better err on the side of liberality towards a prisoner than, by endeavoring to solve nice and technical refinements of the laws of evidence, assume the risk of injuriously denying him a proper latitude for defense.' (G. C. M. O. 32, 1872.) (Articles of War, 38.) And now, by the provisions of the act of August 29, 1916 'the President may, by regulations which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals: provided, that nothing contrary to or inconsistent with these articles shall be so prescribed: provided further, that all rules made in pursuance of this article shall be laid before the Congress annually.' The modes of proof, therefore, including the rules of admissibility for witnesses and other evidence, are now by express congressional enactment placed under the authority of Executive regulation; and the rules laid down in this Manual have the force of such regulation. They therefore form the only binding rules, except such rules of evidence as are expressly prescribed (1) in the Articles of War; (2) in the Federal Constitution; and (3) in such Federal statutes as expressly mention courts-martial."

By the revised Articles of War of 1920 the same provision of 1916 (with slight modification) was continued. The Army Manual for Courts-Martial contains a succinct exposition, in 130 paragraphs, of the rules to be applied.— In a few States the military law makes provision for latitude of rules not unlike the Federal system.[11]

[11] *Federal:* U. S. St. June 4, 1920, Ch. V, subchapter II, Articles of War, Art. 38 ("The President may by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial", etc.; "which regulations shall, in so far as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States"; but nothing so made shall be inconsistent with these Articles); 1920, A Manual for Courts-Martial, effective Feb. 4, 1921 (c. X, Witnesses and Depositions; c. XI, Evidence).

Louisiana: St. 1912, No. 191, § 99 ("The rules of evidence in all courts martial shall follow in general, so far as apposite, the common law rules of evidence as observed by the courts of this State in criminal cases, but a certain latitude in the introduction of evidence and the examination of witnesses by an avoidance of restrictive rules is permissible when it is in the interest of the administration of military justice");

Minnesota: Gen. St. 1913, § 2436 ("Military Courts are not bound by the technical rules of evidence prevailing in civil tribunals, and may depart therefrom when in

3. *Juvenile Courts.* The original reforms in the penal treatment of children preserved the theory of the criminal court. But the great innovation of principle took place in the Juvenile Court Act of Illinois, in 1890 (framed by Harvey B. Hurd), which adopted as the basis of its jurisdiction and procedure the chancery court's function as 'parens patriae.' This type of court obtained ample recognition, after the lapse of some decades, and has since then gone on supplanting the criminal type of court in all parts of the world.

Logically and practically, it is not bound in law to observe the jury-trial rules of Evidence. Nevertheless, it deals with adults in their relation to dependent and delinquent children, and must therefore at times employ repressive or compulsory measures which approach the border line of penality. For this reason, and because the responsibilities involve serious need of caution, it becomes a question how far the judge should consider himself morally bound to observe at least the fundamental framework of the jury-trial rules. There is constant pressure from lay-advisers to eliminate "technicalities." On the other hand, since the juvenile-court methods are undoubtedly due to be extended gradually to adult offenders in some fields, it is needful to build up a system that will not depart too radically from accepted traditions of criminal procedure.

The practice hitherto has been but scantily recorded and little disputed; and the Legislatures have been slow to intervene by statutes.[12]

their opinion the exigencies of the case, the best interests of the service, or the ends of justice demand it"); St. 1917, c. 400, § 88 (same);
Texas: Rev. Civ. St. 1911, § 5861 ("The rules of evidence in all courts martial shall follow in general, so far as apposite, the common law rules of evidence as observed by the courts of this state in criminal cases; but a certain latitude in the introduction of evidence and the examination of witnesses by an avoidance of restrictive rules is permissible, when it is in the interest of the administration of military justice").

That the regular Courts do not attempt to review Courts-martial's rulings on the law of Evidence, is noted in R. *v.* Murphy, Ire. (1921), cited *ante*, § 4*b*.

[12] *Arizona:* Rev. St. 1913, P. C. § 261 (contribution to juvenile delinquency; "procedure under this chapter may be informal"; ordinary criminal procedure "may be followed, but a departure therefrom shall not be error" unless it deprives the accused of constitutional rights);
Arkansas: Dig. 1919, § 5764 ("The Court shall proceed to hear evidence");
California: 1920, Ex parte Tahbel, — Cal. App. —, 189 Pac. 804 (constitutional privilege against self-crimination applies in the juvenile court equally to juveniles; cited more fully *post*, § 2252);
Maryland: Ann. Code 1914, Art. 42, § 20 (the commitment of a minor to custody "shall be determined without regard to technicalities of procedure");
Massachusetts: Gen. L. 1920, c. 119, § 58 (delinquent juveniles; the Court shall "take such testimony relative to the case as shall be produced"); § 75 (criminal proceedings against juveniles; witnesses shall appear "and give evidence");
Minnesota: Gen. St. 1913, § 4060 (commitment to State training school; "the same presumption of innocence and the same rules of evidence shall prevail . . . as in the trial of criminal cases");
Missouri: Rev. St. 1919, § 2593 (juvenile delinquents; when charged with crime, "the practice and procedure . . . for criminal cases shall govern", otherwise the procedure "customary in proceedings in equity"); § 1136 (juvenile court; "the practice and procedure customary in proceedings in equity shall govern"); § 1151 (juvenile court may make its own rules of procedure);
North Carolina: Con. St. 1919, § 5047 (the Court shall "determine the case in a summary manner"); § 5061 (the Court may make "rules to regulate the procedure":
Porto Rico: St. 1915, Mar. 11, No. 37, § 16 (juvenile court; any case "may in the discretion of the Court be conducted informally");
Rhode Island: St. 1915, c. 1185 (juvenile court "need not be bound by the technical rules of evidence in receiving or admitting testimony");

The policy of the practice has been well set forth, from slightly different points of view, in the following utterances from experienced judges deeply interested in the efficiency of the juvenile Court:

1918, WINSLOW, C. J., in *State* v. *Scholl*, 167 Wis. 504, 167 N. W. 830 (rejecting an appeal by the father of two boys aged 10 and 11 who had been placed by the Juvenile Court in charge of probation officers, by reason of delinquency, under Stats. 1917, §§ 573–1 to 573–10; the order had been made after a hearing in the presence of the boys and the father, and was based largely on the probation officer's unsworn testimony, reporting the result of his investigation, including confessions of the boys to frequent prior misconduct of the sort):

"A democracy cannot long exist unless the great body of its voters be not merely intelligent, but moral. The children of to-day are the voters of to-morrow. It is the greatest concern of the state, therefore, that its children be preserved from vicious habits, for the vicious child is the father of the vicious man. The law before us may be said to be founded on these propositions. Its aim is to keep something like a parental watch over children who are neglected or wayward, or both, and hence are subject to vicious influences; to bring them and their parents or guardians before an experienced and humane judge, who shall inquire into the situation, not with the awe-inspiring and frigid methods of a criminal court, but informally and intimately, like a wise and gentle elder brother, or like the good Samaritan of Holy Writ, and who shall, when fully advised, do that which is best for the child's future, either by way of sending it to an institution or by providing for kind and tactful, but in no sense degrading, surveillance for a limited time at home. It would be a public misfortune to set aside a law so designed, even though it were not perfect in its details. Only the most weighty and convincing considerations could justify such action, and we do not think they exist here.

"The serious claims made will be briefly considered. It is said the constitutional guaranties of trial by jury and due process of law are denied. . . . The power of the state to exercise such control over the child is fully vindicated by Chief Justice Ryan in the case of Mil. Ind. School v. Supervisors, 40 Wis. 328, and it is there distinctly and eloquently held that such proceedings as these are not in any sense criminal proceedings. They are in fact simply investigations by the state into serious conditions which if unchecked may lead to the making of its children into criminals instead of law-abiding citizens. . . .

"In such investigations we know of no rule which prevents the use of investigation and unsworn testimony in ascertaining the essential facts. The desideratum is to obtain, by the use of kindness and sympathy, the confidence of the child and of its parents if possible, to convince them that the judge and probation officer are friends and not the avengers of offended law. Good results are far more likely to be obtained in this way by the use of informal methods than by bringing them into a court conducted with the form and ceremony attendant upon trials for crime, where all the proceedings suggest that the law is about to be invoked to inflict punishment upon hardened malefactors.

"It may be advisable, in cases where it seems best to take the child permanently from its parents and consign it to the care of an institution, that sworn testimony be taken and the essential facts thus proven before the final order is made, because in such case the natural

South Dakota: Rev. C. 1919, § 9998 (juvenile court; "all hearings . . . shall be informal in their nature, conducted under such rules and regulations as the Court may prescribe");
Utah: Comp. L. 1917, §§ 1816, 1820 (juvenile court; for adult misdemeanors, "the practice and procedure shall conform to the practice and procedure . . . for justice courts"; for delinquencies of children and for guardianship, "shall conform as nearly as possible" to that of district courts; and for "the delinquency of children and their disposition", exercising equity jurisdiction, the Court "to this end may adopt any form of procedure which is deemed best suited to ascertain the truth in the particular case"; the juvenile is compellable to testify, and the probation officer or other person is compellable to report the result of investigation);
Wisconsin: 1918, State v. Scholl, 167 Wis. 504, 167 N. W. 830 (quoted *supra*).

right of the parent to the custody of the child is invaded, and it would be desirable to avoid any question as to the validity of the order. We intimate no opinion on this point. It does not arise here. In the present case the boys were simply put on probation, and we regard the proceedings taken as entirely sufficient, although no witness was sworn. The investigations of the probation officer and the facts brought out by the kindly questioning of the judge upon the hearing substantiate the fact of delinquency fully as well as sworn testimony.

"As a matter of fact there is no 'Juvenile Court' in the sense of a separate and independent court; it is so called simply for convenience, and is a jurisdiction rather than a distinct court. . . . This seems somewhat anomalous to us because we have been so long accustomed to the rigidity of our court system, but no constitutional or serious practical objection can be successfully urged against it. It is a common-sense step toward greater elasticity in the administration of the law by the courts which will doubtless be followed by many more."

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 Law and Criminology, XII, 339):

"(*a*) *Conformity with Rules of Evidence.* More serious questions arise in respect to conformity with the rules of Evidence. Speaking generally, rules of Evidence throughout the United States are the rules of the English common law, variously modified by local statutes, and uniform in their application to all courts deriving authority from the same source — the States or the Nation. I do not happen to know of any legislative rule of evidence peculiar to juvenile courts except a Minnesota statute permitting findings upon the written reports of official investigators with like effect as upon testimony received in open court in county allowance or mother's pension cases. Rules of ancient origin, approved or at least tolerated by the community for generations, encountered by the citizen whenever he resorts to other legal forums to assert or defend his rights, should not lightly be set aside in juvenile courts. The only safe practice is to observe them. If hearsay, for example, has not been found justly admissible in civil disputes and criminal trials, it is no better in juvenile court proceedings. Exceptions should be made when appropriate, and informal short cuts will often be found agreeable to all concerned; but the exception should always be recognized as an exception. No judge on any bench has need to be more thoroughly grounded in the principles of Evidence and more constantly mindful of them than the judge of a juvenile court. The boy against whom it is proposed to make an official record of misconduct, involving possible curtailment of his freedom at the behest of strangers, has a right to be found delinquent only according to law. The father, however unworthy, who faces a judicial proceeding, the event of which may be to say to him, 'This child of your loins is henceforth *not* your child: the State takes him from you as finally as though by the hand of death', that father may rightfully demand that the tie of blood shall be cut only by the sword of constitutional justice. Surely, those substantial rules of Evidence which would protect the boy if the state called its interference 'punishment' instead of 'protection', and would safeguard the father in the possession of his dog, should apply to issues which may involve the right of the boy to liberty within the family relationship, and the right of the father to his child. The greater the conceded discretion of the judge, and the freer he is from the vigilance of lawyers, and the less likely he is to have his mistakes corrected on appeal, so much the more careful should he be to base every judicial conclusion on evidence proper to be received in any court of justice. Otherwise the state's parental power which he embodies is prostituted; the interpreter of the law degenerates into the oriental kadi; and the juvenile court falls into suspicion and disrepute.

"(*b*) *Investigation into Circumstances of Offense.* If there is a question here, it must be as to the use to be made of information obtained rather than as to the propriety of a preliminary investigation through agents of the court. The value of such an investigation in

suggesting inquiry at the hearing is obvious. But when there are issues of fact to be tried it seems to me equally plain that statements made to an investigator out of court should have no standing as evidence when they are disputed by parties in interest, who by the implications of their denial demand the same right to be confronted with the witnesses against them that is freely recognized in other judicial proceedings. Without attempting a discussion of 'due process of law', considerations of public policy seem conclusive. The undisciplined minds of the juveniles and most of the parents who come before the court cannot make clear distinctions between proceedings that are really friendly and paternal and those that are hostile, when the results may be alike in depriving them of liberty of action which they had before they came into court and are unwilling to surrender. Public opinion, too, looks askance upon any abandonment of traditional barriers against governmental interference with the citizen. However wise the judge and kind his purpose, he must have regard to both the individual and the community sense of justice; and Americans have an ingrained conviction that nothing, however well meant, ought to be forced upon them on the basis of information obtained behind their backs.

"Let it be observed that I am now discussing policy rather than constitutional rights. As respects non-criminal proceedings, I am not prepared to set limits to the power of the Legislature to enlarge and adapt to modern conditions the ancient methods of official inquisition. Professor Wigmore speaks of an increasing 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.' 'This policy', he says, 'when judiciously employed, greatly facilitates the production of evidence without introducing loose methods.' (Evidence, vol. III, § 1672.) It is probable that, as socialization of the courts proceeds, the tendency toward the use of this form of evidence will grow stronger; but popular prejudices must be reckoned with, and procedural convenience will be dearly bought if the cost be impairment of the general confidence in the administration of justice.

"When, however, the adjudication is made the situation changes. It has been lawfully determined that the facts warrant the interference of the Court. The nature and extent of that interference is discretionary with the judge within the limits set by the law. In exercising his discretion he may rely upon anything that brings conviction to his mind, and the parties concerned have no legal right to question the sources of his information. Here official investigation is a proper and valuable aid, whether made before or after the adjudication."

4. *Commercial Courts; Courts of Conciliation.* Wherever a new court, or judiciary branch, has been created or set apart, to act without a jury, and to do justice in a special class of cases by prompt dispatch of claims, there the jury-trial system of Evidence-rules does not control. History and policy alike dictate this conclusion.

In *commercial causes*, where the mercantile desire for prompt disposal has sometimes led to the establishment of a special court, this principle should obtain.[13]

[13] *England:* 1895, Commercial Causes, Notice (White, Stringer, and King's Annual Practice 1921, vol. II, p. 2370); Rule 6 (application may be made to the judge, under the Rules of the Supreme Court, or by consent, "to dispense with the technical rules of evidence, for the avoidance of expense and delay which might arise from commissions to take evidence and otherwise"). The practice under this Order can be seen in Mathews' Commercial Cases, vols. 1–26, 1895–1916 (with an Introduction in vol. I explaining the simple procedure under the Order; in half-a-dozen volumes casually selected, there was no title 'Evidence' in the Index).

So also in Canada, in proceedings to *quiet title to land:*

British Columbia: Rev. St. 1911, c. 192,

In small causes generally, for which *courts of conciliation* are rightly beginning to be used, it would be a defiance of common sense and a nullification of the main purpose, to enforce the jury-trial rules of Evidence; for the parties are expected to appear personally without professional counsel, and they cannot be expected to observe rules which they do not know.[14]

§ 4*e*. **Private Arbitrators; Private Associations.**

1. *Arbitrators.* A main object of a voluntary submission to arbitration is the avoidance of formal and technical preparation of a case for the usual procedure of a judicial trial. Moreover, though an arbitrator's award, to have compulsory effect, must receive ultimate judicial sanction, the arbitrator is himself not a judicial official, nor any official; and he investigates without a jury. On principle and policy alike, therefore, the jury-trial system of Evidence-rules ought not to be deemed to have force; and such has been the judicial conclusion.[1]

2. *Private Associations.* In clubs, fraternal orders, commercial boards, and the like, the contract-privilege of membership may be of great value. As an implied term of the contract, the association is not to terminate membership for cause without using some fair and apt procedure of adjudication, — an opportunity to hear the charges, to produce evidence in refutation, and so on. The Courts have always insisted on this. But neither in theory nor in policy, do the jury-trial rules of Evidence form any necessary part of the fundamentals of fair procedure for a private association :[2]

§ 9 (quieting title; like Ont. R. S. c. 123, § 9);
Newf. St. 1921, c. 21, § 8 (quieting title; like Ont. R. S. c. 123, § 9);
Ontario: Rev. St. 1914, c. 123, § 9 (quieting title; "the judge in investigating the title may receive and act upon any evidence . . . which the practice of conveyancers authorizes to be received on an investigation of title out of court, or any other evidence, whether the same is or is not receivable or sufficient in point of strict law" etc., if it "satisfies the judge" as to the facts).

[14] See the Journal of the American Judicative Society (Chicago, Herbert Harley, Secretary), 1912, *passim*, for accounts of these courts.

§ 4*e*. [1] ENGLAND: 1836, Symes *v.* Goodfellow, 2 Bing. N. C. 532 (arbitration not void because an inadmissible witness was heard); 1864, Wakefield *v.* Llanelly R. & D. Co., 34 Beau. 245, 249 (arbitration not void because a witness was not sworn); 1892, Keighley M. & Co. *v.* Bryan Durant & Co., 1 Q. B. 405, 411 (remitting an award for new evidence; Lord Esher, M. R.; "It has been argued that we ought not to remit the award unless the fresh evidence would be good evidence if the case were being tried in a court of law; but the parties have agreed to go before an umpire, who is not bound by the strict rules of evidence enforced in a court, and to be bound by his decision; and in my judgment the Court ought not to fetter the arbitrator or the parties by its own rules of evidence"); 1922, Ramsden & Co., *r.* Jacobs, 1 K. B. 640 (award of arbitrators set aside because "the arbitrators heard evidence of one party in the absence of the other"); 1921, Percival *v.* Peterborough Corp., 1 K. B. 414 (arbitrator held bound to consider certain evidence under rules expressly stated in St. 1919, Acquisition of Land Act, c. 57, s. 2).

UNITED STATES: *Fed.* 1914, Re Georgia & F. R. Co., D. C. S. D. Ga., 215 Fed. 195 (under U. S. St. 1913, July 15, 38 Stat. 103, Arbitration Act, an exception to the findings of the statutory arbitrators was that it was "unsupported by the testimony"; held, that "such courts are not confined . . . by technical rules of law; . . . [the parties] waived any rights to have the questions involved determined by the strict and cumbersome rules of the courts of law");
Conn. 1917, Whitney Co. *v.* Church, 91 Conn. 684, 101 Atl. 329 (rules of evidence not applicable in an arbitration where the parties consented to proceeding otherwise).

[2] ENGLAND: 1879, Labouchere *v.* Warncliffe, L. R. 13 Ch. D. 346, 352 (expulsion of Mr. Henry Labouchere from the Beefsteak Club; quoted *supra*).

1879, Sir *George* JESSEL, in *Labouchere* v. *Earl of Warncliffe*, L. R. 13 Ch. Div. 346: "'The committee are not to form an opinion until after inquiry.' What does that mean? What kind of inquiry is intended? The words do not mean that they are simply to take up a newspaper, see in it that Mr. A. B. has written a letter, or has been brought up at the police court for drunkenness, and then expel him. . . . What the rule I have quoted means is that there shall be a fair inquiry into the truth of the alleged facts. . . . What ought the committee of a club to do when the conduct of one of its members has been impugned? They ought to see what that conduct has been, and what excuse or reason can be given by the member for it; and they ought to give notice to that member that his conduct is about to be inquired into, and afford him an opportunity of stating his case to them. . . . In a case where a decision depended upon their opinion — in other words, upon their judgment — it was most important that the materials on which that judgment was formed should be accurately ascertained; and, of course, that could only be done by a proper investigation, by giving due notice to the accused and by taking — I do not say legal evidence, or that evidence not directly legal might not be admissible — but taking evidence on the question of fact before them, and satisfying themselves as to the truth. They could then form their opinion. . . . If, having given the accused fair notice, and made due inquiry, the committee came to the conclusion that the conduct of one of the members of the club was injurious to its welfare and interests, no judicial tribunal could interfere with any consequences which might arise from an opinion thus fairly formed."

1920, SEARS, J., in *Cabana* v. *Holstein-Friesian Ass'n*, Sup. Ct., 182 N. Y. Suppl. 658 (cancellation of a certificate of registration in a herd-book; requirements of a fair hearing, examined): "The association is not bound by the rules of common-law evidence. If such were the rule, almost no decision of such a body as this could be sustained. In the case of the defendant association, the directors have no power to subpœna witnesses. It may be impossible to obtain the presence of all the persons having knowledge of the circumstances. Under such circumstances, an explanation being offered, it would not be necessarily unfair to receive 'ex parte' statements and other hearsay evidence. Whether such a proceeding would be fair or not can only be determined when all the facts are before the Court, and not in such an anticipatory action as this. As a general rule it cannot be doubted that a person whose property rights are involved should be confronted by the witnesses against him, and have an opportunity to cross-examine, and a departure from this rule must be the exception."

UNITED STATES: *Connecticut:* 1921, Gervasi *v.* Societa Giuseppe Garibaldi, 96 Conn. 30, 112 Atl. 693 (expulsion from a beneficial society, whether the charges must have been presented in writing, etc.; Wheeler, C. J.: "In actions by or against fraternal organizations, their course is not to be determined by close adherence to the forms of legal procedure or to the exact observance of those rules of practice which govern in the case of public bodies");

Indiana: 1920, Gardner *v.* Newbert, — Ind. App. —, 128 N. E. 704 (labor union; expulsion without hearing on charges will be enjoined);

Kansas: 1907, Harris *v.* Aiken, 76 Kan. 516, 521, 92 Pac. 537 (explosion from a livestock exchange; argued that the committee "was influenced by information obtained from persons who did not appear at the hearing and whom he had no opportunity to cross-examine"; held, that "it was not at all necessary . . . that the ordinary rules of evidence should have been enforced");

Michigan: 1904, Derry *v.* Great Hive, 135 Mich. 494, 98 N. W. 23 (death claim disallowed by a committee on the ground of false representations; the medical examiner had mentioned the statement of a neighbor; "this statement would of course have been incompetent in a court of law; [but] if these proceedings are to be controlled by the rules governing suits at law, probably not one of the hearings before these orders could be sustained"); 1904, Barker *v.* Great Hive, 135 Mich. 499, 98 N. W. 23 (like Derry *v.* Great Hive; physician's affidavits had been admitted, also an unsworn physician's certificate; held (1) that the plaintiff's initial use of such evidence was an estoppel; (2) that "it is not to be supposed that in his hearing before the Great Hive strict regard will be paid to legal rules of evidence; . . . the only rule for the admission and exclusion of testimony is common fairness"); 1904, Dick *v.* Supreme Body, 138 Mich. 372, 101 N. W. 564 (death claim disallowed; a physician's affidavit to deceased's

§ 4*f*. **Social Case-Work.** If the ordinary Courts, the bulwark of our justice, can learn from other kinds of tribunals that the jury-trial rules of Evidence are not the only nor the indispensable means of arriving at truth, so too, on the other hand, all investigators having to do with inquiries into issues of human conduct can learn from the Courts that the jury-trial rules represent a vast body of accumulated experience, and that this experience has value for all such investigations and should be utilized so far as applicable.

A chief field is that large enterprise known as "social case-work", *i.e.* the personal administration of philanthropic help and advice, through representatives of private and public agencies, to families and individuals whose domestic affairs go wrong and are not self-corrected. The problem presented is analogous to the judicial one; for the ultimate purpose is action by the agency, and that action must depend upon ascertainment of facts, and those facts, involving human conduct and conditions, are ascertainable through much the same materials of proof as the facts of ordinary judicial litigation.

The field is extensive and important; and fortunately a leader of thought has arisen, to point out to this group of investigators the necessity for systematic study of evidence, and the utility of the principles already embodied in the jury-trial rules:

communications had been received: held, that the statutory privilege was binding for such proceedings; and the finding was void; "it is clear that the validity of adjudications of this character is not lessened by the circumstance that technical rules for the admission of evidence are disregarded; it is likewise true that within the limits of common fairness such tribunals may prescribe their own rules of evidence; but . . . they have no right to violate any law which the State power prescribes for their guidance"; unsound; the statute did not expressly apply to private associations);

Nebraska: 1917, O'Brien *v.* South Omaha L. S. Exchange, 101 Nebr. 729, 164 N. W. 724 (expulsion from membership in a live stock exchange; in such a hearing, "it is not required that the procedure be tested by the rigid rules of criminal pleading and practice");

New York: 1900, Kopp *v.* White, Sup. Sp. T., 65 N. Y. Suppl. 1017 (expulsion from a Masonic lodge; held (1) that the proceedings were governed only by the rules of the society, (2) as to certain hearsay, that "hearsay evidence is not always incompetent, but is frequently allowed in trials in courts of record, and is evidence so far as it goes, and if not objected to may in the absence of other evidence become conclusive upon the party"); 1921, Cabana *v.* Holstein-Friesian Ass'n, Sup. App. Div., 188 N. Y. Suppl. 277, 284 (injunction refused to plaintiff, a member of defendant record association, seeking to prevent it from canceling cattle records obtained by fraud except after a hearing of a certain sort; the defendant was willing and ready to give a hearing; the trial court provided in its order that the mode of procedure at such hearing should "accord to the plaintiff a fair and impartial trial, which, however, does not necessarily confine the board to the receiving of common-law evidence; in case any witness cannot be produced after an explanation is offered the board may in the exercise of sound discretion receive ex parte statements and other hearsay evidence coming from such absent witness; this shall be applicable to all parties appearing; but in all respects any such exercise of discretion shall be subject to the general rule above stated that the hearing shall be fair and impartial"; plaintiff appealed from the ruling that the board was not necessarily confined to common-law evidence; on appeal, it was held that the trial court "should not have passed upon that question in advance", and that part of the order was stricken out; this decision not to decide is another example of the pedantic litigation-breeding procrastination of supreme courts);

Rhode Island: 1917, Fales *v.* Musicians' Protective Union, 40 R. I. 34, 99 Atl. 823 (rule of notice and opportunity for cross-examination applied to proceedings of expulsion from a trade-union).

1917, Miss *Mary E. Richmond*, Social Case-Work (Russell Sage Foundation Publications), pp. 38, 41–45: "I. *Social Evidence Differentiated;* From the beginning of his task the social case worker deals with testimonial evidence in a way shaped by the end for which it was obtained; namely, the social treatment of individuals. As he proceeds he often finds himself in need of more knowledge as to the weight which should be attached to the social evidence he has gathered. Are there rules of evidence, principles of choice, that can guide him in selecting from a group of unassorted observations and testimonies those which he can rely upon from those which must be accepted with a grain of salt? If so, are these principles peculiar to social work, so that its practitioners will be obliged to dig them out from their own experience alone, or may they hope to find them already identified in law book or laboratory?

"That there are such rules to guide the social worker is intimated by a correspondent who had gone from a charity organization society to a society to protect children from cruelty. He writes:

'As a result of my experience both with C. O. S. and with S. P. C. C. investigators, there seems to me a weakness in the training of the C. O. S. district secretary, who from the nature of her duties is constantly required to weigh evidence but who has not got clearly in mind the fundamental differences between different classes of evidence and their different values. I do not now refer to the nice discriminations; those I am content to leave to trained lawyers to squabble over. Not only would the co-operation with a S. P. C. C. be at once improved, but evidence as it stands in a C. O. S. investigation would be increased in value and reduced in bulk. I confess to considerable impatience at times when I find district secretaries of some and even of great experience apparently *valuing every statement equally and then adding the items together to find a total.*'

"Many will share this correspondent's impatience with such arithmetic. Nevertheless, no considerable group of social case workers — whether in a society to protect children or a charity organization society or anywhere else — seem to have grasped the fact that the *reliability* of the evidence on which they base their decisions should be no less rigidly scrutinized than is that of legal evidence by opposing counsel. On the other hand, the question of admissibility, the rules for which were framed mainly to meet the average juryman's lack of skill in testing evidence, does not enter into the weighing of facts as gathered by an agency all in whose service are, or can be, trained to this special task. Skill in testing evidence, as leading to such proof as social workers need, is in no way dependent upon a knowledge of the legal rules of admissibility. Social evidence, like that sought by the scientist or historian, includes all items which, however trifling or apparently irrelevant when regarded as isolated facts, may, when taken together, throw light upon the question at issue; namely, as regards social work, the question what course of procedure will place this client in his right relation to society? Many an item, such as a child's delayed speech, for instance, may have no significance in itself, whereas when considered in connection with late dentition and walking and with convulsions it may become a significant part of evidence as to the child's mentality. Social evidence, then, has an advantage over legal evidence in that it can include facts of slight probative value. . . .

"In examining the reliability of evidence, social case work should make its own application of universal tests; and, coming late to the task, should be able to profit by the experiences not merely of law, but of history and of natural science. The various professions apply rules of evidence for arriving at truth, each according to its own special conditions. The scientist uses controlled experimentation because he works with material which may be brought under complete control. He may, for instance, till half of an orchard whose physical conditions, soil, grade, exposure, etc., are the same throughout. If the tilled half bears much better than the untilled, he concludes that tilling increases the product of fruit trees. When, however, the farmer in the fable digs in his orchard for buried treasure, and in place of gold finds his promised fortune in an unprecedented yield of fruit, he probably draws no causal inferences whatever.

"Should a social worker have the task of showing whether the farmer's labor had paid or not, he would get the testimony of the farmer, of his family, and his neighbors as to the previous care of the trees; their evidence as to any other measures of improvement he might have taken, such as pruning, thinning out, etc.; their recollection, corroborated by governmental reports, of weather conditions, pests, etc., of preceding years. He would take account of hearsay evidence, of persistent rumors, of the general appearance of the man's farm and home. As a result, the social worker might establish or discredit the value of tillage in this instance with a fair degree of probability.

"Suppose, on the other hand, some decision in a law court should turn on the question whether or not it was his tilling of the soil that had brought the farmer an increased yield of fruit. The court would deal in the main with the same facts as the social worker, namely, with the testimony of witnesses, with government reports, or with an inspection of the premises; the difference would be that a court would guard with scrupulous care the admission of hearsay evidence and would exclude rumors; that it would, in short, hold each witness to a responsibility for his statements, allowing him in the main to say nothing of which his own knowledge was not first-hand. This evidence might or might not satisfy the court beyond a reasonable doubt that it was justified in concluding that tillage had increased the farmer's yield. But these restrictions upon evidence are necessary in law because of the obligation the judge is under of sifting evidence for a jury who are liable to allow undue weight to items which have small value as proof. . . .

"It is clear, then, that whereas social evidence is distinguished from that used in natural science by an actual difference in the subject matter, it differs from legal evidence not in the sort of facts offered, but in the greater degree of probative value required by the law of each separate item. . . .

"In short, social evidence may be defined as consisting of any and all facts as to personal or family history which, taken together, indicate the nature of a given client's social difficulties and the means to their solution. Such facts, when duly tested in ways that fit the uses to which they are to be put, will influence, as suggested in the preceding chapter, the diagnosis of physical and mental disorders, will reveal unrecognized sources of disease, will change court procedure with reference to certain groups of defendants, and will modify methods in the school classroom. To a certain extent social evidence is already exerting this influence, but the demand for such evidence is likely far to outstrip the supply during this next decade.

"II. *The Wider Use of Social Evidence.* Scattered and tentative as they still are, the signs of such coming demand are nevertheless unmistakable; the uses of social evidence in the older professions are beginning to multiply, as the following illustrations will show:

A specialist in the *diagnosis of feeble-mindedness* committed two difficult girls to custodial care, largely on the facts supplied him from first-hand observations by a children's aid society as to the characteristics of these girls and of their families. The 'stream pictures' furnished in summaries of two case records, covering two years in one instance and nine in the other, were his most conclusive evidence.

"The nature of these 'stream pictures' may be gathered from Dr. W. E. Fernald's discussion of the evidence needed by the psychiatrist for making a diagnosis of mental defect. Some of this evidence, although obtainable by social workers, is of course medical in character, that is, delayed dentition, late walking, delayed speech, a history of convulsions in the first few years of life, the presence of degenerative stigmata. Much of it, however, is precisely the slight but cumulative evidence which social workers habitually gather as bearing on disabilities; namely, facts of family and personal history with special reference to the period of infancy and early childhood, a relatively long continuance of untidy habits (of childhood), the public school grade in relation to age, inability on the part of the patient to apply himself continuously either in school or in any other occupation without constant

supervision. In some cases with only slight intellectual defect, the inability to 'make good' socially will be a deciding factor in the diagnosis. . . .

"We have also seen in the discussion of Beginnings that the Children's Courts of the United States owe their existence to social workers. These courts *supplement legal evidence by social.* Not only have the courts come to recognize the value of a more liberal inclusion of imperfectly relevant evidence in disposing of child offenders; they are growing to feel that even the method of gathering this evidence has an influence upon the welfare of the child. They believe that such investigation should be inspired not by the ambition to run down and convict a criminal but by a desire to learn the best way to overcome a boy's or girl's difficulties. The need of modifying in these courts the usual legal procedure is thus commented upon by Flexner and Baldwin:

'The best interests of the child make it necessary for the court to consider hearsay and other evidence of a more or less informal kind which would ordinarily under strict rules of evidence be excluded. It is of the utmost importance that the court should avail itself of just the kind of evidence that the investigator [the probation officer] presents. If it should finally be determined that the laws as drawn do not permit the introduction of such evidence, express provision should be inserted in the statutes allowing its use.'

"Another court having its origin in needs brought to light by social work is the court of Domestic Relations, which may in time be merged with the Children's Court. It suffers at present from inability to secure and use the necessary social evidence. This experiment, like many others, will continue to fall short of full usefulness until social workers develop the diagnostic skill that will enable them to offer to the court authenticated and pertinent information. The following is a case in point:

"A court of domestic relations sentenced a man for desertion and non-support on the testimony of his wife. The wife then applied to a charity organization society for relief for herself and four children. The district secretary, assuming that on the face of it this convicted man was good-for-nothing, asked her committee to arrange for assistance to the family. It was with reluctance that the secretary at the suggestion of her committee agreed to make what she regarded as a superfluous investigation of the man's side of the story. This inquiry, however, brought statements from employers, former neighbors, relatives, etc., which showed that the trouble lay not with the man, who was a decent enough fellow, but with the woman, who was probably mentally unbalanced. Instead of voting relief, therefore, the district committee asked the judge to release the man.

"In short, the secretary in question would hardly have been qualified to persuade a court of the helpfulness of social evidence, while she herself was capable of treating an inference — that as to the man's character — as if it were an evidential fact. . . .

"It would seem that social evidence is beginning to receive recognition. The endeavors of social workers are bringing to light ways of thinking and doing that prove useful in quite other fields. The fact that law, medicine, history, and psychology, in their effort to break new ground, have been opening the same vein of truth, shows a growing demand for the kind of data that social practitioners gather. The absence of any generally accepted tests of the reliability of such evidence, however, still keeps this new demand itself ill defined and unstandardized. Personal histories which might appear sufficiently authenticated to a shop manager might strike a neurologist as inadequate for conclusions, while they would certainly be open to objections from a court. Progress on the social side of these several fields of endeavor will be hastened as social workers subject their own experiences to a more critical and searching analysis."

The treatise above quoted, though a pioneer work, has in a masterly manner applied the principles of Evidence to the whole complex field of social case-work. As illustrations of the useful possibilities suggested for this field by the

State Court of the decisions of other State Courts. Except in four or five States, the opinions are full of citations from other States. Those other States' decisions are not binding as precedents; their use tends to unsettle the law of the Court that resorts to them. To rely upon a ruling from another Court, not in the least binding, is of course to give a quality of optionalness in the use of precedents. And so the genuine doctrine of precedents is every day undermined by this loose resort to the law of other States. We possess all the drawbacks of having 'stare decisis', and also all the drawbacks of not having it.

The immediate causes of this loose practice are mainly two already mentioned, — the lack of thorough familiarity with the Court's own prior decisions, and the facile resort to digests and compilations.

5. A shortcoming kindred in its nature to the preceding is *over-consideration of every point of law* raised on the briefs. This shows faithfulness and industry; for which we should be and are grateful. But it tends to remove the decision from the really vital issues of each case, and to transform the opinion into a list of rulings on academic legal assertions. The opinion is as related to the meat of the case as a library catalogue is to the contents of the books. This is far from exercising the true and high function of the Supreme Court.

One immediate cause of it is the removal of the Supreme Court on high, away from direct touch with the arena of the litigation. In the great days of Erskine, Eldon, Garrow, and Denman, the appellate judges were also trial judges. The peculiar American separation of the trial judge from the appellate judge has tended to make the latter more and more of a legal monk, immured in a Carthusian cell and cultivating his little plot of the law's barren logic. But (as Mr. Justice Holmes has said) "other tools are needed besides logic; the life of the law has not been logic; it has been experience."

One more and a deeper cause there certainly is for this trait, — the substantial loss (temporary, let us hope) of the conception of justice, in contrast to rule of law, as an element in every case. Whenever this conception shall be restored to its due place, and judges shall be less timid about mentioning the word, this defect will lessen. Read some of the late Chief Justice Furman's recent opinions, in the Oklahoma Court of Criminal Appeal, to see how judicial law can frankly express itself in terms of justice, when needed, and yet maintain the true spirit of law. For the older generation, Lumpkin senior, of Georgia, and Doe, of New Hampshire, are good examples.

6. Finally, another shortcoming is the *one-man opinion.* Of course, nobody knows just how widespread this practice is. And the method of deliberation and decision of the issue, and of preparation and approval of the opinion, differs widely. But even where in name it is an adequate method, we believe that (except for a few Courts, and for a few much-controverted cases in the other Courts) the opinion is too often *intellectually* a one-man opinion. And that is what we lament.

The standard to seek for is that *all the law* of every opinion should be intelligently affirmed to be law by every member of the Court. If not, it is not Court law, but individual's law. And yet the very merit of a bench Court is that it shall represent the fusion of all the variant knowledges, experiences, temperaments, and talents of five or seven or nine representative leaders of legal thought, and thereby shall come as near to being safe and sound as human devising can make it. This standard means, for example, that if seven important issues of law are raised on appeal, and if one of them is a supposed rule that a creditor, to maintain a bill to reach a fraudulent purchaser from the debtor, must first have reduced his claim against the debtor to a judgment, then each and every member of the court who signs the opinion sanctioning or repudiating that rule must be able to say that he believes it from personal familiarity with the sources of law in his State. Anything less than this is intellectually not a full Court opinion.

That full Court opinions, in this sense, are few, is the strong impression given by the opinions themselves. The main cause for this state of things is one among the complex of causes already mentioned, — the pressure for quick despatch, created in part by the profession mobbing the appellate courts with appeals, and in part by the community's disinclination to give the judges ample time for the personal study of every case.

Two supposed shortcomings must now be mentioned, only to repudiate their existence or relative importance.

7. *Corruption* and *political bias*. Amidst the ululations of the demagogues, and the suspicions of the laity, it is a duty to express a sense of satisfaction at the lack of reasonable grounds for complaint on the score of corrupt intent and political bias. Few of us can know the hearts of any of the judges, — whether attackers or defenders. We must rely for our working estimates upon their attitudes as exhibited in their judgments of law upon the facts of the cases submitted. Those data give us no right to form any sinister impressions. On the contrary, they give us the right to be eminently satisfied, and all along the line of the States. Doubtless there are particular judgments, now and then, for which the hidden motive of one or two judges was either a corrupt subservience to political creditors or a partisan political basis. But, in the first place, these instances are negligible in estimating the mass. In the next place, they represent (so far as they have occurred) not a judicial shortcoming, but a shortage in the morality of the community; any other number of representative lawyers that might have replaced them would have contained as many men susceptible to such weaknesses. And in the third place, in their effect upon daily judicial justice as a system, they are of small consequence relatively to the habitual shortcomings already enumerated.

Whatever the significance of such instances in popular politics, they should not blind us to the great fact that the daily labors of the fifty Supreme Courts on the thousands of litigated cases are marked by conscientiousness and impartiality. Too much dust has been stirred up in public discussion on this

issue. Wherever such charges are merited, they can and should be attended to on the merits of each charge. But it is unfortunate that the clouds thus raised about our judiciary have obscured the study of the real shortcomings which habitually deteriorate the system of judicial justice, as a whole and every day.

8. *Economic* and *class bias*. This is another shortcoming of which much has been made of late years. The fact, in some extent, cannot be denied. But the question is, What is its significance for the steady qualities of our judicial law?

In the first place, it was shared with the profession and the community as a whole; it was not a peculiar trait of the judicial system. For example, up to, say, A.D. 1900, there was not a voice raised to upbraid the judges with the fellow-servant rule; none of us (virtually) knew any better.

In the second place, a main occasion for the apparent contrast between judicial and public opinion has been the constitutional limitations upon legislative power, committed to the judiciary for protection. This is a peculiar governmental function, — something outside of the regular system of justice in litigation. The issue raised by it is an issue as to the wisest method for distributing political powers — not an issue as to judicial justice.

In the third place, any shortcoming in this respect, on the part of the judges when allotted that political function, is certain to be corrected by the force of public opinion, whenever that opinion has itself been clarified and focused and has spread to the incumbents of the bench. Already, indeed, the bench is seen, within a few years, to have become responsive to this public opinion. In other words, this shortcoming, being due to the judges' convictions on matters of general public conviction, is bound to right itself in due season, — whatever may be the subject of the views. But the professional, the essentially judicial, shortcomings, will never be directly affected by changes in current public opinion. They are technical, they concern the judges' way of thinking about their own specialty; hence they are esoteric; and general public conviction does not know about them and does not get at them.

This is why the shortcomings that are going to remain habitual are more to be concerned over. They are incurable, unless within the profession we set about analyzing them and seeking consciously to remove them. And this is why the emphasis has here been put upon the six traits already enumerated. They are traits of the judiciary in the core of their professional work, — traits of their way of doing justice under the law. And they are blemishes on the system, as judged by a standard which our profession is capable of appreciating and accepting.

(I) **The Judicial Decisions**; (*B*) *In the Law of Evidence.* What are the special traits of the judicial attitude, in Supreme Courts, in their treatment of the law of Evidence? We may assume it understood that the solid function of the law of Evidence is to assist the discovery of truth in trials, while safeguarding the jury from false estimates of evidence, by means of rules of exclusion based on long experience in jury trials.

1. *Enforcement of rules regardless of Dispute over their Need.* A cardinal shortcoming is the judicial habit of enforcing a rule of Evidence, regardless of whether there is any dispute as to the need of enforcing that particular rule in the case in hand. The rules of Evidence, that is, are erected into a supreme end in themselves. They are not restricted to their sole value, as tools for truth. For example, a plaintiff suing on a contract for goods offers a copy of a shipping receipt affecting part of the goods. The rule of Evidence requires that he should first show loss of the original. His showing does not disclose due diligence. The rule forecloses him; the copy is rejected; the proof fails for that part of the case. Meanwhile, the opposing counsel, except for his objection, sits silent; the Court never once asks him, "Do you really dispute the correctness of this copy? Is there any word in it that is falsified?" For all that the trial Court or the Supreme Court knows or asks, the copy may be exactly correct, and the opponent may have no 'bona fide' doubt at all on that point. If so, the rule's enforcement is a vain piece of legal tactics; for the sole and acknowledged purpose of that rule is to secure accurate copies. If in fact the rule's sole purpose is achieved, it is 'functus officio,'—ended, for that case and that offer. Why use it merely to penalize the party?

In thousands and thousands of rulings this is and long has been the way of using the rules of Evidence. No other applied science in the world uses its rules in that way. Suppose an architect were to prepare the data for sinking deep caissons in a sand subsoil, and then the drills should disclose unexpectedly that solid rock underlies one-fourth of his building area at a depth of twenty feet. Would he go on to order the caissons, wait six months for them, blast out the solid rock, and sink his caissons in spite of all? He has got his solid foundation without them; shall he needlessly spend all the time and money on them nevertheless? There is only one answer to this for the architect. But the judge with his rules of Evidence doggedly persists in the other answer.

Of late years, in England and Canada, the system of settling issues before trial by a master or judge in chambers, and the general spirit of the Rules of Court of 1883, has placed those courts (so we hear) where they should be in the present respect. But in the United States no signs anywhere appear of such a spirit. Read any brief; read any opinion. In vain you search. The wrangling at the trial, and the logic-chopping in the opinions, go on pertinaciously, regardless of whether there is any real basis for dispute as to the fact.

What is wanted is a principle something like this: *A rule of Evidence need not be enforced, if the Court, on inquiry of counsel or otherwise, finds that there is no bona fide dispute between the parties as to the fact which the offered Evidence tends to prove, or that the danger against which the rule aims to safeguard does not exist for the case in hand.*

Such a principle, fathfully observed by judges, would clear the air of much of the legal malaria now caused by the rules of Evidence.

2. *Trial Court given no Discretion.* Another marked shortcoming is the Supreme Courts' habit of treating the rules of Evidence as a rigid steel-work

invariably applicable in precisely the same way. The rules are never allowed to bend. The Supreme Court, sitting up aloft, far removed in time and space from the actual trial, does not know whether the case was one in which the rules might have been allowed to bend; therefore the rules are rigidly enforced on appeal, and hundreds of new trials granted accordingly.

But this is highly academic and unpractical, — as unpractical as the chambered abstractions of any professorial dryasdust. Every man of experience knows that the rules of Evidence are based on generalities, on broad policies of experience, and are meant for typical situations, — but *for those only*. We all know that in the application of them, from case to case, the abstract situation, for which they are supposed to be meant, does not necessarily exist; it is varied, in the case in hand. And therefore the rule should bend. For example, one Supreme Court has a rigid rule of thumb, for proving loss of the original of a document, that some inquiry must have been made of the last possessor. This is a very sensible rule, *as* a rule, but to enforce it rigidly without exception, as that Court does, is the opposite of sensible.

Again, the application of most rules of Evidence to the facts depends on circumstances so varied and so elusive that no appellate court can expect to be well possessed of them from the bare record. The trial judge, on the other hand, is well possessed of them. Why should the Supreme Court insist on including that part of the work in its function? For example, a party desiring to use a copy of a lost original must show due diligence in searching for the original. This preliminary fact is best decided by the trial Court. Yet in hundreds of opinions the Supreme Courts attempt to repass on that question.

True enough, Supreme Courts are frequently found declaring that the application of a rule was "in the trial Court's discretion, unless that discretion was abused." But mostly, we regret to note, this expression is (as the Spaniards say) mere palaver. For the Supreme Court then goes on to examine elaborately the trial Court's ruling, and, as likely as not, reverses it. In other words, it is often an abuse of discretion not to agree with the Supreme Court, if the latter on its lesser information takes the opposite view. The Supreme Judicial Courts of Massachusetts and of New Hampshire, on many rules, do faithfully relegate their application to the trial judge. In no other Supreme Court is any such habitual attitude noticeable.

What is wanted is a sharp distinction, faithfully enforced, between the rule of law and its application. On the former — the tenor of the rule — the Supreme Court should determine. On the latter, the trial Court's ruling should be final. And for most rules, the principle should also be recognized that, for special reasons, an exception may always be made by the trial Court.

3. *Charging the Jury on the Weight of Evidence.* Another radical shortcoming is the prohibition to the trial judge (outside of the Federal Courts and those of a few Atlantic States) to express his views to the jury on the weight of the evidence in the case.

This is a large question. Many members of the bar strongly prefer this practice. Yet many others are coming to believe that the other and orthodox practice, coeval with the jury system itself, is after all the only wise one. But here it is desired merely to point out the way in which the present system maximizes the weaknesses of the rules of Evidence.

Those rules are mainly aimed at guarding the jury from the overweening effect of certain kinds of evidence. The whole fabric is kept together by that purpose. The rules are supposed to enshrine that purpose. Hence, of course, when such evidence enters in technical violation of that rule, the apprehended harm may be done, — *i.e.* the jury *may* be misled or mis-affected by it, to the hurt of the truth. And so, the harm being possibly or probably done, but incurably, now that the jury has gone, the Supreme Court can only say, "Try it over, with another jury."

But why use such a cumbrous method? Why not let the trial judge correct the possible misimpression by a few words at the trial? In hundreds of instances this can be done with entire effect and safety. Take the Opinion rule, for example. A policeman, on a murder trial, telling about the bloody hatchet he found, is asked, "Was it human blood?" and the answer gets in. "Yes, it looked to me like human blood." Instead of ordering a new trial because the jury *might* give to this layman's guess a value which it does not have, why not let the trial judge say to the jury in his charge: "You must not pay any attention, gentlemen, to the policeman's notion about the blood being human. He knows nothing about the difference between different kinds of blood. He is no expert in blood. You heard chemists here, on both sides, testify from their analyses and give their reasons and scientific processes. Decide from their testimony. Do not mind what the policeman thought."

Hundreds of petty slips could be amply corrected in this way. But not under our present system. No; the ponderous machine of a new trial must be laboriously set going again from the beginning; all the complicated levers, cranks, cogs, and wheels must turn once more; and vast effort and tedious time again be consumed, — all to do what could as well be done by merely removing the gag from the trial judge's mouth.

Any one who will study the opinions of Supreme Courts can satisfy himself that the permission to the trial judge to express his opinion on matters of evidence would remove a large part of the supposed harm done by trifling transgressions of the rules of Evidence, and would thus remove much of the abuse of new trials.

(II) **The Law of Evidence; its Faults and its Future.** Suppose that we were now to change the law of Evidence, at needful points; what changes should be made?

Before offering a critical summary of such changes, three or four general facts must be rehearsed; for perhaps we do not all realize them to be facts, and perhaps extreme partisans on either hand will benefit their cause by conceding them.

1. A *complete abolition* of the rules in the future is at least arguable, — not merely in theory, but in realizable fact. They are to-day largely ignored in the practice of several important jurisdictions, — in the Interstate Commerce Commission, in Patent litigation, in Admiralty trials, and in (some of) the Juvenile Courts. The extent of this practice, and its significance, has already been examined (*ante*, § 4*a*–4*f*). It shows that, in the United States and to-day, justice *can* be done without the orthodox rules of Evidence. Whether this fact will permanently demonstrate an ability to dispense with the rules, remains to be seen. Meanwhile, it must not be taken as a demonstration, but merely as a suggestion, that the thing is not so impossible as the Bar would have supposed, a few years ago.

2. To *abolish* the bulk of the rules *now*, in the ordinary courts, would be a *futile* attempt. To pass a law (supposing this possible, in the hasty manner of our "freak" legislation) would amount to little or nothing. You cannot by fiat legislate away the brain-coils of one hundred thousand lawyers and judges; nor the traditions embedded in a hundred thousand recorded decisions and statutes. And the plain fact is that trials are to-day being managed by these men and these books, as the living receptacle of the rules. More than this, the temperament is there, — the temperament in which the rules find a solid lodgment and nourishment. The thing has been tried in many countries and in many ages; and as a reform it has never succeeded (exceptions excepted), even when enforced by a powerful government. As an importation of alien law (which is not the case in hand), it has sometimes succeeded, but only after a century or more of slow pressure. Any one who knows our profession from within knows that it would be a vain dream to think of abolishing the rules of Evidence, as a system, until all mature practitioners and judges now alive had passed into the grave. And in the meantime, since trials must go on, a new generation will have been bred into the same system.

Furthermore, assuming that the fiat were issued and accepted, the new method would have all the risk of an experiment only. We cannot be sure how it would work. We have no experience except under the present system. The present one has some deep roots in the necessities of human nature. And, as human nature will go on just the same, can we expect to handle it without any rules at all? Certainly as much false justice may be done by a chaotic trial as by a chess-game trial. Do we know that our judges and our lawyers, as men, and without any rules, will be able and willing to manage the ordinary jury trial, in matters of proof, as successfully as (for example) the Interstate Commerce trials are managed?

And so, much as we might wish to try the experiment, and promising as the other examples may be, it is futile to plan such a radical change. We may as well realize that the change will have to come as a growth, — a growth of improvement both in the rules and in the men. And this is the way in which almost all legal progress, that was *progress*, has come about.

3. Most practitioners, to-day, are *unskilled* in *the rules of Evidence*. This

is a hard saying; but those who ought to know report it so unanimously. The trial judges know the rules better, but still imperfectly. Is it not startling to reflect on the meaning of this?

It means, in the first place, that the rules to a large extent fail of their professed purpose. They serve, not as needful tools for helping the truth at trials, but as game-rules, afterwards, for setting aside the verdict. Neither lawyer knew them well enough to avoid numerous violations of them at the trial; but afterwards the defeated lawyer (having duly emitted a machine-gun fire of objections) studied a few of them for the purpose of pointing out on appeal his opponent's errors. If the new trial is needed because neither the successful lawyer nor the trial judge knew the niceties well enough, then by hypothesis the system of Evidence failed, after all, for that trial, to accomplish its purpose.

And, in the second place, it means that there are thousands of trials in which neither attorney knew enough either to observe the rules' niceties or even to point out his opponent's errors, and yet a verdict was reached which satisfied the judge. In other words, owing to ignorance of the rules, they were not enforced, and yet justice (presumably) was as well done as if they had been enforced. How far this is the fact, no one can know. But the widespread ignorance of the rules shows that it *must* be a large fact. And the moral is that we can probably get along just as well without enforcing many of the niceties of the rules.

4. The *jury* of laymen must be reckoned with. Our system of Admissibility is based on the purpose of saving the jurors from being misled by certain kinds of evidence. Their inexperience in analyzing evidence, and their unfamiliarity with the chicanery of counsel, distinguish them from the judge in this respect. As long, then, as the jury system is retained, certain fundamentals (at least) in our rules of Evidence must be retained.

To be sure, the jury itself might be abolished. Here we have the examples of the Interstate Commerce Commission, and the others, to warrant us in supposing that the rules of Evidence might no longer be needed. Will it be, or should it be, abolished? This is a hard question, nowadays, for some to answer; for a few, it is easy. For some of those few, it is easy to answer: No.

In the first place, no one would think of abolishing jury trial merely to enable the rules of Evidence to be discarded. It would have to go by reason of its own defects, if at all.

In the next place, its own defects may be incidental and remediable, not inherent. They have never been fully examined with this distinction in mind. Some of them are obviously incidental accretions of American practice, and are no essential part of jury trial; for example, evasion of jury duty by responsible citizens, excessive challenging, over-nice disqualifications. All these have tended to reduce the intelligence of the jury; and a restoration of jurorial intelligence (which the change of these practices might effect) would render so much the more needless the precautions of the rules of Evidence.

Again, the constitutional limitations upon jury trial have prevented (except in three or four States) any experimenting with a jury system improved but not abolished. It will be time enough to flee to our Charybdis, the judge-jurors of fact, when we have sufficiently tested the possibilities of our Scylla, the lay-jurors of fact. Till then, it will be wiser to wait.

We must keep in mind, then, that the modern American jury's defects are in large part non-inherent and remediable, and that we have experimented very little with its great possibilities of improvement. How, then, can we fairly propose its radical abolition?

With this in mind, and also the vast popular agitation which must inevitably precede any radical step, it is safe to assume that jury trial will be with us for at least generations to come. If so, the improvement of the rules of Evidence must be made with the retention of the jury as a necessary condition.

5. Our system of Evidence is *sound on the whole.*

In the first place, it was and is based on *experience of human nature,* — and that is saying a great deal for it. It was not created by legislative fiat, — like our Patent law. It was not devised by chambered jurists, — like the German Civil Code. It was not (for the most part) founded on anachronistic tradition, — like some of our Property law. It simply grew. And it grew during the last two centuries, so that its human nature basis is not, in time, far enough away to be possibly out of date.

That human nature is represented in the witnesses, the counsel, and the jurors. All three, in their weaknesses, have been kept in mind by the law of Evidence. The multifold untrustworthinesses of witnesses; the constant partisan zeal, the lurking chicanery, the needless unpreparedness, of counsel; the crude reasoning, the strong irrational emotions, the testimonial inexperience, of jurors, — all these elements have been considered. Tens of thousands of trials have forced them out into the open, where thousands of judges have observed them; and their observations have profited by them, in thinking out principles and formulating rules.

All this has not been created out of nothing; it rested on a solid basis of experience in human nature at trials. And that human nature has not essentially changed. The main basis is there yet. The changes have not been in the great factors.

The rules of Evidence, then, are to have at least that presumption in their favor which sensible critics always give to the conclusions of experience, even when all of the data of that experience are not specifically known to the critic.

In the next place, *that human nature,* in the same factors, *will always be with us.* Witnesses, counsel, jurors, will continue to exhibit similar weaknesses. The trial will always be struggle, revealing nakedly those weaknesses. And there will always have to be some apparatus for testing and checking those weaknesses. We can expect to improve the apparatus, but not to ignore the weaknesses. And just as long as man continues to be a reasoning animal,

and to desire to profit in his narrow personal task by the combined experience of others, just so long will trial judges crave and devise generalized rules for making some headway through the welter of lies and errors and doubts and inferences that is heaped up before them at a trial.

The lone judge seeks support and relief in these generalized rules. He cannot intellectually avoid it. Make him (and not the jurors) the judge of facts —and he will seek it just the same. For four centuries the fact-judges of Continental Europe worked with a system of self-devised mechanical rules, which they have now for a century repudiated as shackles; but what now seem shackles were but the effort of the helpless human individual, weighted down by his responsibility and his doubts, to seek relief in a system of rules. And it may safely be asserted that one reason why the modern American trial judge (since 1850) has so unduly exalted the "technicalities" of Evidence rules is that he is less sure of himself, less strong professionally and temperamentally, than his American predecessors and the English judges, and hence seeks relief and refuge in the elaborate system of rules of Evidence.

And so we may as well understand that (for some time to come) the tendency to keep a system of rules of Evidence, as a refuge for the judge in handling the problems of human nature, will be inescapable.

And, in the third place, the present rules as a whole are *sensible ones*. Taking each of them in the big, there is hardly one that is not based on some aspect of human nature, which needs some such a rule of warning. (Always the Opinion rule must be excepted; for that was never anything but a futile historical bastard.) And, when out of the whole bundle, we select the three or four great principles which clash most sharply with the practice of other countries, — the hearsay rule, the character rule, the privilege against self-crimination — we find that they are among the contributions of Anglo-American character to the world's types of justice; they represent deep traits, bound up with our whole attitude, — not to be lightly changed, nor without changing ourselves.

The way we abuse the rules is one thing; but the rules themselves are quite a different thing. Our abuse of them should not obscure our minds to the good sense that is in the rules. And the petty details and infinitesimal absurdities to which they have been elaborated need not force us to disown the substance of their good, — any more than the systematic excesses of college athletics oblige us to reject the sound core of physical training for youths.

6. Our *judges* and our *practitioners* must *improve in spirit*, as a prerequisite for any hope of real gain to be got from better rules. In the end, the man is more important than the rule. Better rules will avail little, if the spirit of using them does not also improve.

Counsel must become less viciously contentious, more skillful, more intent on substance than on skirmishing for a position. The whole condition of below-par, now noticeable, is here involved. It has many symptoms and

many causes. Enough here to note that some of them directly affect counsel's handling of the Evidence rules.

Judges must become stronger and better equipped at the trial bench, and more liberal and more justice-seeking on the appellate bench. The rules must be treated only as means to an end; and this cannot be until the men on the bench see them in that light and make it a prime aim to treat them so. The rule is the complement of the man. The weaker the man, as a dispenser of justice, the more the rule is exalted and the stiffer its bonds become. Improvement of the rules will need more sympathy and intelligence to handle them effectively.

ALL THE RULES IN THE WORLD WILL NOT GET US SUBSTANTIAL JUSTICE IF THE JUDGES AND THE COUNSEL HAVE NOT THE CORRECT LIVING MORAL ATTITUDE TOWARDS SUBSTANTIAL JUSTICE.

And now, with these premises, we may survey the faults and needs of the rules of Evidence themselves.

Faults and Needs of the Rules of Evidence. *A. In general.* The three general defects, running through the whole system — in its use, mainly, not so much in its fabric, are: *Inflexibility*, *Magnification of Details*, and *Over-Emphasis on Errors*.

1. *Inflexibility.* This is a plain enough vice. It is due to the exaltation of the rule into an end in itself, instead of a means to an end, viz. a correct verdict.

How can this vice be got at? By applying measures which involve least change with most efficiency. These would seem to be three.

(*a*) The rules are now enforced, as such, *regardless of whether a dispute exists* in the case in hand, which the rule would serve to safeguard. This defect has been already enlarged upon (*supra*, I, B, 1). To remedy it, a simple expansion of the principle of Judicial Admissions will furnish the tool.

Let the Court decline to enforce the rule if, on counsel's admission, there is no need for it in the case in hand; and let the Court require counsel to make proper avowals.[2] Put in the form of a Code section, this principle might be thus phrased: "*A rule of Evidence need not be enforced if the Court, on inquiry made of counsel, or otherwise, finds* (*a*) *that there is no bona fide dispute between the parties as to the fact which the offered evidence tends to prove,* (*b*) *or that the danger against which the rule aims to safeguard does not exist for the case in hand.*" This principle may to some seem somewhat loose. But the law of Evidence needs a good deal of loosening.

The principle of Judicial Notice can also be liberalized to give similar flexibility, as pointed out more fully in § 2571.

(*b*) The rules, as now enforced, are not left at all to the *trial Court's determination*, but are defined and applied by the appellate Court. This defect

[2] How the Court should deal with disingenuous counsel is a large problem, which itself also needs attention. This shows how the improvement of Evidence rules is bound up with other improvements.

has already been noted (*supra*, I, B, 2). The question is how to get at it, without abdicating the appellate Court's function of defining the law. A fair and workable distinction would seem to be the distinction between the tenor of the rule itself (which is the main thing to safeguard), and its application to the specific offer. This distinction could be enforced in the following form:[3]

"1. *In all rulings upon the admissibility of Evidence, the trial judge's ruling is final and absolute;* subject to the following distinctions and exceptions.

"2. The trial judge is bound to *obey the rules* of Evidence, and therefore *does not have discretion*, in the sense of determining the admissibility of evidence by his personal views or changeable beliefs as to what is just.

"3. The trial judge's determination is *not final* (*i.e.* it is subject to the usual methods of appeal) in so far as his statement of the *tenor of a rule of law* is objected to as an erroneous statement of the rule.

"4. The trial judge's determination is *final*,

"(*a*) In the *application of a rule* of Evidence to a particular offer of evidence; and

"(*b*) In the *finding of any facts preliminary* to or otherwise involved in the application of the rule to the offer."

If the bench and the bar could stomach this simple dose — a mere extension of the present principle of judicial discretion — a vast mass of needless matter would be purged from our system of trials and appeals.

Here again, however, we encounter the man-element — the need of personal improvement, not merely of better rules. In many (or most?) trial courts to-day, and in many (or most?) trials, the typical incident is: *Counsel A:* "Now state to the jury what you thought —"; *Counsel B:* "Object!"; *Judge:* "Objection overruled!"; *Counsel B:* "Exception!" And so far as this blind and unintelligible canine snarling and yapping may be assumed to be an incurable trait, no rule like the above could serve. For, to that end, in the first place, both judge and counsel must *know* what rule is supposed to apply; and, the rule must be openly *stated* so as to separate the rule itself from its application. Until all court officers improve in knowledge and in spirit, no improved law can serve the situation. How disgraceful and degraded it commonly is, we seldom pause to reflect. And its worst feature is that it has dragged down our most accomplished and highminded practitioners to employ their talents in this ungentlemanly spectacle.

(*c*) The rules are now enforced with over-strictness, on appeal, because there is *no corrective at the trial* to avoid the possible *misleading of the jury's mind* by the violation of the rule. The trial judge being a mere umpire — and a dumb one, at that, as to the jury — the appellate Court feels obliged to order a new trial, and thus to vindicate the rule. If the appellate Court could have some assurance that the jury had been duly warned of the net value

[3] In the writer's "Pocket Code of Evidence", these phrasings have already been put forward (§§ 49–52), with some comments.

of the evidence, it would not feel bound to treat the error as vital. In other words, a large part of the sacred inflexibility of the rules, in the appellate Court's treatment, is due to the lack of any dependable corrective at the trial.

That corrective is the *trial Court's charge on the weight of evidence.* This needed remedy has already been outlined (*supra*, I, B, 3). Enough to say here that the abandonment of that orthodox practice, fifty or sixty years ago, was one of the greatest mistakes the American people ever made. The sin of our fathers is now being visited upon us. And the depressing feature is the bigoted alarm which so many good practitioners feel at the proposal to revert to orthodoxy. They shudder with the needless dread of the blindfold fraternity neophyte who at his initiation extends his arm to be branded with — a lump of ice! And they seem unwilling even to reflect upon the surviving example of the Federal system; for the latter's concededly excellent method is within every one's reach to observe in a hundred courts all over the land; and yet the conservatives act as though the judge's charge on the evidence were something anachronistic and un-American, suggestible only by a revived emissary from King George the Third.

What is wanted is a general return to this safeguard of jury trial, in some such principle as this:

"*The judge may express to the jury, after the close of evidence and argument, or from time to time before then, his personal opinion as to the credibility or weight of the evidence or any part of it.*"

The foregoing three measures, then, are both needful and practicable for removing the first great defect of our rules, their Inflexibility.

2. *Magnification of Details.* This next great defect is hardest to get at. It cannot, apparently, be got at directly. You cannot stop the working of logic. And if the working of that logic — say, of the rule for accounting for the absence of an original document before using a copy — leads to numerous petty detailed rules, each one unavoidable in logic, the problem of drawing a line somewhere and declaring "Here the rule shall stop; it is getting too refined and subtle and petty" — this problem is practically insoluble, considering the difficulty of reaching an agreement as to a thousand such points and as to communicating this agreement to practitioners and judges.

So the remedy must be sought by indirection. In other words, minimize the effect of such details. What specific measure could avail to this end, we are unable to suggest.

3. *Over-Emphasis on Errors.* This third defect lies at the doors of the appellate Courts. The nauseous and intellectually disgraceful doctrine of "reversible error" has too long stained the pages of our appellate opinions. Much has been written and legislated against it; and time will bring its complete erasure from our records. No more need be said against it here.[4]

But a warning should be sounded against futile measures. They are too commonly seen in the phrasings of legislative proposals. They commonly

[4] See § 21 of this Treatise.

run: No new trial shall be granted where the errors "do not affect the substantial rights of the parties", or "do not cause any manifest wrong or injury", or "do not prejudice the defendant", etc. These abstract terms do not bind the minds of those judges who believe that there are vested individual rights in the observance of the rules of Evidence. — Another form runs: No new trial shall be granted "if the evidence erroneously admitted or excluded *would* not have changed the result." But this form, conversely, is too narrow; for it obliges the appellate Court to speculate upon what the jury *would* have done, and this speculation will easily lead to reversals on far-fetched hypotheses. — The sound form requires the appellate Court to determine according to what the jury *should* have done. And more than one Court has gone to this length, in these words: "We do not reverse for the error, because the verdict rendered is the only one that *could* have been rendered by the jury", or "because we can clearly see that a correct result was reached by the jury."

We now come to consider the specific rules of Evidence.

B. Changes in Particular Rules.

The question is to be asked, for each of the main rules: *Should it be abandoned, or at least be radically altered?*

The order of topics used in this Treatise may be followed. The three main groups are (in Book I, What Facts are Admissible): Part I, Rules of Relevancy; Part II, Rules of Auxiliary Probative Policy; Part III, Rules of Extrinsic Policy.

Book I. What Facts are Admissible. Part I. Rules of Relevancy, etc. Here we have three groups: Title I, Circumstantial Evidence; Title II, Testimonial Evidence; Title III, Autoptic Proference.

Title I. Circumstantial Evidence. There are here three general controlling policies, viz. the avoidance of Undue Prejudice, of Unfair Surprise, and of Confusion of Issues. But these policies result in but two main rules, and the multiplicity of sub-rules and exceptions is due to the firm instinct of Courts to avoid trespassing on these two main rules. One of them is the rule against using Personal Character; the other is the rule against using Particular Instances of External Happenings.

1. *The rule against Character.* This appears in two further separate rules. One forbids the use of a *party's general traits of character*, unless exceptionally; the other forbids evidencing it, in the excepted classes of cases, by *particular instances of conduct*, unless exceptionally. The former rests on the policy of avoiding Undue Prejudice; the latter rests on the same policy, plus those of avoiding Unfair Surprise and Confusion of Issues. Are these policies sound in the main, as represented in those rules?

We are convinced that the policies and the rules are sound, in the main. (1) The policy of avoiding Undue Prejudice is based on weaknesses of human nature which are to-day as obvious as ever. In criminal cases, this policy is one of those that mark off the Anglo-American system from the rest of the civilized world. Nothing in the French system attracts us to believe either that

it is intrinsically better than ours, or that it would be workable in our country with our judiciary and juries. Our own rule represents a safeguard against a real danger to which the search for the truth will always be liable so long as the decision of facts is committed to any but Solomons. The failures of justice, now observable in the pursuit of offenders, are not attributable to this rule, but to many other and independent conditions. — In civil cases, the rule is equally needed, especially in personal injury cases, where emotion is apt to overpower calm reasoning. — What is needed, however, is less fetish-worship of the rule. With the proper safeguards of the judge's charge on the weight of evidence, of a sane rule for new trials for error, and the like (noted *supra*), little or no obstruction to justice need be apprehended from this policy. (2) The policies of avoiding Unfair Surprise and Confusion of Issues are much less important, and have been greatly overworked. The dangers they are meant to guard against are merely exceptional contingencies. Cast-iron rules are not suitable for protecting against such contingencies. Flexible rules are here the need. The principle of the trial Court's discretion (*supra*), with the other relaxatory rules above noted, would here furnish ample protection. Most of the thousands of rulings here involved could as well have been disposed of by those principles, and need not have cumbered our records; while the general principles would have been preserved.

2. *The rule against Particular Instances of External Happenings.* Of the three great policies above mentioned, here the second and third are chiefly involved, — *i.e.* avoiding Unfair Surprise and Confusion of Issues. Most of the rulings here recorded are far-fetched; many of them were needless obstructions to the search for truth. The policies are sound enough, — emphatically so. The evil has arisen from using the policies as inflexible rules. They apprehend merely contingencies. The current application of them is just as absurd as if a man resolved never to go out of the house in winter because he feared that he might slip down on the ice; but the sensible man goes out, keeps a watch for icy spots, and then steps around them. Here again the principle of the trial Court's discretion would bring almost all of the needed relief. Chief Justice Doe's opinions have demonstrated this, once for all.

3. *Sundries.* There remain the miscellaneous mass of sub-rules which are due, directly or indirectly, to the purpose of not infringing on these other main rules; *e.g.* the rules about admitting former crimes as evidence of Intent, etc. These present a difficult problem. As long as the above main rules of exclusion are kept, and no matter how much they are liberalized, the task of defining the boundaries will be inevitable. Our best hope is that this minor mass of quiddities can be sufficiently taken care of (*i.e.* to prevent obstruction) by the general safeguards already proposed — the judge's charge on the evidence, the liberal new trial rule, the trial Court's discretion, etc.

Title II. Testimonial Evidence. This includes three groups of rules, for Testimonial Qualifications, Impeachment, and Corroboration, respectively.

1. *The rules requiring certain Testimonial Qualifications.* Here the sound general policy suited to the times is to complete the abandonment of rules of exclusion, and to rely upon the testimony itself for criteria of its weight. For one reason, the tendency of a century past has been in this direction. For another reason, the present lines of definition of the elements which make a witness admissible are out of harmony with the teachings of science, and have become merely arbitrary. No one can maintain that there is in reality any such vital distinction as the law now draws between witnesses that may be listened to and weighed and witnesses that may not be listened to at all.

(1) In the first place, the few remaining rules of exclusion based on Mental Derangement and Immaturity may as well go. They are vain.

(2) In the next place, the rules, now remaining in some States, excluding a person Convicted of Crime, must go. They have been anachronisms for fifty years. They are arbitrary and futile obstructions.

(3) In the third place, the rule universally in force (except in four or five States) against the Survivor of a transaction with a Deceased Person, must go. It is of a piece with the long discarded disqualification of interested persons. It involves a mass of verbal technicalities, and it shuts out at least as much truth as falsehood.

(4) In the fourth place, the disqualification of Husband and Wife to testify on behalf of each other (still preserved in a minority of States) must go. It was repudiated sixty years ago in England.

(5) Finally there is the rule requiring Personal Observation by the witness' own senses. This is a healthy rule, — no wiser or safer was ever devised. It raises the quality of our verdicts, by forcing the parties to seek for the most trustworthy testimony. But it needs to be more flexible. It should have numerous general exceptions; and it should receive constant exceptions, without definition, for casual details, in every witness' testimony, where its strict enforcement is pedantic. Here, again, the principle of the trial Court's discretion, with the others already noted, would bring most of the needed relief.

(6) The rules for Refreshing and Recording Recollection are a troublesome snag. They are based, indeed, on good sense and logic. But the historic precedents have left the law much confused; its distinctions are of little real importance compared with others which modern science points out but the law does not enforce; and the present rules cannot be administered without barren technicalities, difficult to master. On the whole, they seem to do more harm than good. Reliance on cross-examination would probably answer the purpose, together with two or three simple rules that could be retained.

2. *The rules excluding certain modes of Impeachment.* As to general considerations, it would seem that we overwork certain modes of impeachment, and that we underestimate others. Apparently, in the Continental countries, little stress is laid on these things, — not enough, to be sure. We possess the great sound idea, viz. that you never can tell how credible a witness'

assertion is until he and it have been thoroughly scrutinized in every aspect. Here modern psychological science confirms our inherited tradition.

But where we part from science is in overemphasizing certain elements and underemphasizing others.

What we overemphasize is the witness' moral character. It is needless to expound here the several details of this fallacy. "No case! Abuse the opponent's witness", — this anecdotal instruction to a certain counsel expresses truly enough the tendency too frequently seen with the mass of trial practitioners. Probatively, the cause is seldom advanced, by these methods, as much as we think.

What we underemphasize, on the other hand, is the study of the witness' personal equation as to temperament, memory, the bases of perception, etc., etc.[5] We are satisfied to use a few practical expedients — contradiction, self-contradiction, etc. — without really understanding their probative force. What we need, therefore, is to develop the study of testimony as affected by these various elements, and to lessen our reliance on the crude bludgeon of character-evidence. But this must be a development of the future.

Now as to the specific rules of exclusion. They hardly need radical change; the change should come mostly in the manner of using what is already admissible.

(1) The rule excluding proof of Specific Instances of Misconduct by extrinsic testimony does very well; it is based mainly on the sensible policies of avoiding Unfair Surprise and Confusion of Issues. The rule allowing such inquiries (in all but a few States) on cross-examination of the witness himself is a fair rule, — when left to the trial Court's discretion, and not dragged up needlessly (as it usually is) to become an appellate Court question.

(2) The rule excluding Contradiction and Self-contradictions, when evidenced by other witnesses, on "collateral" points is another healthy rule, — easy to administer if left to the trial Court's discretion.

(3) The rule requiring a Prior Inquiry to the witness before proving a self-contradiction is a sensible one; but it is enforced with needless and harmful inflexibility. It should have several general exceptions, and should be left entirely to the trial Court's discretion. That application of it to documents, known as the rule in The Queen's Case, is a lamentable error in logic and in policy, long ago discarded in England and some of our States, and should be abolished out of hand.

(4) The rule against Impeaching one's Own Witness is an irritating relic of worn-out tradition, — a relic of the Saxon days of the compurgation-system. It does as much harm as any one rule in our system. No party owns a witness, and this rule tends to cultivate the too natural features of partisanship which must always attend our system of trials. If a witness is unworthy of credit, let this be shown up, no matter who first called him. If the counsel has been guilty of disingenuous conduct, let the Court deal with him. None

[5] See the passages collected in the present writer's "Principles of Judicial Proof" (1913).

but fantastic reasons were ever put forward for the present rule. As great a criminal judge as Chief Justice Furman has spoken in favor of the rule: and that obsession, no doubt, is widespread. But it is an illusion, which would be dispelled by a short experience under trials without the rule.

3. *The rules excluding certain modes of Corroboration.* These seem to be more or less futile, and not worth while keeping. What they now exclude would not seriously infringe on the policy of avoiding Confusion of Issues, and does involve some useful probative material. We know so little scientifically, as yet, of the logical and probative bearings of this kind of evidence that we can hardly afford to exclude any of it. One kind, in particular, the Courts perversely shut out, under the present rules, viz. a witness' identification of a party when first confronted with him before trial and freshly after the event; for the sake of eliminating this incredible perversity, it would be a fair bargain to let all these rules go, — if that were necessary.

4. The rules for *Parties' Admissions* should be liberalized. And yet, to enlarge their definition would, of itself, probably be of little avail. The Courts are to-day looking at this subject through the large end of the telescope; the principle looks to them unduly narrow. Their timidity at receiving agents' admissions, in particular, must improve; here the practice of courts is far away from the realities of commercial life. The subject, moreover, is to-day loaded with logical quiddities, more or less futile.

Title III. Autoptic Proference. Here we are fortunate in having withstood successfully the pressure to adopt any rule of exclusion for autoptic proference at the trial.

But for proference out of court, *i.e.* the jury's view of a place or object irremovable into court, we are still laboring under a rule of exclusion which is so unscientific and so unpractical that to call it childish would be unfair to the intelligence of childhood. The still prevailing limitations on juries' views come down to us from the technique of feudalism; England herself has long shaken them off; but (except in a few States) we remain supine. If a sensible man wants to make sure whether a window is broken or a house burned down, he puts on his hat and goes out and sees for himself what the fact is. But our Courts seem to regard a jury's view as if it were an act which would expose jurors to an infectious disease or a moral contamination. And all related methods, such as the impounding of an object causing damage, or the preparatory inspection of premises by witnesses, are equally frowned upon, so far as the Courts' assistance is concerned. One timid Court, for example, in the case of a boiler explosion, where the common-sensed sheriff had impounded the boiler so that proper evidence of its possible defects could be timely obtained, pronounced it a wrongful act and made the sheriff liable in damages! — This whole spirit of impotence must be abandoned. To that end, the present limitations of rule must be replaced by the unlimited English rule, which goes beyond the halfway measures now in the Codes of California and a few other States.

Part II. Rules of Auxiliary Probative Policy. Many of these are the peculiar product of the Anglo-American genius for practicality, and in principle are wise and indispensable. A few of them are barren technicalities. A few of them are the product of our American distortion of the jury-system, and their change would be bound up with other conditions.

Title I. Preferential Rules. 1. The rule for *Producing the Original of a Document*, where that original is available, is a rule of practical good sense, which no one need think of abandoning. And its details have been worked out, on the whole, with only rational logic and consistency. Its trouble now seems to be that there is too much logic about it, *i.e.* the mass of detailed applications of it form so cumbrous a mass that, though their logical connection may be unimpeachable, they are practically unmanageable. To apply the details with such minute correctness is not worth the while, in most cases.

This is a hard situation to meet, by mere rule. A few Courts have tried to cut the Gordian knot by holding the rule to be not enforceable when the document is merely "collateral"; but this, though a move in the right direction, has not been successful. Much could probably be accomplished here by the two general principles already noted, viz. judicial dispensation of the rule where the parties are really not in dispute over the probandum, etc., and trial Courts' discretion in the ruling.

2. The rule for *Calling the Attesting Witness* has, by legislation everywhere, already been reduced to a minimum of obstructiveness; and what remains is sound in principle. It needs only an infusion of flexibility, which the general principles already noted could presumably effect.

Title II. The Hearsay Rule. We come here to the greatest and most distinctive contribution of Anglo-American law (next after jury-trial) to trial procedure. Bentham thought this much of it, and we can afford to continue in that conviction.[6] But if it is the greatest and most valuable, it is also (like other great truths) overworshipped and overworked, — especially in its unessential details. The difficulty about it is that it has two principal aspects, one of which is vital and the other is not.

(1) The vital aspect is that we are *not to credit any man's assertion until we have tested it by bringing him into court* (if we can get him) *and cross-examining him*. Now the development of this art of cross-examination, during two centuries, is the great valuable contribution of the rule. And modern psychological science confirms emphatically this empiric result; for it has shown us something of the hundred lurking sources of error that inhere in all testimonial assertions; and we now perceive that our traditional expedient of cross-examination was the main way to get at these sources of error, and that it owes its primacy to permanent traits of the human mind. To abandon our insistence on the necessity of this test would be to surrender the best single

[6] The testimonies from various authorities, quoted in this Treatise at § 1367, deserve perusal, by any one who doubts.

expedient anywhere invented for getting at the truth of controversies. For this reason, the abandonment of the Hearsay rule, in this vital aspect, is unthinkable.

(2) But it has another aspect. By the rule for a witness' qualifications, personal knowledge is required, and the two rules together work out as follows: The witness who testifies about an affray between A and B at the corner of Broad and Washington streets must have been at the corner of those streets where he could see and hear the matters he testifies to. So that if witness X begins to testify about the affray, and it appears that he saw and heard nothing of the affray itself, but merely sat next to Y in a street-car going home and heard Y's story of the affray, we discard X immediately and insist on having Y; because X would be giving us virtually *nothing but Y's assertion*, and we will not accept Y's assertion unless it is made here in court where we can test him and it. Now thus far we are merely enforcing the Hearsay rule in its vital aspect; *i.e.* we are refusing to credit Y's untested assertion, offered merely through X as a mouthpiece, — precisely as we should have refused to receive a letter written to the judge by Y. But suppose that X, the first witness, was actually at the street-corner in issue, and did see and hear the affray, and thus is fully qualified with some basis of personal observation for his assertions; then, when he launches into his story, we may expect to find interpersed in it: "As I came up to the corner, I heard the clerk in the drug store shout, 'Who threw that stone at the window?' . . . And the boy said, 'There come the police.' . . . And when he went off, a man said, 'Here is the knife he dropped', and I gave it to the policeman and said", etc., etc. It is at this point that the Hearsay rule is overworked. Logically, each one of these quoted remarks is a hearsay assertion, and we must exclude it and wait till the various persons themselves can be offered, to tell what they saw. And yet each one of these remarks has usually a very subordinate or even negligible testimonial value in itself. Their recital does not infringe upon the great spirit of the rule. Practically, the rule is not violated, in ninety-nine such cases out of a hundred. And in the hundredth, when the recited assertion has vital testimonial value, its utterer can be had and is in fact ready and is put upon the stand, so that the value of his assertion can be duly tested; and nothing is there really lost for lack of such testing, and nothing is really gained by excluding the first witness' recital of it. — Now, the foregoing misguided form of application of the Hearsay rule marks the daily testimony in hundreds of trials. One result has been to take away all natural straightforwardness from the witness' narration, and to break it up into a series of answers to bits of questions, framed by inexpert counsel. Another result has been to multiply tenfold the time and tedium of a trial. A third result has been to exclude a vast amount of useful detail of evidential facts. And, finally, a result has been to bring the Hearsay rule into disrepute, by the abuse of this its incidental and unessential feature.

What, then, shall we do with the Hearsay rule?

1. Keep it, in its vital feature.

2. In its application to former testimony and depositions, liberalize its application. An important measure would be to authorize the prosecution in criminal cases to take depositions, — an authority now lacking in most States; the amount of needless hardship inflicted by the detention of witnesses pending trial must be very great.

3. In its application to extra-judicial assertions, adopt the Massachusetts statutory exception for admitting all statements made by persons now deceased. This is merely a logical extension of the spirit of the rule; for the rule aims to insist on testing all statements by cross-examination, *if they can be; i.e.* if the person has passed beyond the power of the law to procure him, the test may be dispensed with. No one could defend a rule which pronounced that all statements thus untested are *worthless;* for all historical truth is based on un-cross-examined assertions; and every day's experience of life gives denial to such an exaggeration. What the Hearsay rule implies — and with profound verity — is that all testimonial assertions *ought to be* tested by cross-examination, as the best attainable measure; and it should not be burdened with the pedantic implication that they must be rejected as worthless if the test is unavailable.

4. For the same reason, all the Exceptions to the rule, now anywhere recognized, should be liberalized and enlarged, and adopted where not yet in force.

Of the specific Exceptions, only one or two need here a comment. (1) The Dying Declarations exception is by some regarded with distrust. There seems to be no good reason for this. The distrust seems to be due merely to an instinctive overworship of the value of exclusionary rules. Let some judges tell us that they have actually seen several instances of false dying declarations which have brought an unmerited fate to innocent men; then we shall begin to have some *reason* for hesitation. But there are no signs of any such scientific examination of the subject. (2) The use of Official Statements, *e.g.* by certified copies of documents, etc., is burdened unbearably, in almost all our States, by a preposterous wagon-load of crude and needless statutes, prescribing detailed rules; the broad simple rules of the British law and of a few of our States ought to be substituted. And a broad simple rule for proof by official certificate should be adopted; the modern extension of our administrative system requires some such expedient for proof of hundreds of facts never really disputed. We are here lumbering along, as if in our ancestors' stage-coach, without any of the modern conveniences and expeditious methods. (3) The exception for Statements of a Mental or Physical Condition is now reaching a state of futile intricacy. This is seen chiefly in two fields: (*a*) In personal injury cases, the injured person's statements of pain, etc., are hedged about with a mass of quiddities. The purpose is plain, viz. to avoid letting false claimants impose on juries. The efficacy of the effort may well be doubted; there is a risk of such imposition; but the

Hearsay rule is not, and is never going to be, the main means of stopping up the risk or of revealing the imposition. Most of the rulings on this subject give the impression of being merely rulings upon cards played in a game. (*b*) In testamentary causes, the testator's statements are governed by a number of fine-spun rules. They are logical enough; but they let in quite as much as they exclude of the utterances that are supposed to do harm; and it may be doubted whether, in an issue so subject as this is to the jury's uncontrollable sense of justice, the Hearsay exception ever affected the result appreciably. Sir George Jessel's way of dealing with this class of evidence was, after all, as good a way as we can expect to find. (4) The Spontaneous Exclamations exception offers a large opportunity for liberalization. The way in which, in personal injury cases, the law here puts on blinders for this class of evidence, when it comes to investigating the details of the actual occurrence, would seem farcical, — if we could only stand off at a distance and look at ourselves. Jury trial, fine as it is, has a good deal to answer for; but can we censure jury trial here, merely because the judges have such an exaggerated traditional fear of the jury's emotions that they, the judges, go daft in shutting out the important facts from the jury?

5. The remaining measure needed is to devise some way of permitting qualified witnesses to narrate an occurrence without the exclusion of the incidental hearsays. The vice of the present practice is plain enough. But to frame a measure which will remove it, while keeping the essence of the Hearsay rule, is not easy.

Title III. Prophylactic Rules. Two of these call for special comment.

1. *The Oath.* At present, the oath needs reconsideration in three aspects.

a. Although the statutes making the oath *optional* ought to be re-drafted on the lines of some of the more advanced types, there should be no abolition of the oath. For its abolition, indeed, there appears to be no demand. Observation shows that the oath is still, or may be made, a real force for veracity with the great multitude of persons.

b. But the *administration* of the oath is to-day a travesty, a lamentable failure, — in most courts, at least. All its solemn compulsion is eliminated by the futile, irreverent, and almost blasphemous manner in which it is administered. Two or three measures, at any rate, would do much to restore its virtue. (1) It should be administered by the *judge*, not the clerk. (2) It should be *repeated*, word for word, *by the witness*. (3) It should be administered *anew to each witness*, not once only to a group. And (4) some savor of solemnness should be secured for the occasion, in one way or another. — All these things can be done by the judge without change of law. To the judges' indifference, and not to the oath itself, is mainly due the present insignificance of its function.

c. The *capacity* of children to take the oath is still beridden with limitations which are inappropriate in principle and futile in practice. The example of England's statute should be universally followed.

2. *Discovery before Trial* should be enlarged, by clearing away almost all its present limitations. Here we strike the hidden snag — and a solid one it is — of professional tradition. The partisan-contentious system of trials is the largest feature of the Anglo-American system, and is a possession which we ought not to abandon. Something is said later about this. But we can afford to part with its abuses. One of them is the gaming expedient of holding one's cards secret until the play is made.[7] Of course the conservative will urge that to disclose the cards furnishes the unscrupulous opponent with a means to cheat. This is no doubt a danger. But the answer is, first, that the danger is exaggerated; and, secondly, that the present conditions are so wrong that the other risk should now be experimented with; the presumption at least has now shifted.

What specific measures should be used? (*a*) In civil cases, the rule for documents and party's testimony should be enlarged to include all facts, whether bearing on the applicant's own case or not. (*b*) The rule for witnesses' testimony should be made to go equally far. (*c*) In Federal courts, discovery in all the foregoing features should be introduced; the Supreme Court having shown a lamentably reactionary attitude on this subject. (*d*) In all courts and all classes of cases, the rule should be extended to include discovery of premises and chattels. (*e*) In criminal cases, the defence should make discovery of its witnesses, equally with the prosecution.

But none of these mere rules will help much until the sporting theory ceases to dominate in counsel's motives.

Title IV. Simplificative Rules. In this field, two rules mainly need attention.

1. The rules for *Order of Presenting Evidence* are in general sound; they are apparently better (for us) than the Continental rules. But one of them is wholly bad, viz. the rule against putting in one's own case on cross-examination. Besides the general demerit which experience has shown in this rule, it has the peculiar fatality that it is the rule which apparently the crudest practitioner first learns and most obstreperously invokes, like a little terrier with a rat. And the judges seem to elevate it to the dignity of an Eleventh Commandment. Moreover, this rule combines with others to give some particularly obnoxious results. It must be abandoned absolutely.

2. The *Opinion* rule. Words fail one to express the senseless excesses of this rule. The depths of its present inanity, as a rule of Evidence for sensible men, and the copious harm done by it, are recorded in the annals of every trial. Of course, if one cannot see this, there is an end of the matter. But those who cannot see it should at least endeavor to question their own faith in the doctrine.

But how to get rid of it, is not so simple a matter to settle. It is insidiously mingled with two other rules almost inextricably.

[7] Mr. Sherman L. Whipple, of Boston, has published vigorous denunciations of the present method.

(*a*) The rule for *expert qualifications* requires that on a topic requiring special experience the witness must be shown to possess that special experience. This rule is, of course, to be kept. But what does the expert then give, as his testimony? It is commonly termed his "opinion." But this "opinion" is not what the so-called Opinion rule excludes or lets in. Hence, to abolish the Opinion rule does not affect the above rule, *i.e.* the rule that a witness who is not qualified by special experience, where needed, cannot testify on that subject.

(*b*) The rule for a witness' *knowledge by personal observation* excludes his "opinion" in so far as such an "opinion" may imply merely an impression based on hearsay and not personal observation. Hence, to abolish the Opinion rule would not mean abolishing this rule. For example, a witness to an affray, who merely heard the accused utter a threat the day before and testifies to it, should not be allowed to answer, "In your opinion, is the defendant guilty?" But he should be allowed (the Opinion rule being abolished, *i.e.* the rule prohibiting inferences from observed data), to be asked, "In your opinion, was the defendant in earnest when he uttered that threat?"

(*c*) The *hypothetical question*, which figures as one of the overworked technicalities of present practice, is not a result of the Opinion rule, but of the above rule (*b*). Hence, to abolish the Opinion rule does not mend this part of the situation. Medical men who have experience of the witness-stand resent with irritation the hypothetical question. Yet the necessity for it is plausible; and the medical man's disapproval of it merely shows how distinct are the conditions of a jury trial and a medical prescription. But what can be done to remedy the abuses of the hypothetical question? Several minor measures would assist; but to explain them would be out of place.

In sum, What specific measure would eliminate the Opinion rule, while preserving the other rules that ought to be preserved? Something like the following would perhaps serve; note that any such measure must contain within itself certain educative (as it were) phrases, which would point out how much was removed and how much preserved:

"An inference or opinion may always be stated by a witness; irrespective of whether

"(*a*) the data upon which the opinion is based are or are not capable of being so stated by him in words that the tribunal is equally capable of drawing the inference; or whether

"(*b*) the data are or are not stated by him before stating his inference; or whether

"(*c*) the inference involves the very subject of the issue, or one of the issues, before the tribunal;

"Provided that the trial judge may in his discretion exclude testimony involving an opinion or inference,

"(1) Whenever the topic is one which requires special experience for drawing the inference, and the witness is in the judge's estimation not so qualified; or

"(2) Whenever the witness has not had adequate personal observation of any data from which such inference might be drawn; and

"(3) Except that in the latter case the judge may permit the inference to be stated if the data are stated hypothetically to the witness and if he is qualified by experience to draw inferences on the subject."

However, if the present tangle cannot be successfully abated by the above or some similar rule, then we need not hesitate to cut at the root and to abolish the bad and the good together. Nothing here could be worse than the present state of things.

Among the special applications of the Opinion rule, two or three may here be noted. The rule against an opinion as to safety, care, reasonableness, etc., is one of the most obstructive, and could easily be cut out, by itself. The rule against an opinion to character is one of the most obvious violations of common-sense, — an aberration, too, from historic tradition; it can be set right without attempting to solve the rest of the problem. The rule about handwriting testimony is mingled with other rules, but can also be set right without attempting the whole problem; the English statute, already adopted in a few States, makes a good rule-of-thumb.

Title V. Quantitative Rules. Here the several rules call for distinct treatment.

1. The rules as to *Required Numbers and Kinds of Witnesses* are in theory unsound. When our judges resume their rightful control of trials, and when the judge's charge on the evidence is restored, we can afford to get along without most of these rules. Nevertheless, in the meantime, their vagaries do relatively little harm. Regarded as cautions of experience for judge and jury, they are (virtually all) wise and useful. Regarded as rules of the ritual, to be literally recited by the trial judge and technically enforced by the appellate Court, they degenerate into futilities. A few of them have crystallized into needless details. A few of them are a favorite theme of quibbling for some Courts. But on the whole, there is no fault to be found with their general wisdom.

2. The rule for *Verbal Completeness* is a sound rule, needing only that general liberalization of administration which all our rules need.

3. The rules for *Authentication of Documents* represent one of the most vital and creditable features of our law. Probably no other single rule, except the Hearsay rule, is so useful a safeguard against the frailties of human credulity. Experiments conducted over some years [8] have shown that jurors of the most intelligent class need these safeguards. Here, as elsewhere, a more liberal administration is needed. The chief application needing definite improvement of rule is the exception for authentication by official seal;

[8] In the writer's law school classes.

hundreds of useless statutes cover this rule with needless and variant details; a simple statute of the English type should replace them.

Part III. Rules of Extrinsic Policy. This is one of the fertile places for misguided growths in the law of Evidence. Judges consider too little that this group of rules frankly aims at no purpose of reaching truth in trials, but deliberately stifles truth; and does so by setting up some other policy, over against the search for truth, as more needful and deserving of protection, for the time being, at the expense of truth. If judges thought oftener of this, they would oftener ask themselves whether this other policy really is more needful and deserving of protection, and whether the rule does really give enough such protection as to be worth while. Some such reflection would have avoided most of the excesses now noticeable in the details of these rules.

Title I. Rules of Absolute Exclusion. Here only one rule has found even a partial lodgment, and in a few Courts only; but there is a disposition there to give it undue homage. The remarks at §2183 of this Treatise will here suffice.

Title II. Rules of Privilege. Here may be seen excesses, all along the line; and yet all but one or two of the privileges are sound at the core.

1. *Sundry Privileged Topics.* We are fortunate in being burdened with few of these. The ancient one for the *party-opponent in civil cases* has now gone by the board; except that it remains, in most jurisdictions, in its application to the party's chattels and premises, and in a few jurisdictions, in its application to the party's person. It ought to be completely eliminated. It is merely another feature of the sporting theory of justice.

2. The privilege for *Anti-Marital Facts* has gone in some States, in civil cases; most States retain it for criminal cases. Its retention is a piece of comprehensible but quite misplaced sentimentality.

3. The privilege for *Self-Criminating Facts* is at last brought to the bar to defend itself, for the first time in more than two centuries. Positive signs of unfaith in it are visible, even in our own profession. But we hope that it will be acquitted, or at least placed on probation and given a warning to reform. It has for a long time been conducting itself as an undesirable citizen; but the question is whether the community does not need its talents, in spite of its past misuse of them. The significant fact that a congregation of lawyers and criminalists in Wisconsin has deliberately proposed to remove the constitutional ægis which protects it should at least force a full and frank consideration of its case by enlightened professional opinion. But we see no reason to alter the views expressed on its behalf in § 2291 of this Treatise. — The possible details of reformatory measures would here be out of place.

4. The privilege for *Communications between Attorney and Client* plays only a small part in the decisions, although of course it excludes a vast mass of evidence. Over against some recent arguments for its abolition,[9] we still

[9] Mr. Sherman L. Whipple, of Boston, in addresses before the Connecticut and the Florida Bar Associations.

believe in the adequacy of the arguments for its retention (set forth in § 2291 of this Treatise).

5. The privilege for *Marital Communications* is less strongly defensible. And yet its obstruction to evidence is comparatively little. What it needs is some flexibility; the trial Court should here have liberty of discretion to make exceptions. But also it needs to be treated as a mere privilege, *i.e.* optional when claimed by the spouse. Most Courts erroneously treat it as an absolute rule of exclusion.

6. *Jurors' Communications* belong really under the Parol Evidence rule, applied to the solidity of verdicts, and need not be here considered.

7. The *privilege for Official Secrets* makes relatively little obstruction; but it contains the germs of a vicious growth. It has only two or three legitimate applications; and it should be watched, to prevent its spread to noxious possibilities.

8. The privilege for *Communications between Physician and Patient* is sound enough for an occasional and narrow application; but its illogical and indiscriminate extension has made it one of the most farcical measures of needless obstruction. In three principal classes of cases — will cases, insurance cases, and personal injury cases — it is to-day nothing but a powerful joker in a pack of cards, to be slapped triumphantly on the table whenever the game is going against one. Some judges in appellate Courts treat it with a respect which is simply incomprehensible. That any sensible system of trials should have so long retained in its law so discreditable a rule of evidence will some day be difficult to believe.

Book II. By whom Evidence must be Presented. Two general topics here deserve attention; 1. the contentious system in general; 2. the burden of proof between the parties, and the specific presumptions.

1. *The Contentious System, in general.* A good deal has been heard, of late, against our "contentious" system of trial procedure.[10] The word carries with it a derogatory argument. But we must distinguish, of course, between general "contentiousness", which is a fault of behavior, and "contentious procedure", which merely denotes the scientific fact that our system relies upon *the parties, not the judge,* to search for evidence and to present it, each in rivalry with the other. The former may be merely a remediable abuse, separable from the system itself; the latter may be a sound principle.

And in inquiring whether the procedural principle be sound, we must remember that it is a characteristic and historic feature of our system. It stands in emphatic contrast to the Continental system. Nothing is more interesting than the history of the rise and development of the inquisitorial

[10] Mr. Whipple, of Boston, in the addresses already cited; Mr. Herbert Harley, of Chicago, in Bulletins of the American Judicature Society; Mr. R. S. Gray, of San Francisco, and Mr. Abram Adelman, of Chicago, in the Journal of Criminal Law and Criminology, V, 654, 663; Mr. Wesley W. Hyde, of Grand Rapids, in the Illinois Law Review, VIII, 239.

system,[11] which now dominates on the Continent. The examining judge and the trial judge, in that system, seek before trial, and adduce at the trial, the bulk of the evidence; [12] and the parties' counsel, in this part of the litigation, act mainly as vigilant guardians. That system, too, has had its excesses, — and the very name "inquisitorial" carries in our language a repulsive flavor, due to those long past excesses. So that the ultimate question is not whether our system exhibits abuses; but whether our system, without its abuses, is better for us than would be the other system, without its abuses.

The world has had plenty of experience with both systems, and the inquiry is at least open. Here it is desired merely to point out that the problem is an historic one of contrasting systems, and that to change our system is a much more radical thing than to remove the abuses.

Our system indeed will have a good deal to say for itself, when the time comes. It is intrinsically quite as efficacious as the other to "beat and boult out the truth" (in Sir Matthew Hale's quaint phrase). It is much better suited to the traditions of our bar and to the temper of our people. It is much better suited to the spirit and training of our judiciary. Indeed, any other system, for us, is inconceivable, unless times and manners change radically.

But, obviously, our system has been hard ridden. Its abuses of administration are multiple. Here, however, we are concerned only with rules of law. And the one notable improvement needed is that judges should remember that they *possess the lawful power* to summon witnesses and to extract testimony.[13]

In both these aspects there has long been noticeable a dangerous tendency to forget the dignified and potent traditions of our law:

(1) That the trial judge has the power to *select and summon* and place on the stand a *witness* not called by the parties, has never ceased to be our law, although the practice is now with us rare. But that a modern court could go so far (*post*, § 2484) as to hold that a statute applying this power in a certain class of cases is unconstitutional, would have been incredible, if it had not come to pass. One decision in one State does not bulk large. But in its revelation of the possibilities of contemporary appellate aberration it is an enormity. Practice and custom have already gone far in reducing our trial judges to the position of mere umpires; but for the judiciary to confirm this result irremediably by invoking the Constitution, thus to seal their own abdication of inherent and essential powers, is an event of disquieting omen.

(2) That the trial judge has the power to elicit evidence by *questions to a witness*, has also never (apparently) been doubted in law.[14] But in practice our appellate Courts are constantly rebuking our trial Courts for putting such questions. The ostensible ground for this is the infringement of the (bad and unhistoric) statutory rule against the judge's expression of an opinion

[11] Esmein's History of Continental Criminal Procedure, *passim* (Continental Legal History Series, 1914).

[12] Subject to modern modifications, especially in civil cases.

[13] § 2484 in this Treatise.

[14] § 784 in this Treatise.

on the weight of evidence. But this enforcement of the latter rule would never have been carried so far if the appellate Courts had been possessed of a proper respect for the trial judge's power to elicit evidence. The appellate Courts would have seen to it that this power duly held its own against the encroachments of the other rule.

So that in this field there is much lost ground to be regained. The means, however, must be more a change of appellate temper than a change of rule.

2. *The Burden of Proof between the Parties.* So far as theory goes, the old confusion here reigning promises soon to be dissipated. The enlightening influence of Professor Thayer's writings can be seen breaking through in many quarters of the judicial heavens. An improvement of terminology would ultimately be needed. But we could be satisfied to see the general enlightenment impending.

Nevertheless, in practice, the specific rules for burden of proof make upon us the impression of vain logical verbalities, — on the whole. They are, inherently, artificial methods of controlling the mind's operations. And when applied by a judge in a form of words which the jury is supposed to put to use in the privacy of its chamber, they are unlikely to have the supposed effect, — or indeed any effect, when they are more than the simplest rules of thumb. Comparing the amount of judicial thought expended upon them, they are probably the least worth while part of the rules of Evidence.

And yet they have a necessary place, and they are intrinsically sound enough. What to do with them, is a hard question. But it would be interesting to test them empirically, *i.e.* by asking one hundred trial judges whether they have ever observed that these rules had their designed effect upon the jurymen's decisions.

The foregoing dubitative remarks do not apply to these rules as rules for the judge, *i.e.* in so far as the judge rules as matter of law, *e.g.* against a plaintiff for insufficient evidence, etc. Here there seems no reason to doubt the excellence and efficacy of the present system. No doubt the same general need of liberalization is found in this field as elsewhere.

Book III. To whom Evidence must be Presented. Here the main place for improvement is the statutory rule against the judge's charge on the evidence. Enough has already been said as to this bad feature of our modern procedure. But much more will have to be said, in many quarters, before our profession can be awakened from their delusion in its favor, and induced to abandon it.

Book IV. Of what Facts no Evidence need be Presented. Judicial Notice and Judicial Admissions are the two titles of rules under this head. Both of them are beneficent devices, and the prime need is that they shall be expanded in rule and used oftener in practice. Something is said elsewhere to illustrate this (*post*, §§ 2571, 2597). The newly-minded judiciary, when it develops, will find these to be two of the most useful tools in our system.

In closing this critique of our present system, let the following serve as suggestions collateral to the whole of it:

1. General denunciations against the system, and general denunciations against reform of it, will do little service either way. A great national and racial system cannot be easily set aside; and its historic growth indicates that it has at least some right to exist, as it is and where it is. What is needed rather is detailed study and concrete criticism. The specific rules must be tested, in their original purpose, their workings, their fitness to survive under present conditions. Complete and long-continued discussion, by men of varied experience, along the lines here sketched in this Preface, would ultimately bring an intelligent consensus as to the parts to be preserved or emphasized and the parts to be modified or cast off.[15]

2. In any proposals of improvement, the proposer must sooner or later come down to a draft of words. And until he has tried to frame the words for his proposal, he cannot be sure that he has himself grasped it, either in its extent or in its practicability. To see poor results around us, and to assume publicly the attitude of reform, may signify both intelligence and courage. But it does not signify what is to be the tenor of the proposed reform. And until that tenor is revealed, we cannot say whether it is either desirable or feasible. All who have had experience with proposed legislation are aware of this. And their experience has taught them that there is often a large and sometimes impassable chasm between the abstract idea of a reform and the concrete words which must enact it. — These comments are offered to those who have in mind the reform of any substantial part of our system of Evidence.

3. No reform of rules of Evidence will ever of itself, *i.e.* as an improved rule of law, accomplish *much* in promoting actual justice. It may remove an intellectual error from our records. And it may of its own force effect some good for some time. But on the whole its effect must depend upon its surrounding conditions and *their* coincident advancement. The administration of justice, being a human affair, is not unlike the human body. The perfect operation of any one organ is dependent more or less on the general conditions of the rest of the body. And the system of Evidence is dependent upon procedure in general, upon the organization of courts, upon the personnel of the judiciary and of the bar, upon the human nature of witnesses, upon the grade of services rendered by juries, and upon the temper of the community in wanting and supporting a high and intelligent standard of justice.

Let us therefore expect that the system of Evidence, on the whole, will most readily improve when the men who administer it also improve and the system of justice as a whole advances. Sound rules of Evidence, in short, are as much a symptom as a cause of better Justice.

[15] The Committee organized (1922) by the Commonwealth Fund (New York City) for discussion and proposal of improvements in the law of Evidence will doubtless make useful recommendations.

BOOK I

WHAT FACTS MAY BE PRESENTED AS EVIDENCE (ADMISSIBILITY)

INTRODUCTION

GENERAL THEORY AND PROCEDURE OF ADMISSIBILITY

CHAPTER II.

1. General Theory

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

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

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

This notable passage fitly expresses the marked spirit of our law of Evidence for the last century and a half, — that is, since the beginning of our consciousness of it as a system.[2] From the time of Erskine's eloquent, if rhetorical, pronouncement, that " the rules of Evidence are founded in the charities of religion, in the philosophy of nature, in the truths of history, and in the experience of common life",[3] the emphasis on their rationality of method has been an increasing one. The rules of Evidence, said the early Pennsylvania Court, " are founded in reason and good sense ";[4] and such utterances typify the general spirit of the modern administration of the law.

Among the innumerable indirect effects are to be noted the rules directed to prevent the jury from substituting passion and prejudice, instead of reasoning, as the foundation of their conclusion (*post*, § 1904); and the doctrine that even the Legislature cannot establish a rule of decision which will deprive the Judiciary of its power to investigate the facts by rational methods (*post*, § 1353).

§ 9. [1] These passages were substantially reproduced by the learned author, in 1898, in his Preliminary Treatise on Evidence, 264, 198.

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

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

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

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

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

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

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

[8] 1629, Hertfordshire Murder, 13 How. St. Tr. 1325 (the accused persons were tried on an appeal before Sir Nicholas Hyde, Chief Justice, and Sir J. Maynard reports that "because the evidence was so strange, I took exact and particular notice; the minister of the parish, and his brother the minister of the adjoining parish, deposed (and their statement was apparently received without objection) that the four defendants had been taken to the exhumed body and required each of them to touch it; and when a certain one touched it, a sweat came out on the body, the color changed, the eyes opened, and the finger dropped blood upon the ground"); 1688, Standsfield's Trial, 11 How. St. Tr. 1371, 1387, 1393, 1403, 1417 (in Scotland; at the examination of a corpse two days buried, the defendant touched it in helping; and the effusion of blood that followed was treated as evidence, and it was argued by counsel that "God Almighty himself was pleased to bear a share in the testimonies which we produce"; this case is also alluded to by Scott, in the "Fair Maid of Perth").

So too the witchcraft cases involved similar credulities: 1702, Hathaway's Trial, 14 How. St. Tr. 639 (indictment as an impostor and cheat of one who claimed that a spell had taken away his power of swallowing; evidence was received for him of his expectoration of pins, etc.; but L. C. J. Holt made the issue for the jury his sanity, and not his bewitchment; the defendant was found guilty, and this trial is said to have checked the offering of such superstitious evidence).

In the Athenian Mercury, a periodical printed between 1690 and 1697 (selections reprinted as the Athenian Oracle, re-edited by J. Underhill, 1892, in the Camelot Series), appeared a paragraph on corpse-bleeding, as to which the editors assert: "Legislators have thought fit to authorise it and use this trial as an argument at least to frighten, though 'tis no conclusive one to condemn them. Yet we grant that many murders have been found out by it" (p. 108). In another passage, after an account of some trials for witchcraft in 1692, where the cold-water test was used, the correspondent queries (p. 123). "Is it lawful to attempt the discovery of witches by swimming, and how far is it an evidence against them?" To which the editor answers that "such sort of examination by swimming etc. is utterly unlawful, and a breach of the fifth commandment." Evidently the law and the custom were just coming to be heterodox in this period.

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

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

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

In the present day the last remnant of the irrational element is our law of new trials (*post*, § 21). The primitive ordeals of fire and of water were not more calculated to deify chance or chicanery as the arbiter of litigation than is this dominant contemporaneous practice of granting new trials for an immaterial slip in the rules of Evidence. The most trifling error "works a reversal", in the same wizard-like manner that the mispronounced word in the

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

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

superstitious formulas of the Germanic litigation lost for the party his cause. This modern doctrine is the more discreditable of the two. They knew no better, then. We do know better; yet we preserve this technical trumpery.

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

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

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

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

1794, Mr. *Edmund Burke, Report to the House of Commons*, Debrett's History of Hastings' Trial, 1796, pt. VII, Suppl. p. xxiii, 31 Parl. Hist. 324: "Your Committee conceives that the trial of a cause is not in the arguments or disputations of the prosecutors and the counsel, but in the evidence, and that to refuse evidence is to refuse to hear the cause. Nothing, therefore, but the most clear and weighty reasons ought to preclude its production. Your Committee conceives that when evidence, on the face of it relevant, that is connected with the party and the charge, was denied to be competent, the burthen lay

§ 10. [1] This passage was reproduced by the learned author, in 1898, in his Preliminary Treatise, 265, 268.

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

upon those who opposed it, to set forth the authorities, whether of positive statute, known recognized maxims and principles of law, passages in an accredited institute, code, digest, or systematic treatise of laws, or some adjudged cases, wherein the Courts have rejected evidence of that nature."

Circa 1823, Mr. Justice EDWARD LIVINGSTON, Introductory Report to the Code of Evidence (Works, ed. 1872, I, 421): "Ultimately, the whole machinery of jurisprudence, in all its branches, is contrived for the purpose of enabling the judging power to determine on the truth or falsehood of every litigated proposition. This is to be done by hearing and examining evidence: that is to say, hearing and examining everything that will contribute to bring the mind to the determination required. If we refuse to hear what will, in any degree, produce this effect, we must determine on imperfect evidence; and in proportion to the importance of the matter thus refused to be heard, must evidently be the chance of making an incorrect rather than a just determination. But, as in morals, we are forbidden to do evil that good may come of it, so, in legislation, we should refrain from doing that kind of good which may produce more than its equivalent in evil. The desirable end to be attained by the admission of every species of evidence, may be more than counterbalanced in some instances, by the evil attending it; sometimes, in the shape of inconvenience and expense inseparable from its procurement; sometimes, from the danger of error arising from the deceptive nature of the evidence itself. The great art is to weigh these difficulties, and in those cases where they are most likely to preponderate, but in no others, to exclude the evidence."

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

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

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

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

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

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

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

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

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

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

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

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

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

The second group of rules (Part II, *post*) lays down *auxiliary tests and safeguards*, usually for particular kinds of facts, over and above the required

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

minimum probative value. The hearsay rule, the rules of quantity, the rule of the oath, and a dozen others, belong here. An analysis of the general policy and relation of this group to the others is elsewhere made (§ 1171, *post*).

These two groups together are rules of *Probative Policy*.

The third group of rules (Part III, *post*) invokes, for the exclusion of certain kinds of facts, *extrinsic policies* which override the policy of ascertaining the truth by all available means. These rules concede that the evidence in question has all the probative value that can be required, and yet exclude it because its admission would injure some other cause more than it would help the cause of truth, and because the avoidance of that injury is considered of more consequence than the possible harm to the cause of truth. Most of these rules consist in giving certain kinds of persons an option — *i.e.* a Privilege — to withhold the evidential fact. The general nature of these rules is elsewhere examined more at length (§ 2175, *post*).

This third group, as contrasted with the first and second, represents rules of *Extrinsic Policy*.

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

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

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

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

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

§ 12. [1] Another exposition of his theory is given by the learned author in his Indian Evidence Act, 122–126 (1872).

Either this generalization is wholly incorrect, or the term Relevancy must be diluted so as to lose any standard meaning of its own. That most of the characteristic rules of admissibility are rules which do not prescribe anything about the relevancy, or probative value, of the facts they exclude is undoubted. All of the rules of Privilege, for example, are of that sort. The rules for the Order of Evidence assume the evidence to be relevant. The rules for Producing Documentary Originals concedes that a copy is relevant, even when excluding the copy.

There *is* a group of rules defining the sufficiency of probative value, and the term Relevancy is a convenient one for them. If it be desired to enlarge that term, and make it synonymous with Admissibility, this can be done, by forced use of terms. But it is needless; and the rules for probative value, no matter what they be called, will remain distinct in nature from the other rules; and this distinction cannot be abolished merely by misusing the term Relevancy. The fallacy of that misuse has been well expounded as follows:

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

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

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

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

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

Here, after all, the difference is one of nomenclature only. The patent fact cannot be denied that there are thousands of judicial rulings which deal with pure questions of inference and probative value; they do this, not "tacitly" (as suggested in the passage above), but expressly. When the party is told that insanity in A cannot be inferred for the insanity of A's collateral relations, or that a consciousness of guilt can be inferred from flight, the material and method of this ruling is precisely the same as if the question were argued in a debating society or in a book of logic; the difference is that when the Court employs the process, the result is law. It is none the less law because it is also logic; and though this legal logic may lead to illogical law, still it is a legal precedent. Being a legal precedent, it must be studied and observed by the profession. As law aims to represent justice, so the rules of relevancy aim to follow the principles of natural logic; but neither the success or failure of the law to square with natural justice, nor the success or failure of the Courts to be truly logical, justify us in holding that the law is nothing but the dictates of justice and of logic. So long as Courts continue to declare in judicial rulings what their notions of logic are, just so long will there be rules of law which must be observed. For these rules the only appropriate place is the law of Evidence:

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

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

(2) Admissibility, on the other hand, *falls short of Proof or Demonstration.* This is due partly to the circumstance that, in our system, the tribunal has traditionally been a divided one, so that the rule of law, uttered by the judge, merely declares what is sufficient to go to the jury, and the jury ultimately decide upon the total effect which we call Proof.

But chiefly the distinction is due to the circumstance that each evidential fact is offered separately, and the quality of complete demonstration could therefore never be expected of it. Since the production of evidence takes time, and since one piece of evidence must precede another, the rules of admissibility, if there are to be any at all, can have nothing to do with the inquiry whether certain evidence effects complete proof. Weight, Proof, Demonstration, —

these terms have no application until the evidence is all introduced and the jury are ready to retire. The effect of this peculiar feature of Admissibility upon the quality of probative value required is more particularly considered in contrasting Relevancy and Weight (*post*, § 29).

§ 13. **Multiple Admissibility; Evidence applicable to more than one Purpose.** It constantly happens that a fact which is *inadmissible for one purpose is admissible for other purposes;* while, on the other hand, a fact which is entirely admissible, so far as some rules are concerned, is excluded because it fails to satisfy some other rule.

This paradox may be solved if we notice the analogy of candidates for an obstacle-race. Let us suppose that there are to be several races, — one for boys under sixteen years of age, one for lawyers, and one for club-members. Now the ineligibility of A for the second or the third class of entries does not prevent his entering for the first, and conceivably he may be eligible in two different classes. But if after entering the race he fails to surmount any one of the half-dozen obstacles, he loses all chance of victory. So with evidentiary facts; the rules of substantive law, of pleading, and of relevancy are the conditions of entrance; the auxiliary rules and the rules of privilege are the obstacles which must then be evaded by the relevant material.

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

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

(2) Conversely, if A, though a club-member, is also as a lawyer eligible to enter the race not having the stream-obstacle, and would be permitted to pass

over a bridge in the race for that class, it is no ground of objection to him that he cannot swim the stream as required for the club-members' class; further, it is no objection that perhaps the judges of the race will in the crowd be unable to distinguish who passed over the bridge and who swam the stream, and will by possibility award erroneously to A the prize in the club-members' class, thinking that he swam the stream. The reason is that the judges must be assumed to do their duty intelligently and to recollect that A was entered for the lawyers' race and not the club-members'. So, the letter above, if offered as an admission of the defendant, because shown to him and assented to, may be introduced without calling the writer of it, because it is no longer offered as the writer's testimony but as the defendant's admission. In other words, *when an evidentiary fact is offered for one purpose, and becomes admissible by satisfying all the rules applicable to it in that capacity, it is not inadmissible because it does not satisfy the rules applicable to it in some other capacity and because the jury might improperly consider it in the latter capacity.* This doctrine, though involving certain risks, is indispensable as a practical rule:[1]

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

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

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

Here the only question can be what the proper means are for avoiding the risk of misusing the evidence. It is uniformly conceded that the instruction of the Court suffices for that purpose; and the better opinion is that the *op-*

§ 13. [1] *Accord:* 1892, Com. *v.* Trefethen, 157 Mass. 180, 186, 31 N. E. 961 (hearsay); 1893, Jamison *v.* People, 145 Ill. 357, 379, 34 N. E. 486.

ponent of the evidence must ask for that instruction; otherwise, he may be supposed to have waived it as unnecessary for his protection:[2]

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

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

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

§ 15. **Curative Admissibility; Prior Introduction of Inadmissible Evidence, as Estopping from Subsequent Objection to other Inadmissible Evidence.** Does one inadmissibility justify or excuse another? If the one party offers an inadmissible fact which is received, may the opponent afterwards offer similar facts whose only claim to admission is that they negative or explain or counterbalance the prior inadmissible fact?

[2] *Accord:* 1920, F. *v.* F., 52 D. L. R. 440, N. B. (divorce for adultery); 1853, Cook *v.* Parham, 24 Ala. 21, 34 (reputation of an employee); 1920, Atkins *v.* Brett, 184 Cal. 252, 193 Pac. 251 (alienation of affections; as to the doctrine in the text, "The general correctness of this statement cannot be doubted; but we doubt if the learned author intended to say more than that the opponent of such evidence is always entitled to such an instruction for his protection if he asks for it, and that generally it will suffice"; holding that the trial judge in his discretion may sometimes exclude the evidence); 1920, Stacey *v.* Com., 189 Ky. 402, 225 S. W. 37 (moral character of party as witness only); 1920, Com. *v.* Feci, 235 Mass. 562, 127 N. E. 602 (thefts as leading to a motive for murder); 1913, Cooper *v.* Seaboard A. L. R. Co., 163 N. C. 150, 79 S. E. 418 (applying Court Rule 27); 1921, Roberson *v.* Stokes, 181 N. C. 59, 106 S. E. 151 (under Court Rule 21, "counsel who objects to evidence which is competent for one purpose but not for another must specify the ground of his objection or ask the judge to restrict it within its proper limits"); 1908, State *v.* Greene, 33 Utah 497, 94 Pac. 987.

Contra, semble: 1894, Dalton *v.* Dregge, 99 Mich. 25, 358 N. W. 57; 1903, Harrison *v.* Garrett, 132 N. C. 172, 43 S. E. 594.

If the opponent *duly objected* and was erroneously overruled in the first instance, he could not claim to present similar inadmissible facts, because his objection would (in theory) save him, on appeal, from any harm which may accrue, and he needs no other protection.

But if he *did not object* and except, he has no such protection; and the question thus arises whether he can protect himself at the trial by retorting in kind.

On this subject three different rules are found competing for recognition in the different jurisdictions.

(1) The first is that *the admission of an inadmissible fact, without objection by the opponent, does not justify the opponent in rebutting by other inadmissible facts:*

1875, LOOMIS, J., in *Phelps* v. *Hunt*, 43 Conn. 194, 199: "It is obvious that this whole subject matter, both of the direct and cross-examination, was wholly irrelevant, and ought not to have been entertained at all. . . . It is doubtless true that the inquiries ruled out on the cross-examination were in the main pertinent to the matter testified to in chief, and if the irrelevant matter in chief was allowed to have any effect it would have been more just and fair to have allowed a reasonable opportunity for cross-examination upon the same subject; and if, when the questions on the cross-examination were excluded, the plaintiff had asked the Court to reject also all the kindred matter previously received, and the Court had refused, the plaintiff would have had a just ground for a new trial. But no objection whatever was made to the testimony in chief, neither at the time it was offered nor afterwards. The auditor seems to have allowed the parties to take their own course in the testimony until specific questions were raised on the cross-examination; and the decisions then made were according to law. The plaintiff seems to assume that if the cross-examination was pertinent to the examination in chief it necessarily makes the ruling erroneous. This proposition we do not accept. Where the plaintiff stands on matters 'stricti juris', it must appear that the particular ruling complained of was erroneous in law. We cannot hold that it was error in law to rule out, objection being made, what it would have been error to admit, merely because the Court had received without objection matter just as irrelevant before. The maxim 'Similia similibus curantur', has been applied to some extent in the science of medicine, but the principle has never been recognized as applied to the cure of errors in law."

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

§ 15. [1] ENGLAND: 1818, Shaw *v.* Roberts, 2 Stark. 455 (improper questions as to a nonsuit, held not to justify further inquiries on cross-examination); 1913, R. *v.* Cargill, 2 K. B. 271 (virginity of the girl, in rape under age).

UNITED STATES: *Federal:* 1830, Stringer *v.* Marshall, 3 Pet. 320, 337 (intimating that the rule might be different for "improper testimony calculated to make such an impression on the jury that no instruction given by the judge can efface it"); 1840, Philadelphia & T. R. Co. *v.* Stimpson, 14 Pet. 448, 461 (hearsay matter irrelevant to the cause); *Georgia:* 1900, Stapleton *v.* Monroe, 111 Ga. 848, 36 S. E. 428 (ordinarily, "there can be no equation of errors");

Illinois: 1875, Wickenkamp *v.* Wickenkamp, 77 Ill. 92, 96 ("This view of the question worked no hardship upon appellant; he had it in his power to exclude the improper evidence introduced by appellee from the jury upon motion, or he could have prepared an instruction directing the jury to disregard it"); 1900, Maxwell *v.* Durkin, 185 Ill. 546, 57 N. E. 433 (counter-evidence of character, excluded); 1913, People *v.* Newman, 261 Ill. 11, 103 N. E. 589 (a co-indictee having testified to police persecution as the motive for the charge, and having denied former crimes, the prosecution was not allowed to prove one of the crimes to rebut the testimony to police malice);

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

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

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

Maine: 1874, Sturgis *v.* Robbins, 62 Me. 289, 292 (inadmissible evidence on cross-examination does not justify a re-examination on the same subject);
Maryland: 1853, Baltimore & S. R. Co. *v.* Woodruff, 4 Md. 242, 255 (fire set by a locomotive; rebuttal of irrelevant facts, not allowed; "the offering of improper evidence by one of the litigant parties never can justify the introduction of similar evidence by the other party"); 1854, Mitchell *v.* Sellman, 5 Md. 376, 385; 1854, Warner *v.* Hardy, 6 Md. 525, 539 (prescriptive possession); 1916, Flaccus Glass Co. *v.* Gavin, 39 Md. 431, 98 Atl. 213 (contract claim);
Massachusetts: 1918, Com. *v.* Wakelin, 230 Mass. 567, 120 N. E. 209 (homicide);
Missouri: 1916, Buck *v.* St. Louis Union Trust Co., 267 Mo. 644, 185 S. W. 208 (testamentary undue influence);
Pennsylvania: 1837, Smith *v.* Dreer, 3 Whart. 154 ("cross-examination to irrelevant matter shall not bring it into the issue").

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

[2] ENGLAND: 1835, Blewett *v.* Tregonning, 3 A. & E. 554, 581 (acts of prescriptive uses in other places than that in issue having been testified to on the defendant's cross-examination of the plaintiff's witness, the plaintiff's re-examination to explain away those acts was allowed; "the plaintiff was entitled to pursue it, unless the defendant got it struck out"); 1837, Duncombe *v.* Daniell, 8 C. & P. 222, 227 (matters stated in the plaintiff's opening, but not afterwards evidenced by him, allowed to be rebutted; Lord Denman, C. J.: "A statement cannot fail to make some impression and I think it competent for the opposite party to remove that impression").

CANADA: 1903, R. *v.* Noel, 6 Ont. L. R. 385 ("Even if inadmissible matters are introduced in cross-examination, the right to re-examine remains; . . . if it was desired to avoid re-examination upon it, it should have been expunged"; Blewett *v.* Tregonning followed).

UNITED STATES: *Federal:* 1905, Warren L. S. Co. *v.* Farr, 142 Fed. 116, C. C. A. (conversion); 1906, Ball *v.* U. S., 741 Fed. 32, 41, C. C. A. (conviction of crime, offered to discredit the accused as witness);
Alabama: 1882, Ford *v.* State, 71 Ala. 385, 398 (rebuttal of testimony to sanity); 1889, Morgan *v.* State, 88 Ala. 223, 6 So. 761 ("the party first in fault cannot take any advantage of the ruling of the Court in favor of the other"; applied to the rebuttal of improper character evidence); 1891, Mobile & B. R. Co. *v.* Ladd, 92 Ala. 287, 9 So. 169 ("It is never erroneous to receive irrelevant evidence to rebut evidence of a like kind offered by the opposite party"; applied to the rebuttal of the irrelevant fact of the darkness of the night); 1899, McIntyre *v.* White, 124 Ala. 177, 26 So. 937 (wife's separate acknowledgment; irrelevant facts introduced may always

(3) A third form of rule, intermediate between the other two, is that the opponent may reply with similar evidence *whenever it is needed for removing*

be denied); 1905, Louisville & N. R. Co. *v.* Quinn, 145 Ala. 657, 39 So. 616 (carrier putting off a passenger before reaching destination); 1916, Murphey *v.* State, 14 Ala. App. 78, 71 So. 967 (murder);
Arkansas: 1905, German-Amer. Ins. Co. *v.* Brown, 75 Ark. 251, 87 S. W. 135 (opinion testimony);
Illinois: 1914, Jones *v.* Sanitary District, 265 Ill. 98, 106 N. E. 473 (condition of flowage and its cause);
Indiana: 1890, Perkins *v.* Hayward, 124 Ind. 449, 24 N. E. 1033 ("If a party opens the door for the admission of incompetent evidence, he is in no plight to complain that his adversary followed through the door thus opened");
Iowa: Artz *v.* R. Co., 44 Ia. 284, 286 (personal injuries; the defendant introduced a minister of the gospel, to prove conversations with the plaintiff after the injury, who testified, among other facts, to "offering the plaintiff the consolations of religion"; having then on cross-examination denied that he had refused to pray with the plaintiff, the plaintiff was allowed to prove this refusal, and an objection of irrelevancy was overruled; "this was clearly a continuation of the subject introduced by defendant, and objection cannot now be raised by the same party to the competency of the evidence"); 1877, Hale *v.* Philbrick, 47 Ia. 217 (false representations); 1885, Frost *v.* Rosecrans, 66 Ia. 405, 407, 23 N. W. 895 (fraudulent mortgages; rebuttal of irrelevant transactions allowed, to prevent prejudice); 1896, Spaulding *v.* R. Co., 98 Ia. 205, 67 N. W. 227 (personal injuries; rebuttal of improper opinion testimony allowed); 1903, Hamilton *v.* Mendota C. & M. Co., 120 Ia. 147, 94 N. W. 282 (opinion testimony); 1904, See *v.* Wabash R. Co., 123 Ia. 443, 99 N. W. 106 (repairs at a crossing, contradiction allowed); 1916, Smith *v.* Rice, 178 Ia. 673, 160 N. W. 6 (alienation of affections);
Maine: 1851, State *v.* Sargent, 32 Me. 429 (here applied to an accomplice's testimony on a collateral point, because otherwise "if perceived to remain unimpeached when its truth might be tested", it might receive undue credit); 1880, Williams *v.* Gilman, 71 Me. 21, 23 ("If the testimony be purely collateral, it was not for the plaintiff to call out collateral facts which might prejudice, and then object to an explanation"; here applied, in an action for negligence as a veterinary surgeon, to other instances of the defendant's treatment);
Missouri: 1920, Pinson *v.* Jones, — Mo. —, 221 S. W. 80 (lay witnesses to testamentary capacity); 1921, State *v.* Ritter, 288 Mo. 381, 231 S. W. 606 (applied to rebutting evidence of character);
Nebraska: 1921, Macke *v.* Wagner, 106 Nebr. 282, 183 N. W. 360 (slander; rule not clear);
New Hampshire: 1830, Grafton Bank. *v.* Woodward, 5 N. H. 301, 309 (declarations of an agent for a contract); 1870, Janvrin *v.* Fogg, 49 N. H. 347 (admitting explanations of an offer of compromise improperly received);
New Jersey: 1920, State *v.* Engsberg, 94 N. J. L. 464, 110 Atl. 918 (inadmissible conversation; here the opponent failed to move to strike out the original irrelevancy);
New York: 1868, Blossom *v.* Barrett, 37 N. Y. 433, 437 (fraudulent marriage; contradiction of immaterial evidence as to property, allowed); 1873, Coleman *v.* People, 55 N. Y. 81, 89 (*contra;* "A party does not acquire the right to give immaterial evidence because his adversary has done the same thing"; evidence of the receipt of other stolen goods, held to have been improperly admitted; no authority cited); 1895, People *v.* Buchanan, 145 N. Y. 1, 39 N. E. 846 ("Even if the cross-examination had been as to facts not admissible in evidence, the rule seems to be that the witness may be re-examined as to evidence so given"; preceding cases ignored);
Pennsylvania: Sherwood *v.* Titman, 55 Pa. 77, 80 ("The defendant opened the door for the testimony, and cannot complain that it was not closed soon enough to suit him"; here applied in an action for criminal conversation); 1886, Swank *v.* Phillips, 113 Pa. 482, 489 (a disqualified witness of the defendant held improperly admitted, where the plaintiff had introduced another on the same subject; "that error could not be corrected by committing another"; preceding case not noticed);
Vermont: 1897, State *v.* Slack, 69 Vt. 486, 38 Atl. 311 (mode of attacking character of a witness); 1898, Fuller *v.* Valiquette, 70 Vt. 502, 41 Atl. 579 (loss of support by husband's intoxication; the plaintiff having erroneously introduced evidence of prior intoxication, the defendant was allowed to rebut this); 1915, Drown *v.* Oderkirk, 89 Vt. 484, 96 Atl. 11 (contract for support; rule applied to evidence about fraud in a deed);
Washington: 1896, Dutcher *v.* Howard, 15 Wash. 693, 47 Pac. 28 (cross-examination to irrelevant matter excuses a re-examination to the same matter);
West Virginia: 1897, Sisler *v.* Shaffer, 43 W. Va. 769, 28 S. E. 721 ("Strange cattle having wandered through a gap made by himself, he cannot complain").

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

Compare the rules for *re-examination* (*post*, § 1896) and *rebuttal* (*post*, § 1873).

an unfair prejudice which might otherwise have ensued from the original evidence, but in no other case. This seems to be the true significance of what may be called the Massachusetts rule:[3]

1864, BIGELOW, C. J., in *Mowry* v. *Smith*, 9 All. 67: "The question then arises, how far the admission of incompetent and irrelevant evidence offered by one party, to which no objection is taken, renders it competent for the opposite party to introduce evidence of a similar character. There certainly must be some limit beyond which parties cannot be permitted to go, in extending issues of fact and bringing into a case matters which have no essential bearing on its real merits. Without indicating a general rule applicable to all cases of this nature, we think it may be safely said that a party should not be allowed to go farther than to prove facts which have a direct tendency to contradict and control the irrelevant or incompetent evidence which his adversary has introduced into the case. To this extent, it may be properly held that the latter has waived the strict rule of law applicable to such evidence, and is estopped from objecting to the proof of facts, by the opposite party, which can be properly deemed to be contradictory or in rebuttal of those offered by himself. It seems to us that the plaintiff was allowed to transcend this limit at the trial, in the in-

[3] *Accord:* CANADA: 1847, Connell v. Smith, 3 Kerr N. Br. 483 (refusal to perform contract of purchase; defendant's purchases at a cheaper price from other persons having been shown, he was allowed to explain the whole of these irrelevant transactions).

UNITED STATES: *Federal:* 1830, Stringer v. Marshall, 3 Pet. 320, 337 (see citation *supra*);
Alabama: 1916, Bank of Phoenix City v. Taylor, 196 Ala. 265, 72 So. 264 (money on deposit; irrelevant evidence is admissible "merely to neutralize by direct contradiction the force and effect of the evidence improperly adduced", etc.);
Colorado: 1911, Denver City T. Co. v. Hills, 50 Colo. 328, 116 Pac. 125, *semble* (street-car accident);
Connecticut: 1921, State v. Segar, 96 Conn. 428, 114 Atl. 389 (forgery; C's hearsay statements having been admitted for the State without objection, the defendant was allowed to introduce C's self-contradictory statements);
Illinois: 1904, Chicago City R. Co. v. Bundy, 210 Ill. 39, 71 N. E. 28 (a party introducing the opponent's admission during an offer of compromise by the former was not allowed to exclude the opponent's evidence in explanation); 1906, Mash v. People, 220 Ill. 86, 77 N. E. 92 (rule applied to justify the counsel's allusion to the defendant wife's failure to testify);
Indiana: 1903, Hoover v. State, 161 Ind. 348, 68 N. E. 591 (defendant's irrelevant beer-drinking; testimony in denial or explanation, allowed);
Maine: 1881, State v. Witham, 72 Me. 531, 535 (Peters, J.: "The introduction of immaterial testimony to meet immaterial testimony on the other side is generally within the discretion of the presiding judge. But if one side introduces evidence irrelevant to the issue, which is prejudicial and harmful to the other party, then, although it come in without objection, the other party is entitled to introduce evidence which will directly and strictly contradict it"; here, the birth of a child to an unmarried woman was improperly received to show the defendant's adultery; and evidence of other men's intercourse was received to explain away this irrelevant but prejudicial evidence);
Massachusetts: 1861, Brown v. Perkins, 1 All. 89, 96 (trespass in entering the plaintiff's shop and destroying goods; the plaintiff having volunteered the statement that no liquor was in his shop, the defendant was allowed to prove that liquor was found there; "it was too late to object to the question after he had voluntarily testified on the same subject"; but here the Court also thought the fact relevant to the issue).
Vermont: 1868, Lytle v. Bond, 40 Vt. 618 (one erroneous admission does not justify another; but where the first fact is "a circumstance morally tending to render the disputed fact more probable", the opponent has a right "to do away with the impression it may create in the minds of the jury").
Virginia: 1920, Graham v. Com., 127 Va. 808, 103 S. E. 565 (murder of an officer; to rebut defendant's irrelevant evidence as to deceased's misconduct, certain rebutting evidence was admitted).

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

So, too, the trial Court's discretion in *admitting* it will not be disturbed: 1906, Bennett v. Susser, 191 Mass. 329, 77 N. E. 884.

troduction of evidence to which the defendant objected. He was not confined to disproof of the fact that he had charged the defendant with passing counterfeit money, which was the only ground of provocation which the latter had attempted to establish. The plaintiff was allowed to go much further, and to show the distinct and independent fact that the defendant had large sums of money in his possession, which he would take out in papers and show to persons about him, to the amount of several thousand dollars at a time. This was an irrelevant and immaterial fact, which not only had no bearing on the true issue between the parties, but did not tend to contradict or control the evidence which the defendant had introduced in mitigation of damages."

The source of these divergent views is apparent enough. By the Courts adopting the first rule the emphasis is placed upon the circumstance that the opponent did not in the first instance object; hence, his waiver of objection leaves him without ground for maintaining that the original evidence was a wrong which estops the original offeror from now objecting. By the Courts adopting the second rule, on the other hand, the emphasis is placed upon the original party's voluntary action in offering the evidence, by which he virtually waived future objection to that class of facts. Both these circumstances of waiver are true; it is simply a question of relative emphasis; hence the contradictory views. But it may be noted that under the first rule, in almost all the cases, the counter-evidence had been rejected below, while under the second rule, in almost all the cases the counter-evidence had been admitted below; *i.e.* the Courts under both rules reached practically the same result in that they refused to disturb the ruling below. This points to the true rule, namely, that since each party is alike in the condition of 'volenti non fit injuria', *neither can complain of a ruling either admitting or rejecting*, — a waiver being predicable of both. The matter is thus left in the hands of the trial Court. Modify this in certain cases by conceding to the opponent, as of right, to use the curative counter-evidence when a plain and unfair prejudice would otherwise have inured to him, and the rule will be sufficiently flexible.

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

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

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

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

§ 16. **Judicial Discretion as applied to Admissibility; Distinction between Discretion and Unappealable Rulings.** The term "discretion", as applied to a trial Court's powers, may be used in several senses, which have not been, in our law, as often discriminated or as fully developed as they ought to be.

It may mean (1) that the trial judge is controlled by *no fixed rules*, but may in each case decide according to good sense and justice without regard to precedents, either by himself or by a higher Court. In this meaning, nothing is involved as to the finality of the decision; it may or may not be appealable. (2) It may mean, on the contrary, that the trial judge decides according to some rule, but that in one or another respect his *decision is final;* and here it may be final (a) as to the law, *i.e.* the tenor of the rule, (b) as to the applicability of the rule to the facts, or (c) as to the existence of the facts. The first of these meanings (1) is Discretion in the ordinary sense; the second (2) may be termed Finality of Ruling.

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

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

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

1896, BENET, J., in *Norris* v. *Clinkscales*, 47 S. C. 488, 25 S. E. 797: "The term 'discretion' implies the absence of a hard and fast rule. The establishment of a clearly-defined rule would be the end of discretion. And yet 'discretion' should not be a word for arbitrary will or unstable caprice. Nor should judicial discretion be, as Lord Coke pronounced it, 'a crooked cord', but rather, as Lord Mansfield defined it, the 'exercising the best of their judgment upon the occasion that calls for it', adding that 'if this discretion be wilfully abused . . . it ought to be under the control of this Court.' The Courts and text writers all concur that by 'judicial discretion' is meant sound discretion guided by fixed legal principles. It must not be arbitrary nor capricious, but must be regulated upon legal grounds, — grounds that will make it judicial. It must be compelled by conscience, and not by humor. So that when a judge properly exercises his judicial discretion he will decide and act according to the rules of equity, and so as to advance the ends of justice. There are two different kinds of discretion that may be exercised by the presiding judge, one of which is appealable, the other not. In the exercise of his exclusive right to decide a matter

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

of fact, or to control the orderly conduct of trials, the discretion of the circuit judge will not be reviewed by this court. For example, in granting or refusing a new trial on the evidence, or in granting or refusing additional time for argument of counsel, or in deciding whether an admission or confession was made freely and voluntarily, so as to determine its admissibility as evidence, or in permitting a witness to be recalled, or in granting or refusing a motion for a continuance, or the like. In such matters no error of law can be committed, and no appeal can be taken."

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

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

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

(*c*) Finality as to the *findings of fact*, however, is by most Courts in theory, and by some Courts in practice, conceded to the trial judge.[2] In the instance above, for example, the facts as to a diligent and adequate search would be taken, upon appeal, as determined below.[3] This is the sensible and practical doctrine. A few Courts — notably that of New Hampshire (largely due to the influence of Chief Justice Doe) and of Massachusetts — systematically

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

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

recognize it for substantially all the rules of Evidence. On a few topics (such as the qualifications of an expert witness) almost all Courts enforce its recognition. On the remaining topics, most Courts profess an adherence to it, but nevertheless inconsistently waste their own time and that of the profession by recording at great length their opinions upon a thousand petty questions of fact preliminary to the admission of particular pieces of evidence. This is due chiefly to their usual qualification that the discretion is final unless it is "abused"; so the necessity of overhauling the facts in detail, to see whether discretion has been "abused", involves the very labor for the appellate Court and the very uncertainty for suitors which would be obviated by a doctrine of discretion, if it were worth anything at all. It is usually the appellate Court, not the trial Court, that "abuses" the doctrine of discretion. However, in theory at least, all Courts are found more or less explicitly recognizing some concession of finality to the trial judge on the matters of fact upon which the application of the rules of evidence depend:

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

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

2. Procedure in Questions of Admissibility

§ 17. **The Offer of Evidence.** The procedure in raising and deciding questions of Admissibility is a part of the general body of procedure, and could not be fully treated except in that connection. But its details often depend intimately upon the doctrines of Admissibility, and a knowledge of the rules of procedure is necessary in considering many of the applications of those prin-

[4] Further utterances may be found in the ensuing opinions: 1895, State *v.* Sawtelle, 66 N. H. 488, 32 Atl. 831; 1914, Nawn *v.* Boston & Maine R. Co., 77 N. H. 299, 91 Atl. 181 (history of the doctrine of trial Court's discretion in this State); 1922, Dunklee *v.* Prior, — N. H. —, 115 Atl. 138 (opinion by Plummer, J., approving the text above); 1906, State *v.* Monich, 74 N. J. L. 522, 64 Atl. 1016; 1898, Martin *v.* Jennings, 52 S. C. 371, 29 S. E. 807.

ciples. A short survey of the rules and their reasons is therefore necessary at this point. The procedure as a whole falls into five separate stages: the Offer of Evidence, the Objection, the Ruling, the Exception, and the Judgment of Error.

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

a. Form of the Offer. (1) The offer at the trial need not be in *writing;* it is ordinarily made by the counsel's oral calling of a witness or presentation of a document or by his oral statement of a question to a witness. But where the testimony is in the form of a deposition taken before trial, the questions are required to be in writing when the depositions are taken by the method of commission, *i.e.* when the counsel do not attend personally at the time of the witness' examination before the officer but prepare written interrogatories to be sent to the officer;[1] the more usual method, however, consists in an oral examination by counsel personally attending, the questions and answers being written down after utterance.[2] In either case the deposition-document is usually required to be filed with the clerk of court before trial,[3] and is always formally offered at the trial, by being read by the counsel or handed to the clerk for reading.[4]

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

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

1903, Ricks, J., in *Chicago City R. Co.* v. *Carroll*, 206 Ill. 318, 68 N. E. 1087 (the plaintiff having been allowed, after the close of both cases, to offer evidence of the defendant's ownership of the car on which the injury occurred, and the defendant then desiring to offer, for the first time, evidence of the due inspection of the cars, the defendant's attorney said: "We desire to offer evidence on the question of inspection", and the Court replied: "I will not receive any evidence, except as to the ownership of this line, at this stage"; this was held not a sufficient offer): "No witness was put upon the stand. No question was asked. Nothing was done, except a mere conversation or talk had between counsel for appellant and the Court. Such procedure as that does not amount to an offer of evidence, and the remarks of the Court did not amount to a refusal to admit evidence. There can be no refusal to admit that which has not been offered; and counsel cannot, by engaging in a mere conversation with the Court, although it may relate to the procedure, by merely stating

§ 17. [1] For the distinction between these two methods, see *post*, §§ 802, 1376.

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

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

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

what he desires to do, get a ruling from the Court upon which he can predicate error. If appellant desired to make the contention it now makes, it should have at least put a witness upon the stand, and proceeded far enough till the question relative to the point it is now said it was desired to offer evidence upon was reached, and then put the question, and allowed the Court to rule upon it, and then offered what was expected to be proved by the witness, if he was not allowed to answer the question asked."

1917, MCCAMANT, J., in *Columbia Realty Investment Co. v. Alameda Land Co.*, 87 Or. 277, 168 Pac. 64, 444 (action for brokerage commissions on sales of realty where the purchasers had defaulted and contracts been cancelled): "In rebuttal plaintiff made the following offer: 'The plaintiff at this time offers to produce witnesses and prove that all the cancellations of contracts which have been referred to in the case are the result of an interference by the Alameda Land Company . . . so that it was profitable for the purchasers to surrender the contracts and forfeit the moneys. . . .'

"Defendant contends that an offer of proof cannot be made without calling a witness and asking an appropriate question. . . . In the case at bar no witness was named, and the offer of proof was couched in the most general terms. We think that plaintiff should have named its witnesses and specified the acts of interference relied on. The offer should have named the contracts of purchase which were cancelled because of each act of interference by the defendant. Unless the calling of witnesses is waived by the court, or by the adverse party, we think the better practice is to call the witnesses relied on and ask appropriate questions. If objections are sustained to these questions, the time is ripe for an offer of proof . . . authorities are cited to the effect that, when the trial court settles a bill of exceptions reciting offer of proof, it will be assumed on appeal that the witnesses were present and the evidence was properly offered. We do not think that the certification of a bill of exceptions should be given the effect contended for. It is the practice in this State to incorporate in a bill of exceptions the objections to questions and the offers of proof in language taken from the reporter's transcript, and a trial court refusing so to do would be regarded as unfair to the unsuccessful litigant. The certification of the bill does not import a waiver by the trial court of the calling of witnesses in connection with an offer of proof."

The offer must therefore not be merely a verbal suggestion for invoking a ruling, or a promissory announcement of expected material. It need not expressly appear, however, that a witness was corporally called to the stand, unless there are circumstances to raise the presumption that the offer was improper in one or the other of these respects.[5] An elusive violation of this principle

[5] Such seems to be the result of the cases: *Federal:* 1884, Scotland Co. *v.* Hill, 112 U. S. 183, 186 ("If the offer is actually made and refused, and there is nothing else in the record to indicate bad faith, an appellate Court must assume that the proof could have been made"); 1909, Missouri Pac. R. Co. *v.* Castle, 8th C. C. A., 172 Fed. 841 (a witness being called and a certain question being excluded, the counsel offered to prove certain other facts, without asking the appropriate questions; held sufficient); 1912, Platte Valley C. Co. *v.* Bosserman-Gates L. S. Co., 8th C. C. A., 202 Fed. 692, 694 ("In the Federal courts, an assignment as error of a rejection of an offer to prove certain facts without propounding any questions to a witness calculated to elicit them properly raises the issue of the admissibility", the presumption being that the offer was made in good faith); 1917, Louisville & N. R. Co. *v.* Burns, 6th C. C. A., 242 Fed. 411 (ejectment from a railroad train; counsel's announcement of "ability to make such proof", which was "never definitely offered", held not enough); *Fla.* 1922, Tyson *v.* State, — Fla. —, 90 So. 623 (objections were sustained to questions put by counsel to witnesses as to alleged material facts; the rulings were affirmed; "the proper practice is to proffer to establish the facts relied upon as a defense by competent proof"); *Ida.* 1922, Mabbett *v.* Mabbett, 34 Ida. 611, 202 Pac. 1057 (habeas corpus by a father against a mother for the custody of a child; on the trial, and before resting, petitioner's counsel said, "I would like to ask Mrs. Mabbett (the respondent) a few questions"; to which respondent's counsel said, "We object." The court said, "I do not think

occurs often on cross-examination to character, when facts of discreditable conduct are groundlessly asked about, in the hope that though denied they will be assumed by the jury as well founded (*post*, §§ 983, 1808). Here, since the cross-examiner is by another rule not allowed to prove such facts by ex-

you can cross-examine her unless she goes on the stand herself"; McCarthy, J.: "While he did not expressly say so, it is probable that appellant's counsel desired to cross-examine the respondent as the adverse party under our statute (C. S. § 8035). . . . Does the record show a denial by the court of appellant's right to examine respondent, and resulting prejudice? Counsel did not call her to the stand, nor ask that she be sworn; did not state what questions he proposed to ask her, nor what he proposed to prove by her. The remark made by the court can hardly be called a ruling. Counsel did not assert his right in such a way as to call for a ruling"); *Ind.* 1919, Chicago, Indiana & L. R. Co. *v.* Public Service Commission, 188 Ind. 334, 123 N. E. 465 (the filing of a transcript of evidence taken before the Commission, with the clerk of the court in which action was brought, as required by St. 1913, p. 167, § 69, does not of itself make the whole or any part of the transcript evidence for either party as if introduced); *Md.* 1877, Eschbach *v.* Hurtt, 47 Md. 61, 67 (a judicial statement that certain evidence will not be admitted is not the subject of exception where it does not appear that the party at the time produced or had present a witness to the fact, or so stated to the trial Court); *Minn.* 1910, National Citizens' Bank *v.* Thro, 110 Minn. 169, 124 N. W. 965 (here two judges dissented because the colloquy at the trial showed sufficiently that the evidence ready to be offered, but not formally offered, was material); *Mo.* 1910, Seibel-Suessdorf C. & I. M. Co. *v.* Manufacturers R. Co., 230 Mo. 59, 130 S. W. 288 (a "mere expression of a desire to introduce evidence" is not enough); *Mont.* 1919, Juby *v.* Craddock, 56 Mont. 556, 185 Pac. 771 ("defendants did not call or offer to call any witness by whom the facts detailed in the offer could be proved"); *Nebr.* 1909, Butterfield *v.* Beaver City, 84 Nebr. 417, 121 N. W. 592 (questions were excluded, but the expected answer was not formally offered; held insufficient); *N. Y.* 1922, People *v.* Nunziato, 233 N. Y. 394, 135 N. E. 827 (offer held insufficient); *N. Dak.* 1907, Madson *v.* Rutten, 16 N. D. 281, 113 N. W. 872 (questions asked and rejected, but not followed by an "offer of proof", held inadequate); *Or.* 1920, Booth-Keely Lumber Co. *v.* Williams, 95 Or. 476, 188 Pac. 213 (counsel "read into the record the language of his pleading as an offer of proof"; held insufficient); 1922, Patterson *v.* Causey, —S. C.—, 111 S. E. 725 (grantor's capacity: here the failure to offer a witness was held fatal); *P. R.* 1915, People *v.* Diodonet, 22 P. R. 698 (assault; "where the question shows its purpose and the materiality of the evidence sought to be elicited, an offer to prove is not necessary,"); *Tenn.* 1878, Robinson *v.* State, 1 Lea 673, 674 (the party making the offer must show that he had the proper witness or the means of producing him, or in good faith so believed); *Wis.* 1916, Witt *v.* Voigt, 162 Wis. 568, 156 N. W. 954 (defendant's counsel "said in substance that he had witnesses in court . . . who would testify" etc., whereon the Court "informed him that such evidence would not be received"; held, a sufficient offer).

For additional illustrations of the application of the principle, see *post*, § 1808.

The following rulings seem too strict: 1884, Higham *v.* Vanosdol, 101 Ind. 160, 162 (the record showed that, a witness being on the stand, "the defendant offered to prove by the witness" a specific conversation set out in full; a ruling rejecting the offer was sustained, partly because "it does not appear that any question was asked the witness"); 1905, Indianapolis & M. R. T. Co. *v.* Hall, 165 Ind. 557, 76 N. E. 242 ("There must be a question asked which is calculated to elicit the testimony excluded"); 1904, Schilling *v.* Curran, 30 Mont. 370, 76 Pac. 998 (the counsel "now makes formal offer to prove that S. knew of this transaction", etc., held insufficient without calling the witness or affirmatively showing that the offer is made in good faith, etc.); 1917, Columbia Realty I. Co. *v.* Alameda Land Co., 87 Or. 277, 168 Pac. 64, 440 (broker's commissions; ordinarily, "an offer of proof cannot be made without calling a witness and asking an appropriate question"; quoted *supra*).

It has been said that *on cross-examination* the rule requiring an offer of proof is not applicable; 1918, Herzig *v.* Sandberg, 52 Mont. 538, 172 Pac. 132. But this means perhaps no more than another aspect of the general exception that on cross-examination the ulterior purpose of an apparently irrelevant question need not be disclosed, so far as required by the general principle of conditional admissibility (*post*, § 1871). It is of course obvious that, on the one hand, the very question by the cross-examiner to the witness is an offer of proof; and, on the other hand, that no other witness could properly be called at that moment by the cross-examiner (*post*, § 1885). In this aspect, the statement above would be therefore both a truism, in one sense, and incorrect, in another sense.

trinsic testimony, he is exempt from supporting his question by formal tender, and he thus abuses his advantage. Nothing but a strict exercise of judicial duty can avail to check this abuse.[6]

b. Tenor of the Offer. The general principle is that the offer must be judged *exclusively by its specific contents* regarded as a whole. This principle leads to several consequences.

(1) If the evidentiary fact desired to be offered is in itself apparently irrelevant, or otherwise dependent on other facts for its admissibility, the offer must contain a statement of the *specific purpose*, or of all the *other facts necessary* to admissibility. This rests on the doctrine of conditional relevancy (*ante*, § 14, *post*, § 1871).[7] A common application of this rule is found where on objection the trial Court excludes an indefinite question (*e.g.*, "What did he say?") whose answer might or might not contain irrelevant or otherwise objectionable matters. In other words, the Court and the opponent are entitled to an offer *specific enough* to permit of intelligent objection and ruling; whether the offering party need specify precisely the expected answer or only the general objective of the question, and whether he needs to volunteer this or may wait until the Court requests it, and whether the context of the testimony may suffice for the purpose, — these must depend much upon the case in hand.[8]

(2) If *several facts* are included in the offer, some admissible and others inadmissible, then the whole (if properly objected to) is inadmissible; in other words, it is for the proponent to sever the good and the bad parts.[9]

(3) Similarly, an offer of a fact for *two purposes* is erroneous if the fact is inadmissible for one of the purposes, though it would have been admissible for the other if offered for that alone.[10]

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

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

[8] 1912, Birmingham R. L. & P. Co. *v.* Barrett, 179 Ala. 274, 60 So. 262 (rehearsing prior cases in this State). 1914, Hartnett *v.* Boston Store, 265 Ill. 331, 106 N. E. 837 (sale of firearms to a minor; a question by the plaintiff to the minor, whether he was experienced in the use of weapons, was excluded on objection; held that the plaintiff was not required to state what the expected answer was); 1905, Marshall *v.* Marshall, 71 Kan. 313, 80 Pac. 629 (citing cases; good opinion by Mason, J.); 1915, Rice *v.* Sheldon, 38 R. I. 161, 94 Atl. 711 (here a dissenting opinion exhibits the error of having a fixed rule).

This question, however, tends often to merge into that of § 20, *post* (embodying the answer in a bill of exceptions) and that of § 1871, *post* (whether there was an implied offer to prove other facts making the offer relevant), and Courts tend not to distinguish.

[9] 1921, Sage *v.* State, 22 Ariz. 151, 195 Pac. 534 (statutory rape); 1895, Herndon *v.* Black, 97 Ga. 327, 22 S. E. 924; 1885, Over *v.* Schiffling, 102 Ind. 191, 26 N. E. 91 (libel; offer rejected to show that the witness "communicated all these facts" to the plaintiff; not all of the facts being admissible for a privileged communication, "it was counsel's duty to specifically state the facts which they expected to show that the witness communicated to their client; . . . the Court was not bound to analyze the testimony and sift out the competent from the incompetent"); 1905, Indianapolis & M. R. T. Co. *v.* Hall, 165 Ind. 557, 76 N. E. 242; 1903, Farleigh *v.* Kelley, 28 Mont. 421, 72 Pac. 756; 1919, Juby *v.* Craddock, 56 Mont. 556, 185 Pac. 771.

Contra: 1910, Finch & Co. *v.* Zenith Furnace Co., 245 Ill. 586, 92 N. E. 521 ("We cannot adopt a view so narrow").

[10] 1855, Phillips *v.* Hoyle, 4 Gray Mass. 568.

(4) An offer of a fact for an *inadmissible purpose* A is properly excluded, though the same fact would have been *admissible for purpose* B.[11]

(5) Conversely, an offer of a fact admissible for purpose B is properly admitted, even though the same fact *would have been inadmissible if offered* for purpose A; this follows from the doctrine of multiple admissibility (*ante*, § 13).

c. Finality of the Offer. Evidence once offered and admitted cannot ordinarily be *withdrawn* by the offering party, even by allowance of the Court, without consent of the opponent, — at least, merely because the offering party changes his mind about using it.[12] But where an offer of evidence has been objected to and nevertheless admitted, the Court overruling the objection, the offering party may later, it would seem, with the Court's consent, withdraw the evidence with a view to obviating the possibility of an error of ruling; in such a case, the question then becomes one of a revocation of the ruling (*post*, § 19).

§ 18. **The Objection.** The initiative in excluding improper evidence is left entirely to the opponent, — so far at least as concerns his right to appeal on that ground to another tribunal. The judge may of his own motion deal with offered evidence; but for all subsequent purposes it must appear that the opponent invoked some rule of Evidence. A rule of Evidence not invoked is *waived*.[1]

[11] 1849, Doe *v.* Beviss, 7 C. B. 456, 508 (a … as to its legal admissibility"); 1905, Deitrich *v.* Kettering, 212 Pa. 356, 61 Atl. 927.

Contra, but unsound: 1904, State *v.* Charles, 111 La. 933, 36 So. 29 (homicide; certain declarations of the deceased, offered improperly as dying declarations and 'res gestæ', admitted, being properly receivable as self-contradictions of other declarations of the deceased; no authority cited).

[12] 1908, Alabama Great S. R. Co. *v.* Hardy, 131 Ga. 238, 62 S. E. 71.

§ 18. [1] 1911, Diaz *v.* U. S., 223 U. S. 450, 32 Sup. 252 ("So, of the fact that it was hearsay, it suffices to observe that, when evidence of that character is admitted without objection, it is to be considered and given its natural probative effect as if it were in law admissible"); 1921, Sawyer *v.* French, — Mo. —, 235 S. W. 126 (hearsay); 1915, Forster *v.* Rogers, 247 Pa. 54, 93 Atl. 26 (incompetent testimony introduced without objection; the Court's refusal later to grant a motion to strike out is not reviewable); 1920, George M. Keebler, Inc. *v.* Land T. & T. Co., 266 Pa. 440, 109 Atl. 659 (approving Forster *v.* Rogers); 1908, Murella *v.* Reyes, 12 P. I. 1 (incompetency of witness under C. C. P. § 383); 1909, Falero *v.* Falero, 15 P. R. 111; 1912, Coto *v.* Rafas, 18 P. R. 493

Hence, *any* rule is waivable: see examples *ante*, § 7 *a*, *post*, §§ 18, 2275, 2592.

In Baltimore & O. R. Co. *v.* State, 107 Md. 642, 69 Atl. 439 (1908), the above passage

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

1908, POWELL, J., in *Marella* v. *Reyes*, 12 P. I. 1, 3: "His omission to object to her operated as a waiver. The acceptance of an incompetent witness to testify in a civil suit, as well as the allowance of improper questions that may be put to him while on the stand, is a matter resting in the discretion of the litigant. He may assert his right by timely objection or he may waive it, either expressly or by silence. In any case the option rests with him. Once admitted, the testimony is in the case for what it is worth, and the judge has no power to disregard it for the sole reason that it could have been excluded, if it had been objected to, nor to strike it out on his own motion. The disqualification of witnesses, found in rules of evidence of this character, is one not founded on public policy but for the protection and convenience of litigants, and which consequently lies within their control."

The function of the objection is first to signify that there is an issue of law, and, secondly, to give notice of the terms of the issue. An objection serves, for the rules of Evidence, the same purpose as a demurrer for the rules of substantive law:

1833, SHAW, C. J., in *Cady* v. *Norton*, 14 Pick. 236: "The right to except [*i.e.* object] is a privilege, which the party may waive; and if the ground of exception is known and not seasonably taken, by implication of law it is waived. This proceeds upon two grounds; one, that if the exception is intended to be relied on and is seasonably taken, the omission may be supplied, or the error corrected, and the rights of all parties saved. The other is, that it is not consistent with the purposes of justice for a party, knowing of a secret defect, to proceed and take his chance for a favorable verdict, with the power and intent to annul it as erroneous and void, if it should be against him."

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

1922, PEASLEE, J., in *Tuttle* v. *Dodge*, — N. H. —, 116 Atl. 627: "Our procedure is based upon the proposition that it should be such as justice and convenience require. One of the requisites for a full application of this principle is that errors should be corrected at the earliest practicable time, and in a manner to prevent as far as possible the waste and delay of mistrials. While in most respects the theory above indicated is followed in our practice to the fullest extent, in the matter of dealing with the argument of counsel to the jury we are far behind the reasonable and expeditious practice adopted in other jurisdictions. . . . The long-established erroneous practice here of claiming an exception without first objecting and obtaining a ruling from the presiding justice (*State* v. *Ketchen*, N. H., 114 Atl. 20) is undoubtedly responsible for the present situation. No good reason appears for continuing such practice. While so-called exceptions so irregularly taken have up to this time been considered because of the reliance of the bar upon the existing methods, the evil has increased to such an extent that it plainly calls for an abandonment of the practice at trials and in this Court of treating a so-called exception to argument which is not based upon a ruling by the trial court, as raising a question of law. The 'best inventable procedure' demands a reform in this respect upon the part of the bar, the trial court and this court. Counsel should present his objection in a form calling for a ruling by the Court, the presiding justice should allow exceptions only when they relate to a 'ruling, direction or judgment' of

is quoted, and is stated not to be "in complete harmony with other writers." Nevertheless it is the only sound rule; *i.e.* for purposes of *trial*, the Court is free to act without waiting for an objection; but for purposes of *appeal*, a party not objecting has no standing. In the above case, this principle was satisfied, for the appealing party did object; his objection happened to be to a ruling of the Court made on its own motion; if the other party had appealed, in the above case, the principle would have prevented him from taking any benefit.

the Court (*State* v. *Ketchen*, *supra*), and this Court should consider such exceptions only as have been regularly taken."

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

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

(1) For evidence first taken *at the trial*, the objection may be to the disqualification of a particular witness in general or to the inadmissibility of an evidentiary fact contained in a specific question or document.

An objection to a *witness' disqualification in general* must be made as soon as he is called to the stand and before his direct examination begins, provided his disqualification was then known. But the rule on this point has relaxed in modern times, owing to the increasing disuse of the formal 'voir dire' or preliminary questioning; and the subject is better considered in connection with the general doctrine of Testimonial Qualifications (*post*, §§ 486, 586).

For evidence contained in a *specific question*, the objection must ordinarily be made *as soon as the question is stated*, and before the answer is given; unless the inadmissibility was due, not to the subject of the question, but to some feature of the answer:[2]

[2] *Accord: Federal:* 1905, Davidson S. S. Co. *v.* U. S., 142 Fed. 315, C. C. A.; 1905, Shandrew *v.* Chicago St. P. M. & O. R. Co., 142 Fed. 320 C. C. A. ("immaterial, incompetent, and irrelevant"); *Ala.* 1899, Coppin *v.* State, 123 Ala. 58, 26 So. 333; 1905, Tutwiler C. C. & I. Co. *v.* Nichols, 145 Ala. 666, 39 So. 762; 1916, Western Union Tel. Co. *v.* Favish, 196 Ala. 4, 71 So. 183 (deposition); *Cal.* 1904, People *v.* Scalamiero, 143 Cal. 343, 76 Pac. 1098; 1907, Short *v.* Frink, 151 Cal. 83, 90 Pac. 200; *Del.* 1904, Macfeat *v.* Phila. W. & B. R. Co., 5 Del. Penn. 52, 62 Atl. 898; *Ga.* 1906, Patton *v.* Bank, 124 Ga. 965, 53 S. E. 664; *Ill.* 1921, People *v.* Sawhill, 299 Ill. 393, 132 N. E. 477 (expert's qualifications); *Kan.* 1905, State *v.* Castigno, 71 Kan. 851, 80 Pac. 630; *Md.* 1907, Dick *v.* State, 107 Md. 11, 68 Atl. 286; 1908, Baltimore & O. R. Co. *v.* State, 107 Md. 642, 69 Atl. 439 (leading questions); *Minn.* 1905, State *v.* Crawford, 96 Minn. 95,104 N. W. 822; *Mont.* 1903, Yoder *v.* Reynolds, 28 Mont. 183, 72 Pac. 417; *N. J.* 1919, State *v.* Young, 93 N. J. L. 396, 108 Atl. 215; *N. Car.* 1903, Dobson *v.* Southern R. Co., 312 N. C. 900, 44 S. E. 593; 1919, State *v.* Stancill, 178 N. C. 683, 100 S. E. 241 (after question answered, too late); *N. Dak.* 1913, State *v.* Reilly, 25 N. D. 339, 141 N. W. 720 (hypothetical question); *Pa.* 1915, Forster *v.* Rogers Bros., 247 Pa. 54, 93 Atl. 26 (formulating a complete rule for this State, and distinguishing prior cases); *R. I.* 1903, McGarrity *v.* R. Co., 25 R. I. 269, 55 Atl. 718; *S. Dak.* 1894, Vermillion Co. *v.* Vermillion, 6 S. Dak. 466, 61 N. W. 802; *Vt.* 1909, Walston *v.* Allen, 82 Vt. 549, 74 Atl. 225; 1915, Comstock's Adm'r *v.* Jacobs, 89 Vt. 133, 94 Atl. 497.

On the general subject, see the following works: 1880, Thompson, Trials, I, §§ 700, 715–720; 1894, Elliott, General Practice, II, § 594.

An objection, upon its ground becoming known, must be made within a *reasonable time thereafter:* 1902, North *v.* Mallory, 94 Md. 305, 51 Atl. 89; 1920, Mitchell *v.* Slye, 137 Md. 89, 111 Atl. 814; and, in any case, before the end of the trial; 1901, Brady *v.* Nally, 151 N. Y. 258, 45 N. E. 547, 549.

For the *reservation of the right* to object, see *infra*.

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

No written document offered in evidence should ever be *read aloud* until the opponent and the judge have had an opportunity to inspect it, so that the objections to its admissibility may be raised and determined: 1915, Martin's Estate, 170 Cal. 657, 151 Pac. 138.

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

1871, BARTOL, C. J., in *Marsh* v. *Hand*, 35 Md. 123, 127: "The bill of exceptions states that no notice had been given to produce the original; there was no admission or proof that the original had ever been received by the plaintiffs. It is very clear that the copy was not legal or admissible evidence. The bill of exceptions however states that it was offered, and a part of it read to the jury, when the plaintiffs' counsel made their objection. The Court decided that the objection came too late: 'that having allowed the first part of the letter to be read, the plaintiffs could not object to the reading of the balance, and that it was too late to object to the admission of the letter, in whole or in part.' . . . The rule is well settled, 'that it is the duty of counsel, if aware of the objections to its admissibility, to object to the testimony at the time it is offered to be given', and it has been embodied among the rules of the Superior Court, as follows: Rule 34. 'Every objection to the admissibility of evidence shall be made at the time such evidence is offered, or as soon thereafter as the objection to its admissibility shall have become apparent; otherwise, the objection shall be treated as waived.' This rule does not appear to us to have been infringed in this case by the appellants. It must have a reasonable interpretation. Its object is to prevent a party from knowingly withholding his objection, until he discovers the effect of the testimony, and then if it turns out to be unfavorable to interpose his objection. Such a course could not be allowed. It is very obvious from reading the bill of exceptions in this case, that such a purpose could not be justly ascribed to the plaintiffs' attorneys. There is nothing to show that they waived their objection or consented to the copy of the letter being read. It was not submitted to their inspection before it was offered, as is the usual and proper course. But it appears that in the hurry of the trial, probably from a momentary inadvertence on their part, a portion of the letter had been read to the jury, when the objection was interposed in good faith and with reasonable diligence. In our judgment it would be too strict and narrow a construction of the rule, to deny them under such circumstances, the right to make their objection."

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

Where the question is in tenor not improper, but is answered with inadmissible matter *not responsive* to the question, an objection made upon the answer is seasonable; its form here is a *motion to strike out* the answer.[3]

[3] 1913, Marinoni *v.* State, 15 Ariz. 94, 136 Pac. 626 (collecting cases); 1915, Hodges *v.* Wilson, 165 N. C. 323, 81 S. E. 340.

Distinguish the doctrine of *non-responsive* answers in chancery (*post*, § 785).

Of course, where the objection could have been made at the time of the question, a later *motion to strike out* need not be granted; this seems elementary logic; 1906, State *v.* Forsha, 190 Mo. 296, 88 S. W. 746; 1913, Sanger *v.* Bacon, 180 Ind. 322, 101 N. E. 1001 (no objection being made at the time of question or to answer, a later motion to strike out is too late).

This rule, as sometimes stated, is given a supplement, namely, that where objection is not made, to an obviously improper question, *until the answer of the witness has been given*, then the *trial Court's discretion* in not striking out the answer will be conclusive unless abused; 1906, State *v.* Hummer, 73 N. J. L. 714, 65 Atl. 249; 1919, State *v.* Gile, 93 Vt. 142, 106 Atl. 829 ("The answer was responsive to the question, and the objection and exception were too late"); 1919, Thayer *v.* Glynn, 93 Vt. 257, 106 Atl. 834. This qualification is too loose; if counsel does not make timely objection, that should be an absolute end of any prohibitory

(2) For evidence taken *by deposition before trial*, the general principle is that the objection should be made at the time of the taking (or in general by motion to suppress before trial [4]), if the ground of the objection was such as might have been obviated before trial, but otherwise not, because the officer has ordinarily no power to disallow answers; in other words, the objection before trial serves as a notice required by fairness to the opponent, rather than as a means of excluding the evidence or obtaining a ruling:

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

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

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

But so broad a principle is seldom stated.[5] The doctrine is usually dealt with in specific rules.[6] Objections to the *procedure* of taking and the *form* of the

rule of evidence that might have been involved. The ruling in People *v.* Scattura, 238 Ill. 313, 87 N. E. 332 (1909), that upon an irrelevant non-responsive answer a motion to strike out, not made till the close of argument, suffices, is totally unjustifiable.

For other aspects of a *motion to strike out*, see *post*, § 19, par. (2), and *infra*, this section.

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

[5] This general principle, by which the incurability of the objection is taken as the test, is found stated in the following cases also: *Canada:* 1914, Elgin City B. Co. *v.* Mawhinney, 17 D. L. R. 577, Alta. (order to use "saving all just exceptions", construed); *Federal:* 1865, Blackburn *v.* Crawfords, 3 Wall. 175, 191 (similar to York Co. *v.* Central R. Co., quoted *supra*); *Illinois:* 1901, Albers Commission Co. *v.* Sessel, 193 Ill. 153, 61 N. E. 1075 (good opinion, reviewing the Illinois rulings); 1911, Hutchinson *v.* Bambas, 249 Ill. 624, 94 N. E. 987 (questions as to letters not produced); 1912, Bjork *v.* Glos, 256 Ill. 447, 100 N. E. 233 (objections to abstracts of title, made at the time of an application for registration before a title-examiner, held insufficient, because not specifying at the time certain grounds of objection which could have been obviated).

The general subject is treated in the following works: 1880, Weeks, Depositions, §§ 389, 413, 423; 1880, Thompson, Trials, I, § 701; 1894, Elliott, General Practice, I, § 413.

[6] The statutes authorizing depositions usually lay down some rule in general and inflexible terms:

CANADA: *Ont.* Rules of Court 1913, No.

document must be made before trial;[7] so also objections to the manner of the *interrogatories*, for example, as improperly leading the deponent,[8] or to the manner of the answers, as being insufficient or irresponsive.[9] On the other hand, objections to the *materiality* or *relevancy* of particular facts need not be made until the trial.[10] The *disqualification* of a witness is sometimes

343; *B. C.* Rules of Court 1912, No. 496; *N. Sc.* Rules of Court 1919, No. 13; UNITED STATES: *Fed.* Sup. Ct. Rule (1912) No. 13; U. S. Equity Rules (1913) No. 46, No. 51; C. C. A. Rule No. 12, *Ala.* Code 1907, § 4042; *Alaska:* Comp. L. 1913, § 1488; *Ariz.* Rev. St. 1913, Civ. C. § 1716; P. C. § 881 (committing magistrate); *Ark.* Dig. 1919, § 4249; *Cal.* C. C. P. 1872, §§ 2025, 2032; *Fla.* Rev. G. S. 1919, § 2760; *Ga.* Rev. C. 1910, §§ 5866, 5904, 5913; *Haw.* Rev. L. 1915, §§ 2572, 2582; *Ida.* Comp. St. 1919, §§ 8020, 8021; *Ind.* Burns Ann. St. 1914, §§ 454, 455; *Kan.* G. S. 1915, § 7266; *Ky.* C. C. P. § 587; *La.* C. Pr. 1870, § 439, §§ 480, 481; *Me.* Rev. St. 1916, c. 112, § 18; *Mass.* Gen. L. 1920, c. 233, § 36; *Mich.* Comp. L. 1915, § 12493 (chancery); § 12497 (depositions in general); *Minn.* Gen. St. 1913, § 8392; *Mo.* Rev. St. 1919, § 5469; *Nebr.* Rev. St. 1922, § 8898; *N. Mex.* St. 1919, Mar. 10, c. 20, § 5; *N. Y.* C. P. A. 1920, § 305; *N. C.* Con. St. 1919, § 1819; *N. D.* Comp. L. 1913, §§ 7906, 7931 (time for taking exceptions to depositions; but the draftsman meant "objections"); *Oh.* Gen. Code Ann. 1921, § 11546; *Texas:* Rev. Civ. St. 1911, §§ 3672, 3677; *Utah:* Comp. St. 1917, § 7176; *Vt.* Gen. L. 1917, § 1933 (objections to competency of the witness may be made to the court where offered); *Wash.* R. & B. Code 1909, § 1244; *Wis.* Stats. 1919, §§ 4090–4092; *Wyo.* Comp. St. 1920, §§ 5850–5853.

[7] *Federal:* 1906, Columbus R. Co. *v.* Patterson, 143 Fed. 245, C. C. A.; *Ala.* 1919, Sovereign Camp W. W. *v.* Pritchett, 203 Ala. 33, 81 So. 823 (objection to deposition based on place of residence, held ineffective after trial begun, under Code § 4042); *Cal.* 1908, King *v.* Green, 7 Cal. App. 473, 94 Pac. 777; *D. C.* 1898, Meyer *v.* Rothe, 13 D. C. App. 97, 99; *Ga.* 1905, White *v.* Southern R. Co., 123 Ga. 353, 51 S. E. 411 (applying Code § 5314); *Mass.* 1918, Re Derinza, 228 Mass. 435, 118 N. E. 942; *Mo.* 1873, Delventhal *v.* Jones, 53 Mo. 460, 462 ("A party should not be permitted to lie by and lull his adversary into a false sense of security by failure to file any motion to suppress his depositions, thus induce him to announce himself ready for trial, and then count on springing the question of some informality on him for the first time when he offers to read those depositions in evidence"); *Nebr.* 1911, Essex *v.* Ksensky, 90 Nebr. 437, 133 N. W. 868; *N. Car.* 1903, Willeford *v.* Bailey, 132 N. C. 402, 43 S. E. 928; *N. Dak.* 1902, Neland *v.* Dealy, — N. D. —, 89 N. W. 325; *Oh.* 1854, Crowell *v.* Bank, 3 Oh. St. 406 ("Exceptions to depositions for other causes than the competency of the witness or the relevancy of the testimony should not be heard unless noted on the depositions, or notice thereof given to the opposite party before the cause is called for trial"); *Okla.* 1912, Eldridge *v.* Compton, 30 Okl. 173, 119 Pac. 1121 (defect in notary's certificate); *Utah:* 1908, Groot *v.* Oregon Short Line, 34 Utah 152, 96 Pac. 1019 (witness not reading over the deposition); *Va.* 1877, Hord *v.* Colbert, 28 Gratt. 49, 54; *Wis.* 1921, Erickson Co. *v.* Farnum, — Wis. —, 185 N. W. 177 (under Stats. § 4091).

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

[8] 1931, Woodman *v.* Coolbroth, 7 Greenl. Me. 181, 184; 1847, Glasgow *v.* Ridge, 11 Mo. 40; 1849, Walsh *v.* Agnew, 12 Mo. 525; 1850, Whipple *v.* Stevens, 22 N. H. 219, 224 (since it is an objection "which if brought to the attention of the opposite party might be obviated"); 1849, Chambers *v.* Hunt, 22 N. J. L. 552, 562; 1810, Sheeler *v.* Speer, 3 Binn. Pa. 133; 1823, Strickler *v.* Todd, 10 S. & R. Pa. 73; 1869, Hill *v.* Canfield, 63 Pa. 77, 84.

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

[9] 1846, Spence *v.* Mitchell, 9 Ala. 744, 749; 1856, McCreary *v.* Turk, 29 Ala. 244, 246; 1876, Louisville & N. R. Co. *v.* Brown, 56 Ala. 411, 413 ("The reason of the rule is that the objection is founded on a defect which can be cured; it is unlike an objection to the relevancy or competency of the evidence"); 1912, Standard Talking M. Co. *v.* Matthews S. Co., 6 Ala. App. 188, 60 So. 481 (reviewing the cases); 1875, Sturm *v.* Ins. Co., 63 N. Y. 77, 87 ("He should take an earlier opportunity for action, so that, if [he is] successful, his opponent might move for a commission to examine his witness anew out of court or might obtain a personal attendance at the trial").

[10] 1847, Wall *v.* Williams, 11 Ala. 826, 834; 1859, Walker *v.* Walker, 34 Ala. 469, 472, *semble;* 1909, Floral Creamery Co. *v.* Dillon, 83 Conn. 65, 75 Atl. 82; 1873, McCoy *v.* People, 71 Ill. 111, 116, *semble* ("It is the duty of a party who offers to read a deposition in

removable by the party, sometimes not; and hence some Courts are found insisting on objection before trial,[11] others not;[12] the truth is that it must depend on the nature of the disqualification.[13] So, too, of the *auxiliary rules*, such as the production of a documentary original, or its authentication; in so far as these objections may be curable in the interval before trial, they should be made before trial.[14] When the *trial* comes, it is necessary to make formal objection, even when objection was already made before trial,[15] because the former objection was essentially only a notice to the proponent and there was no opportunity for securing a judicial ruling upon it.

A failure to object at one trial precludes the opponent at any *subsequent trial* from further objection, for the reason and to the extent that a failure to object before the first trial would have precluded him;[16] and of course no

evidence to know in advance that the questions and answers are relevant"); 1878, Myers *v.* Murphy, 60 Ind. 282, 285 ("the motion to suppress was made before the trial of the cause and at a time when the Court could not possibly know whether the depositions would be relevant or irrelevant"); 1897, Winters *v.* Winters, 102 Ia. 53, 71 N. W. 184 (confidential communication to a physician); 1901, Wanamaker *v.* Megraw, 168 N. Y. 125, 61 N. E. 112 (under C. C. P. § 611); 1904, Cudlip *v.* Journal Pub. Co., 180 N. Y. 85, 72 N. E. 925 (under C. C. P. § 911, since objections to a deposition need not be noted at the taking, the cross-examiner may on the trial object to parts of his cross-examination when offered by the opponent after the former's refusal to offer them).

[11] *Federal:* 1825, U. S. *v.* One Case of Hair Pencils, 1 Paine 400; 1872, Shutte *v.* Thompson, 15 Wall. 151, 160; *Cal.* 1919, People *v.* Hogan, 11 Cal. App. 599, 105 Pac. 933; *Ill.* 1863, Mosbier *v.* Knox College, 32 Ill. 155, 163. *Mont.* 1903, Bair *v.* Struck, 29 Mont. 45, 74 Pac. 69; *Nev.* 1915, McLeod *v.* Miller & Lux, 40 Nev. 447, 153 Pac. 556; *N. Y.* 1835 Gregory *v.* Dodge, 14 Wend. 593 (quoted *supra*); *Pa.* 1904, Mease *v.* United T. Co., 208 Pa. 434, 57 Atl. 820; *Utah:* 1919, Roe *v.* Schweitzer, 55 Utah 204, 184 Pac. 939 (principle applied to an offer of three witnesses after exclusion of a certain question); *Wyo.* 1904, Stickney *v.* Hughes, 12 Wyo. 397, 75 Pac. 945.

[12] *Fla.* 1908, Putnam *v.* State, 56 Fla. 86, 47 So. 864; *Mass.* 1829, Talbot *v.* Clark, 8 Pick. 51, 56 ("All question as to the form of the interrogatories should be made before the commission goes, to give the other party opportunity to vary his interrogatories; but objections to the competency of a witness should be made to the Court at the trial"); 1858, Adams *v.* Wadleigh, 10 Gray 360; *Nebr.* 1903, Woodard *v.* Cutter, — Nebr. —, 96 N. W. 54; *Oh.* 1854, Crowell *v.* Bank, 3 Oh. St. 406 (quoted *supra*, n. 7).

[13] 1901, Albers Commission Co. *v.* Sessel, 193 Ill. 153, 61 N. E. 1075 (incompetent survivor; the objection being here incurable).

An objection to a *deposition* on the ground that the witness is *present in the court* need not be made till then; but special circumstances affect the time of making this objection (*post*, § 1415).

[14] 1865, York Co. *v.* Central R. Co., 3 Wall. U. S. 107, 113 (see quotation *supra;* an objection on the ground that the original of a document, proved by copy, was not accounted for, was required to be made at the time of taking); 1916, Foldager *v.* Atwood-Stone Co., 38 S. D. 16, 59 N. W. 891 (applying C. C. P. § 525).

A *claim of privilege* involves the question of the officer's power to compel an answer (*post*, § 2195).

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

[15] 1921, Arizona B. Copper Co. *v.* Dickson, 22 Ariz. 163, 195 Pac. 538 (deposition, objected to at the preliminary hearing, but not at the trial); 1920, Levy *v.* Doerhoefer's Ex'r, 188 Ky. 413, 222 S. W. 515; 1867, Fant *v.* Miller, 17 Gratt. Va. 187, 227.

[16] 1910, Belskis *v.* Dering Coal Co., 246 Ill. 62, 92 N. E. 575 (failure to object to a spontaneous exclamation does not bar objection at the second trial); 1862, Alverson *v.* Bell, 13 Ia. 308; 1856, Bartlett *v.* Hoyt, 33 N. H. 151, 162 ("The caption of a deposition, when it has been produced in court and the deposition which it contained has been permitted to be used unquestioned, has performed its office, and it would seem to be entirely idle . . . [to permit the opponent to object later] when he has already had that opportunity, and has in effect conceded it to be sufficient"); 1904, Meekins *v.* Norfolk & S. R. Co., 136 N. C. 1, 48 S. E. 501 (former testimony of one deceased between the trials; a certain hearsay part of his testimony excluded, although not objected to at the former trial); 1862, Randolph *v.* Woodstock, 35 Vt. 291, 294 ("The party taking it has the right to consider all objections relative to the taking waived, and may allow his witness to go out of the country, or not produce him on another trial, or take the risk of his decease, relying upon having secured his testimony").

objection at all will be heard when made for the first time in the *court of appeal.*[17]

b. Form of the Objection. An objection, like an offer, must be *positive,* not hypothetical or contingent. Hence, it cannot be *reserved* or *postponed* by notifying the Court, at the time when it should be made, that it will possibly be made in the future; [18] unless, through the length of a deposition, for example, or a complication of relevancies, it is not practicable for the opponent to know whether there is ground for objection.[19] The test is, whether he at the time of the offer knows or could know the grounds; if he does, his decision must be absolute, not contingent.[20]

The term "*motion to strike out evidence*" is used in some localities to represent a form of objection. It is, however, an ambiguous and unsatisfactory term, because the things signified by it are otherwise better known in orthodox practice. The following uses of the term are to be distinguished:

(1) A motion to strike out a piece of evidence which *ought to have* been *objected to* at the time of its offer is merely another term for an *objection,* and is governed by the rules as to the time of an objection (*supra,* par. *a,* notes 1–17).

(2) A motion to strike out evidence which was admitted *conditionally on the subsequent supplying of other evidence* is a mode of taking advantage of the doctrine of *conditional admissibility* (*ante,* § 14, *post,* § 1871).

(3) A motion to strike out a certain class of testimony which is required by law to be *corroborated* in order to be legally effective may be a proper method of taking advantage of such rules (*post,* §§ 2030–2091).

(4) A motion to strike out a *document* which in the course of the evidence turns out not to be properly authenticated may be a proper method of excluding it (*post,* §§ 2129–2169).

(5) A motion to strike out *any mass of evidence* which at the close of a case appears insufficient for the particular issue may serve to eliminate it; but more usually the same purpose will be better attained by a motion to take the case from the jury or by an instruction to the jury (*post,* §§ 2494–2496).

(6) Where the answer to an unobjectionable question is inadmissible and *non-responsive* a motion to strike out the answer is the proper form (*supra,* n. 3). But here the point is simply that the rule requiring an objection to

[17] 1920, Logan *v.* Mutual Life Ins. Co., 293 Ill. 510, 127 N. E. 688 (contract); 1902, Stewart *v.* Conrad, 100 Va. 128, 40 S. E. 624; and cases cited *post,* par. (*c*).

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

There is, however, a rule of general application to *infants,* as a part of which the Court will rule in their favor on points upon which no exception was taken on their behalf: 1904, Parker *v.* Safford, 48 Fla. 290, 37 So. 567.

Compare § 1076, notes 7, 8, *post,* and § 1063.

[18] 1835, Gregory *v.* Dodge, 14 Wend. 593, 595, 615 (a reservation of "every objection to the competency of the witness and all other legal exceptions", made at the outset of an examination, held insufficient when not followed by any formal and specific objection); 1906, Benton *v.* State, 78 Ark. 284, 94 S. W. 688 (an objection "to all evidence of actions, conversations, etc., after the commission of the offence", does not avail for subsequent testimony of the sort, unless by consent).

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

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

be made *before* the answer is uttered does not on principle apply; and the tardy motion to strike out is justified, not merely because the answer is non-responsive, but because it is *inadmissible* in its tenor. An unfounded notion is often seen that a non-responsive answer is in itself improper; this fallacy is examined more fully *post*, § 785.

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

(1) *General Objection.* The cardinal principle (no sooner repeated by Courts than it is ignored by counsel) is that a *general objection, if overruled,* cannot avail:[21]

[21] *Accord:* CANADA: 1881, Allen *v.* McDonald, 20 N. Br. 533.

UNITED STATES: *Federal:* 1886, Noonan *v.* Mining Co., 121 U. S. 393, 7 Sup. 911 ("The objection 'incompetent, immaterial, and irrelevant' is not specific enough"); 1890, Patrick *v.* Graham, 132 U. S. 627, 629, 10 Sup. 194; 1890, District of Columbia *v.* Woodbury, 136 U. S. 450, 462, 10 Sup. 990; 1892, Toplitz *v.* Hedden, 146 U. S. 252, 254, 13 Sup. 70; 1897, New York El. Eq. Co. *v.* Blair, 25 C. C. A. 216, 79 Fed. 896 ("a specimen of a practice not to be encouraged, which is to object with a rattle of words that conceal the real nature of an objection capable of being removed on the spot, and to announce its true character for the first time in the appellate court"); 1904, Choctaw, O. & G. R. Co. *v.* McDade, 191 U. S. 64, 24 Sup. 24; 1918, Shea *v.* U. S., 6th C. C. A., 251 Fed. 433 ("I object", held insufficient, where defendant was being cross-examined); 1919 Wayne *v.* Venable, 8th C. C. A., 260 Fed. 64 ("We object", held insufficient); 1922, Curtis *v.* North American Indian Co., 9th C. C. A., 277 Fed. 909 (objection to a certificate of incorporation because not authenticated as provided by the U. S. statutes, held not specific enough);
Alabama: 1904, Weaver *v.* State, 139 Ala. 130, 36 So. 717; 1907, Sanders *v.* Davis, 153 Ala. 375, 44 So. 979; 1921, Wigginton *v.* State, 17 Ala. App. 651, 87 So. 698;
Arkansas: 1914, Hammel *v.* St. Louis I. M. & S. R. Co., 113 Ark. 296, 168 S. W. 144 (privileged communication);
California: 1897, Wise *v.* Wakefield, 118 Cal. 107, 50 Pac. 310 (impeaching one's own witness); 1897, Yaeger *v.* B. Co., — Cal. —, 51 Pac. 190 (mode of cross-examining);
Georgia: 1895, Harris *v.* Lumber Co., 97 Ga. 465, 25 S. E. 519 (good opinion by Lumpkin, J.); 1903, Andrews *v.* State, 118 Ga. 1, 43 S. E. 852;
Illinois: 1904, Illinois C. R. Co. *v.* Prickett, 210 Ill. 140, 71 N. E. 435 (qualified rule); 1907, Merchants' & F. State Bank *v.* Dawdy, 230 Ill. 199, 82 N. E. 606 (deed); 1921, People *v.* Jennings, 298 Ill. 286, 131 N. E. 619 (former conviction not evidence by copy of a record);
Indiana: 1905, Hicks *v.* State, 165 Ind. 440, 75 N. E. 641; 1907, Williams *v.* State, 168 Ind. 87, 79 N. E. 1079 (irrelevant and immaterial); 1915, Eckman *v.* Funderburg, 183 Ind. 208, 108 N. E. 577 ("incompetent and irrelevant and not tending to support any of the issues in this cause");
Iowa: 1917, Secor *v.* Siver, — Ia. —, 161 N. W. 769 ("incompetent and unqualified" does not suffice);
Maryland: 1855, Pegg *v.* Warford, 7 Md. 582, 603;
Minnesota: 1907, Goss *v.* Goss, 102 Minn. 346, 113 N. W. 690 (warning as to prior self-contradictions);
Missouri: 1904, Longan *v.* Weltmer, 180 Mo. 322, 78 S. W. 655 (hypothetical question); 1914, Hafner Mfg. Co. *v.* St. Louis, 262 Mo. 621, 172 S. W. 28 (Lamm, J.: "We think the time has come when, for the convenience of apt designation, this stereotyped objection may (without lowering the dignity of our case) be termed 'the three i's.' On a similar ground we may say that these i's, like the mere germinating eyes of the potato, see not, and are of little or no sensible use in the administration of justice. We have been lately over the philosophy of the matter in State *v.* Diesner, 255 Mo. 346, 164 S. W. 517");
Nebraska: 1904, Weatherford *v.* Union P. R. Co., — Nebr. —, 98 N. W. 1089; 1919, Neal *v.* State, 101 Nebr. 56, 175 N. W. 671;
New Jersey: 1903, State *v.* Hendrick, 70 N. J. L. 41, 56 Atl. 247 (pointing out special modes of curing the defect); 1905, Willet *v.* Morse, — N. J. L. —, 60 Atl. 362;
New York: 1913, People *v.* Cummins, 209 N.Y. 283, 103 N. E. 169 (equally for criminal cases);
North Dakota: 1908, Buchanan *v.* Minneapolis T. M. Co., 17 N. D. 343, 116 N. W. 335; 1909, Flora *v.* Mathwig, 19 N. D. 4, 121 N. W. 63;
Oklahoma: 1904, Enid & A. R. Co. *v.* Wiley, 14 Okl. 310, 78 Pac. 96;
Oregon: 1914, State *v.* Von Klein, 71 Or. 159, 142 Pac. 549 (a general objection overruled,

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

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

1874, DUNNE, C. J., in *Rush* v. *French*, 1 Ariz. 99, 123, 25 Pac. 816: "A party wishing the benefit of the remedy must, at the time he complains, show how he is hurt; in the language of the old authorities, he must lay his finger upon the point of objection. . . . He must not merely complain in a general way, and say that to let certain evidence in will hurt his case, and that under the law it ought to be excluded, and leave the judge and opposite side in the dark as to what principle of law he relies on, and compel them to decide haphazard, or else stop the trial of the cause, with a jury waiting, while the counsel examine the whole body of the law, from the earliest judicial expositions down to the latest act of the legislature, to see if they can discover any valid objection to the testimony. The opposing counsel can make no reply to a general objection, except to throw the whole responsibility upon the judge at once, or else begin systematically and argue that under any possible objection the testimony should come in. Many trials under such a system would

to testimony by a wife, who was competent to prove marriage, held insufficient where the specific objection that the husband did not consent should have been made);
Pennsylvania: 1916, Philadelphia Wrecking Co. v. Nolen, 252 Pa. 443, 97 Atl. 579 ("I object to the offer, except to the 67 tickets that we admit", held insufficient; approving the text above);
South Carolina: 1903, Colvin v. McCormick C. O. Co., 66 S. C. 61, 44 S. E. 380;
Tennessee: 1880, Garner v. State, 5 Lea 213, 218 (record); 1859, Campbell v. Campbell, 3 Head 325, 329 (contents of tax-books not produced);
Texas: 1906, Newcomb v. State, 49 Tex. Cr. 550, 95 S. W. 1048 (irrelevant and immaterial);
Utah: 1896, Culmer v. Clift, 14 Utah 291, 47 Pac. 85;
Washington: 1905, State v. Nelson, 39 Wash. 221, 81 Pac. 721.
Wisconsin: 1870, Cornell v. Barnes, 26 Wis. 473, 480 ("A general objection to particular questions that they were irrelevant, or immaterial, or improper, was not sufficient");
Contra: 1870, Greenleaf v. R. Co., 30 Ia. 301, 303.

In Groh's Sons v. Groh, 177 N. Y. 8, 68 N. E. 992 (1903), the opinion commits the fallacy of assuming that the terms "immaterial", "incompetent", and "irrelevant", have distinct and fixed meanings. In truth, they are too loose and interchangeable to be treated seriously as if they signified any particular ground of objection.

The topic is dealt with in the following works: 1880, Thompson, Trials, I, § 693; 1894, Elliott, General Practice, II, § 584.

For the same reason, an objection may not be *in gross* to a mass of unspecified testimony. 1905, O'Brien v. Knotts, 165 Ind. 308, 75 N. E. 582 (motion to strike out all testimony on a certain subject, insufficient).

practically never end. The effect of it would be to compel one party to fight in the dark, not knowing when his opponent intended to strike, while the other would be free to choose his weapons, and the time and place to use them. Such things may do in love or war, when all things are said to be fair; but life is too short to transact business on such a system in courts of justice. . . . An objection that the testimony is 'irrelevant' without specifying wherein or how or why it is irrelevant will not be considered in the supreme court as raising any issue, if the testimony could, under any possible circumstances, have been relevant. An objection that the testimony is 'inadmissible' may be disregarded; it amounts to no more than the assertion that the evidence is illegal; the objection should fully and specifically point out how it is inadmissible. When an objection is that the evidence offered is 'incompetent and illegal', it is the duty of the Court to overrule it if the evidence was admissible for any purpose. An objection that evidence is 'incompetent' does not raise any issue as to whether the question is leading or not. The only way to raise such an issue is to object specifically that the question is leading. . . . The object of requiring the grounds of objection to be stated, which may seem to be a technicality, is really to avoid technicalities and prevent delay in the administration of justice. When evidence is offered to which there is some objection, substantial justice requires that the objection be specified, so that the party offering the evidence can remove it, if possible, and let the case be tried on its merits. If it is objected that the question is leading, the form may be changed; if that the evidence is irrelevant, the relevancy may be shown; if that it is incompetent, the incompetency may be removed; if that it is immaterial, its materiality may be established; if to the order of introduction, it may be withdrawn and offered at another time, — and thus appeals could often be saved, delays avoided, and substantial justice administered."

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

The only modification of this broad rule is that if on the face of the evidence, in its relation to the rest of the case, there appears *no purpose whatever* for which it could have been admissible, then a *general objection*, though *overruled*, will be deemed to have been sufficient: [22]

[22] This modification is recognized in the following cases: ENGLAND: 1842, Lord Trimlestown *v.* Kemmis, 5 Cl. & F. 749, 776.

UNITED STATES: *Federal:* 1897, Pittsburgh & W. R. Co. *v.* Thompson, 27 C. C. A. 333, 82 Fed. 720; 1901, Mine & Smelter S. Co. *v.* Parke & L. Co., 47 C. C. A. 34, 107 Fed. 881, 884; 1906, Sparks *v.* Terr., 146 Fed. 371, C. C. A. ("when the reason for the objection is readily discernible"); *Alabama:* 1905, Braham *v.* State, 143 Ala. 28, 38 So. 919; *California:* 1861, Nightingale *v.* Scannell, 18 Cal. 315, 323; 1903, Roche *v.* Llewellyn I. Co., 140 Cal. 563, 74 Pac. 147; 1905, Humphrey *v.* Pope, 1 Cal. App. 374, 82 Pac. 223 (marital communications); *Florida:* 1902, Kirby *v.* State, 44 Fla. 81, 32 So. 836; *Illinois:* 1862, Clauser *v.* Stone, 29 Ill. 114 ("the general rule is unquestionably that objections on the trial, to a paper or other evidence, must be specially pointed out, so that they may be obviated if possible: but

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

But when a general objection is *sustained* by the trial Court, it may be presumed that some valid ground was apparent to the judge without express statement; and as the exception is here to be taken by the proponent of the evidence, it is fair to insist that he should have asked for the specific ground of objection, if he did not perceive it; or should have made an offer to obviate it, if he did perceive it; or should have stated clearly the precise basis of his claim for admissibility, if he had rested on any specific ground. Hence, the general objection will suffice, if on the face of the evidence and the rest of the case there appears to be any ground of objection which might have been valid (or, otherwise stated, if there is any purpose for which the evidence would conceivably be inadmissible):[23]

this rule applies only to cases where the objection can be removed by evidence, or by the act of the party under the sanction of the Court, or by the action of the Court itself"); 1903, Chicago & E. I. R. Co. *v.* Wallace, 202 Ill. 129, 66 N. E. 1096; 1907, Chicago R. I. & P. R. Co. *v.* Rathneau, 225 Ill. 278, 80 N. E. 119; *Indiana:* 1913, Dowell *v.* State, 181 Ind. 68, 101 N. E. 815 (conversation in absence of accused); *Maryland:* 1901, Brewer *v.* Bowersox, 92 Md. 567, 48 Atl. 1060; *Massachusetts:* 1908, Hubbard *v.* Allyn, 200 Mass. 166, 171, 86 N. E. 356 ("If competent for any purpose, it is not rendered incompetent by the fact that it also [might be used for another purpose] . . . for which alone it would not be competent"); *Mississippi:* 1859, Morris *v.* Henderson, 37 Miss. 492, 501; 1882, Heard *v.* State, 59 Miss. 545; 1898, Lipscomb *v.* State, 75 Miss. 559, 23 So. 210; *New York:* 1852, Merritt *v.* Seaman, 6 N. Y. 168, 171 (general objection held good, where it could not have been obviated except by a change of parties); *North Dakota:* 1915, Huston *v.* Johnson, 29 N. D. 546, 151 N. W. 774 (letter of plaintiff to defendant); *Oregon:* 1897, State *v.* Magone, 32 Or. 206, 51 Pac. 452; *Utah:* 1898, Snowden *v.* Coal Co., 16 Utah 336, 52 Pac. 599; *Washington:* 1913, State *v.* Shaw, 75 Wash. 326, 135 Pac. 20; *Wisconsin:* 1872, Ripon *v.* Bittel, 30 Wis. 614, 619 ("If there was any possible purpose for which the books were admissible as evidence, or any supposable state of case in which they ought to have been received, then it was not error to admit them").

On the principle of Multiple Admissibility (*ante*, § 13), it follows that where the opponent, without objecting, desires to restrict the evidence to its sole legitimate purpose, he must *ask an instruction* from the Court, otherwise he cannot complain of the possibility of the jury's having misapplied it to other and improper purposes: Cases cited *ante*, § 13, n. 2.

[23] 1904, Matthews *v.* Farrell, 140 Ala. 298, 37 So. 325 (but here the Court puts its decision on inappropriate grounds); 1918, Archer *v.* Sibley, 201 Ala. 495, 78 So. 849 (unlawful detainer); 1907, Short *v.* Frink, 151 Cal. 83, 90 Pac. 200; 1903, Spohr *v.* Chicago, 206 Ill. 441, 69 N. E. 515; 1904, State *v.* Leuhrsman, 123 Ia. 476, 99 N. W. 140; 1919, International Harvester Co. *v.* Chicago M. & St. P. R. Co., 186 Ia. 86, 172 N. W. 471; 1832, Comstock *v.* Smith, 23 Me. 202, 208 (deposition rejected; "it is not set forth that the rejection took place on account of interest in the deponent, or of informality in the caption, or for irrelevancy; . . . it should have appeared in the exceptions how and in what particulars the plaintiff was aggrieved"); 1897, Emrich *v.* Union Stockyard Co., 86 Md. 482, 38 Atl. 943; 1906, Luckenbach *v.* Sciple, 72 N. J. L. 476, 63 Atl. 244 (good opinion by Garrison, J.); 1877, Tooley *v.* Bacon, 70 N. Y. 34 ("When evidence is excluded upon a mere general objection, the ruling will be upheld, if any ground in fact existed for the exclusion; it will be assumed, in the absence of any request, by the opposing party or the Court, to make the objection definite, that it was understood, and that the ruling was paced upon the right ground"); 1917, Columbia Realty I. Co. *v.* Alameda Land Co., 87 Or. 277, 168 Pac. 64, 440 (broker's commissions); 1921, Prouty Lumber & B. Co. *v.* Cogan, 101 Or. 382, 200 Pac. 905 (general objection sus-

1921, BURNETT, C. J., in *Prouty Lumber & B. Co.* v. *Cogan*, 101 Or. 382, 200 Pac. 905 (sale of logs; the defendant's cross-examination of the plaintiff's witnesses was objected to as "immaterial, irrelevant, improper, incompetent, and not proper subject of cross-examination", and this objection was sustained): "It is said that the objections to the testimony were not sufficiently specific to present the question for review. . . . The general rule that objections to evidence must be specific admits of this exception: That if they cannot in any manner be obviated, or if the evidence is clearly inadmissible for any purpose, a general objection will suffice. The relevancy and materiality of testimony are measured by the issue formed by the pleadings. In the instant case the defendants denied the complaint, and made no other defense. Their offer to prove was entirely foreign to the issues thus formed. It was as if the pleadings had said: 'It is true we owe the plaintiff $3,406.20 for the rived logs in question. However, we sold those logs to the Warren-Scott Company, which in turn by the consent of ourselves and the plaintiff agreed to pay the amount to the plaintiff, and we are to be discharged.' In other words, under the general issue the defendants were attempting to prove a novation, a proposition clearly outside the pale of pleadings or evidence, a clear variance.

"There are authorities to the effect that the Court of its own motion may prevent the introduction of improper evidence. Again, it is said that a reason for the rule against general objections is that it is unfair to the trial Court to make a general objection without particular specification of the grounds of the objection. But in good reason, if the trial judge is possessed of sufficient legal acumen to recognize the validity of the legal conclusion suggested by the general objection, he is at liberty to decide the point and exclude the evidence offered. If for his own information the adverse party requires a more specific objection, he should move for the necessary specifications. He cannot speculate on the decision of the Court, and then complain that the objection is too general. It is quite as much his duty to be fair to the Court as it is that of the other party. Moreover, if he would prevail on appeal, he must put his finger on the error complained of. If the Court is informed of the vice of the testimony offered, it is not necessary for the objecting party to put into his objection a brief on the subject, or to go into tautological detail. There is no error in the record."

(2) *Specific Objection.* A specific objection *overruled* will be effective to the extent of the grounds specified, and no further. An objection overruled, therefore, naming a ground which is untenable, cannot be availed of because there was *another and tenable ground which might have been named* but was not:[24]

tained, to defendant's cross-examination as to the novation of a claim based on a sale, held sufficient, the fact being "entirely foreign to the issues"); 1911, Rosenberg *v.* Sheahan, 148 Wis. 92, 133 N. W. 645.

Contra, on the facts: 1906, Hicks *v.* Hicks, 142 N. C. 231, 55 S. E. 106 (here the unusual suggestion is made that "the judge could have called upon the counsel to state what he expected to prove"; but why could not the counsel himself speak up, without waiting to be prodded?).

[24] *Accord:* ENGLAND: 1845, Ferrand *v.* Milligan, 7 Q. B. 730 (in proving a public right of way over the plaintiff's land, acts of repair by a township surveyor were proved by the defendant, and in rebuttal the plaintiff offered to show a contract of repair by which the plaintiff's steward agreed to pay the surveyor; the defendant's objection that the steward had no authority to make such a contract was overruled; on a motion for a new trial, the further ground of objection that the road to which the contract related was not the road in issue was repudiated, because not specified at the time of the ruling, "its admissibility having been decided upon 'alio intuitu' by the learned judge"); 1838, Williams *v.* Wilcox, 8 A. & E. 314, 337 ("Justice requires this, not so much to the judge, as to the opposite party, who may be willing, as in the present case would probably have been done, rather to waive the benefit of the evidence than put his verdict in peril on the issue of the objection"); 1860, Reed *v.* Lamb, 6 H. & N. 75, 90;

UNITED STATES: *Federal:* 1873, Burton *v.* Driggs, 20 Wall. 125, 133; 1920, Bain *v.* U. S., 6th C. C. A., 262 Fed. 664 (deposition of a bankrupt); *Alabama:* 1904, Parrish *v.* State, 139 Ala. 16, 36 So. 1012 (but otherwise where the nature of the answer may be presumed); *Columbia* (Dist.): 1908, Ferry *v.*

1821, GIBSON, J., in *Wolverton* v. *Com.*, 7 S. & R. 273, 276 (refusing to consider an objection on appeal that the loss of an original record was not shown so as to admit secondary evidence, the objection at trial having been that parol evidence of a record was never admissible): "Now I take it to be an inflexible rule, and one of the utmost value, both in pleading and evidence, that whatever is not denied or made special ground of objection is conceded. Thus, if a party being called on for that purpose opens the particular view with which he offers any part of his evidence, or states the object to be attained by it, he precludes himself from insisting on its operation in any other direction, or for any other object; and the reason is, that the opposite party is prevented from objecting to its competency in any view different from the one proposed. In like manner, a party may be called on to state the particular ground on which he rests an objection to competency, and if it fails him, it is not error to receive the evidence, although it be incompetent on other grounds. Where, therefore, there is a special objection, or, what is the same in effect, a general objection resting, not on collateral circumstances, but on the supposed existence of an abstract principle admitting of no exception, as was the case here, every ground of exception which is not particularly occupied, is to be considered as abandoned. For instance, a deposition is offered, and it is resisted exclusively on the ground, that the witness is interested, or that the evidence is irrelevant; would it not be palpably unjust in a court of error, to listen to an objection, that it did not appear there had been proof of notice, or that the deposition had in all respects been regularly taken? If the defect were pointed out in time, it might be supplied by further proof; or if that were impossible, the party would, at least, be apprised of the danger to ultimate success, which is necessarily incurred by pressing the admission of incompetent testimony. Here, if instead of urging the abstract operation of the rule, the defendants had objected that the case did not fall within the particular exception to it, now relied on, the plaintiffs might have been prepared to show that the execution actually came to the hands of the sheriff, or that it was lost or destroyed; but, as to that, the silence of their antagonists at the trial, had a direct tendency to lead them into a surprise."

Henderson, 32 D. C. App. 41; 1919, McMahon *v.* Matthews, 48 D. C. App. 303; *Florida:* 1903, Brown *v.* State, 46 Fla. 159, 35 So. 82; 1907, Sims *v.* State, 54 Fla. 100, 44 So. 737 (judgment in a civil case, offered on charge of embezzlement); *Illinois:* 1873, McCoy *v.* People, 71 Ill. 111, 115; 1903, Illinois C. R. Co. *v.* Wade, 206 Ill. 523, 69 N. E. 565 (witness' contradiction); 1904, Ewen *v.* Wilbor, 208 Ill. 492, 70 N. E. 575; 1906, O'Donnell *v.* People, 224 Ill. 218, 79 N. E. 639 (conviction of crime to impeach a witness; the objection that a copy of the record should be used was not allowed to be raised on appeal); 1913, Chicago *v.* Gilsdorff, 258 Ill. 212, 101 N. E. 546 (objection to a deed's tenor as not giving title, held unavailable to raise an objection to the certified copy's lack of signature); *Indiana:* 1910, Pulley *v.* State, 174 Ind. 542, 92 N. E. 550 (rape complaint); 1913, Shilling *v.* Varner, 181 Ind. 381, 103 N. E. 404 (drainage assessment); 1919, Koehler *v.* State, 188 Ind. 387, 123 N. E. 111; *Iowa:* 1913, Seckerson *v.* Sinclair, — Ia. —, 140 N. W. 239 (extent of specification for objections to a hypothetical question, considered); *Massachusetts:* 1851, Holbrook *v.* Jackson, 7 Cush. 136, 154 (entries in a mortgagor's books being admitted over an unsound objection based on the ground of some of them not being original and not being made by the parties themselves, the further ground of objection that some of them were made after transfer of title, and therefore could not be used as admissions of a grantor, was repudiated, because not specified at the time of the ruling); 1906, Magnolia M. Co. *v.* Gale, 191 Mass. 487, 78 N. E. 128; *Michigan:* 1903, Weeks *v.* Hutchinson, 135 Mich. 160, 97 N. W. 695; *Missouri:* 1905, Bragg *v.* Metropolitan St. R. Co., 192 Mo. 331, 91 S. W. 527 (hypothetical questions; pungent opinion by Lamm, J.); *New Mexico:* 1921, State *v.* Douthitt, 26 N. M. 532, 194 Pac. 879; *Oklahoma:* 1914, Hartzell *v.* Hartzell, 42 Okl. 390, 141 Pac. 772 (an objection to the competency of a wife's evidence does not suffice to raise an objection to her incompetency as wife to testify against her husband); *Oregon:* 1907, Hildebrand *v.* United Artizans, 50 Or. 159, 91 Pac. 542 (hypothetical question); 1918, State *v.* Mello, 92 Or. 678, 173 Pac. 317 (murder; an objection as to rebuttal evidence offered too late, held not to avail for a defect as to relevancy of threats); *Pennsylvania:* 1917, Scott *v.* American Express Co., 257 Pa. 25, 101 Atl. 96; *Porto Rico:* 1909, Falero *v.* Falero, 15 P. R. 111, 115, 1913, Rodriguez *v.* Porto Rico R. L. & P. Co., 19 P. R. 613; *Tennessee:* 1846, Monteeth *v.* Caldwell, 7 Humph. 13.

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

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

Here, also, however (as with a general objection), it would seem that the objection overruled will be effective, though naming an untenable ground, if there is *no purpose at all* for which the evidence could have been admissible;[25] in other words, a specific objection (like a special demurrer) is at least as good as a general objection. So, too, a specific objection *sustained* (like a general objection) is sufficient, though naming an untenable ground, if some other tenable one existed.[26]

In any event the offer, in relation to the opponent's specific objection, is to be construed as a single whole, just as it must be for the proponent himself (*ante*, § 17); so that where the objection is to a question including *several*

[25] 1897, Presnell *v.* Garrison, 121 N. C. 366, 28 S. E. 409.

[26] 1916, Kansas City So. R. Co. *v.* Jones, 241 U. S. 181, 36 Sup. 513 (in an action in Louisiana for death of an employee, under U. S. S. April 22, 1908, declaring that contributory negligence of an employee does not bar recovery but may be considered to diminish damages, the defendant offered to show the decedent's negligence, and the plaintiff objected on the ground that such negligence was not pleaded; the objection being sustained, the plaintiff was allowed to make the objection general, "to apply to all such evidence"; the appellate Court held that the evidence was not admissible to bar recovery, but would have been admissible if offered to mitigate damage; but that because it was offered without naming that purpose the objection was sufficient; this was virtually holding that a specific objection, when sustained, though naming an untenable ground, was nevertheless effective for another untenable ground because the offeror had not specified the admissible ground; properly held erroneous; but the Court discusses it in terms of the propriety of the offer, whereas the real question seems to be the sufficiency of the objection); 1915, Eckman *v.* Funderburg, 183 Ind. 208, 108 N. E. 577 (witness to insanity); 1877, Eschbach *v.* Hurtt, 47 Md. 61, 65 (an offer of testimony to defendant's reputation among men of the same business was rejected, sustaining the erroneous ground of objection that in malicious prosecution reputation was not in issue upon damages; but the exception was overruled on appeal because the reputation among a particular class of persons was improper; "what this Court must determine is whether the testimony offered was admissible, and not whether a right or wrong reason was assigned for its rejection").

Contra, semble, where the tenable one could have been obviated at the trial: 1908, Arcola *v.* Wilkinson, 233 Ill. 250, 84 N. E. 264.

The following ruling seems erroneous: 1904, People *v.* Albers, 137 Mich. 678, 100 N. W. 908 (perjury; offer of the defendant's good character for veracity, admissible for him as defendant, but not admissible for him as witness because he did not testify; an objection to it was sustained; held erroneous, though the offering counsel did not state the specific purpose).

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

facts [27] or to the *entire testimony* of a witness,[28] and names a ground tenable for one part but not for others, it is insufficient; the opponent must specify, not only his ground, but also the part of the offer to which the ground is applicable.

[27] *Federal:* 1828, Elliott *v.* Peirsol, 1 Pet. 328, 337 ("Courts of justice are not obliged to modify the propositions submitted by counsel, so as to make them fit the case; if they do not fit, that is enough to authorize their rejection"); 1866, U. S. *v.* McMasters, 4 Wall. 680, 682; 1908, Chicago Gt. Western R. Co. *v.* McDonough, 8th C. C. A., 161 Fed. 657, 671 (offer defendant's conduct in making certain repairs; motion to strike out all, held not available on appeal, because a part of the evidence was not objectionable); *Alabama:* 1859, Sayre *v.* Durwood, 35 Ala. 247, 251 (a specific objection to a question calling for an answer in part legal is ineffective; so also a motion to strike out an entire answer for a reason applicable to a part only); 1904, Kirby *v.* State, 139 Ala. 87, 36 So. 721; *Colorado:* 1893, Davis *v.* Hopkins, 18 Colo. 155, 32 Pac. 70; *Dist. Columbia:* 1918, Jackson *v.* U. S., 48 D. C. App. 269, 272; *Florida:* 1904, Markey *v.* State, 47 Fla. 38, 37 So. 53; 1903, Hoodless *v.* Jernigan, 46 Fla. 213, 35 So. 656; 1919, Atlanta & St. A. B. R. Co. *v.* Kelly, 77 Fla. 479, 82 So. 57; 1922, United States Fire Ins. Co. *v.* Dickerson, 82 Fla. 442, 90 So. 613; *Georgia:* 1906, Johnson *v.* State, 125 Ga. 243, 54 S. E. 184; *Idaho:* 1922, Bressau *v.* Herrick, — Ida. —, 205 Pac. 555; *Kentucky:* 1920, Hoskins *v.* Com., 188 Ky. 80, 221 S. W. 230 (letters containing admissions); 1921, Lowery *v.* Com., 191 Ky. 657, 231 S. W. 234 (confession); *Louisiana:* 1906, State *v.* Crump, 116 La. 978, 41 So. 229 (dying declaration); *Mississippi:* 1898, Lipscomb *v.* State, 75 Miss. 559, 23 So. 210 (general rule stated; but in the opinion of Magruder, J., it appears to be somewhat qualified); *Montana:* 1905, Thornton-Thomas M. Co. *v.* Bretherton, 32 Mont. 80, 80 Pac. 10 (series of documents); *Nevada:* 1911, State *v.* Smith, 33 Nev. 438, 117 Pac. 19; *North Carolina:* 1903, State *v.* Ledford, 133 N. C. 714, 45 S. E. 944; *Vermont:* 1921, Walls' Will, — Vt. —, 113 Atl. 822 (several letters offered together);

The following case is peculiar: 1908, Cooper *v.* Bower, 78 Kan. 156, 164, 96 Pac. 59, 794 (breach of marriage promise; plaintiff's question to a witness concerning the plaintiff's admissions, "what she said about any agreement with Mr. C. to marry, and his conduct in relation thereto", was admitted, overruling defendant's general objection; held that the rule requiring the objection to specify the part objected to was not applicable where the offer contained in a single oral question two or more pieces of testimony one of which was objectionable; careful opinion, by Mason, J.; but with deference it is suggested that the opinion does not adequately distinguish the respective bearings of the present principle and of that of § 17, par. *b*, n. 9, *ante;* the spirit of the present principle is to force an objector to be specific; the aim of the other principle is to force an offeror to separate his offer so that no more than their due effect will be given to objections; the other principle does not come to bear until the present one has been fulfilled; now in the case in hand the objector had not done his full duty, hence the offeror was not yet bound to do his, viz. separate the objectionable part to make his offer valid).

[28] *Federal:* 1839, Moore *v.* Bank, 13 Pet. 302, 310; 1845, Camden *v.* Doremus, 3 How. 515, 530 ("It could not be expected, upon the mere suggestion of an exception which did not obviously cover the competency of the evidence nor point to some definite or specific defect in its character, that the Court should explore the entire mass for the ascertainment of defects which the objector himself either would not or could not point to their view"); *Alabama:* 1904, Rhodes *v.* State, 141 Ala. 66, 37 So. 365; *Connecticut:* 905, Spencer's Appeal, 77 Conn. 638, 60 Atl. 289; *Florida:* 1904, Alford *v.* State, 47 Fla. 1, 36 So. 436; 1905, Freeman *v.* State, 50 Fla. 38, 39 So. 785; 1906, Hoodless *v.* Jernigan, 51 Fla. 211, 41 So. 194 (several documents); *Illinois:* 1861, Myers *v.* People, 26 Ill. 173, 176 (objection to the whole testimony of a witness, held insufficient where a part of it related to other crimes and was inadmissible); 1906, Mash *v.* People, 220 Ill. 86, 77 N. E. 92; 1916, People *v.* Walczniak, 273 Ill. 76, 112 N. E. 377 (motion to strike out all testimony, of which only parts were objectionable); *Indiana:* 1885, Louisville N. A. R. Co. *v.* Falvey, 104 Ind. 409, 3 N. E. 389 (motion to strike out certain testimony as a whole, part of which was admissible, held properly denied; "it is the duty of the party to select the competent from the incompetent testimony"); 1889, Jones *v.* State, 118 Ind. 39, 20 N. E. 654; *Iowa:* 1919, Polk Co. *v.* Owen, 187 Ia. 220, 174 N. W. 99; 1918, Little *v.* Maxwell, 183 Ia. 164, 166 N. W. 760; *Kansas:* 1906, State *v.* Simmons, 74 Kan. 799, 88 Pac. 57 (deposition); *Kentucky:* 1919, Gravitt *v.* Com., 184 Ky. 429, 212 S. W. 430; 1920, Hall *v.* Com., 189 Ky. 72, 224 S. W. 492 (affidavits); *Maryland:* 1904, Wilson *v.* Pritchett, 99 Md. 583, 58 Atl. 360; 1911, Russell *v.* Carman, 114 Md. 25, 78 Atl. 903; 1921, Nichols *v.* Meyer, — Md. —, 115 Atl. 786 (conversation); *North Dakota:* 1908, State *v.* Dahlquist, 17 N. D. 40, 115 N. W. 81 (freight records); *Wyoming:* 1906, Metz *v.* Willitts, 14 Wyo. 511, 85 Pac. 380.

Moreover, where a *question* is objected to, and the objection is properly overruled, but the *answer* which follows contains improper evidence, the objection to the question is of no avail; a new objection must be made specifically to the answer; because the answer contains new matter, and the nature of the alleged impropriety cannot be known until the opponent specifies it. Here the form of the objection is a motion to strike out.[29]

d. Waiver of Objection. An objection may of course be expressly waived. Of implied waivers, the usual instance is that of *failure to make the objection* at the *proper time* [30] (*supra*, par. 1). Of course, also, the opponent whose *question calls in advance* for obviously inadmissible evidence has thereby waived objection to the answer.[31] Another instance is the curing of an error of admission by the opponent's *subsequent use of evidence similar* to that already objected to; [32] and perhaps the *prior use* of similar inadmissible evidence

[29] 1877, Gould *v.* Day, 94 U. S. 405; 1918, State *v.* Young, — N. J. L. —, 103 Atl. 173 (where the answer, but not the question, is improper, a motion to strike out must be made); 1911, Henderson *v.* Coleman, 19 Wyo. 183, 115 Pac. 439.

[30] A *failure to object* to a *document* will extend, not only to the genuineness of it, but also to an agent's authority to execute, yet not to its legal sufficiency (*post*, § 2132).

Usually, a failure to *renew* an offer, after the opponent's *withdrawal of an objection improperly sustained*, would be a waiver of the error; but not always: 1905, Main *v.* Radney, — Ala. —, 39 So. 981.

[31] 1921, State *v.* Dougherty, 287 Mo. 82, 228 S. W. 786 (deceased's statement as to cause of death).

It is common learning that a party obtaining a *responsive answer* (*post*, § 785) to a *question asked by himself* has waived objection by the very asking: 1905, O'Brien *v.* Knotts, 105 Ind. 308, 75 N. E. 582. Thus the only question usually can be as to responsiveness; compare *supra*, par. *b*, (6). An example of a poor ruling on this subject is seen in Bishop *v.* Bishop, 124 Ga. 293, 52 S. E. 743 (1905).

[32] CANADA: 1874, Smith *v.* Gerow, 15 N. Br. 425.

UNITED STATES: *Federal:* 1912, Franklin *v.* U. S., C. C. A., 193 Fed. 334 (handwriting testimony); *Alabama:* 1913, Lockridge *v.* Brown, 184 Ala. 106, 63 So. 524 (asking in rebuttal the same improper question already asked by the objector, held not the subject of complaint on appeal); *Arkansas:* 1908, St. Louis I. M. & S. R. Co. *v.* Flinn, 88 Ark. 505, 115 S. W. 142 (opinion testimony); *California:* 1921, Kinley *v.* Largent, — Cal. —, 200 Pac. 937 (waiver of surviving opponent's incompetency); *Dakota:* 1886, Gale *v.* Shillock, 4 Dak. 182, 29 N. W. 661 ("The general rule is that, where a party makes a valid objection to the introduction of evidence and afterwards puts in evidence proving the same facts, he waives his objection"); *Indiana:* 1841, Sanders *v.* Johnson, 6 Blackf. 50, 52 ("The defendant waived the error by introducing another deposition by the same witness testifying to the same facts contained in that which was rejected"); *New York:* 1842, Hayden *v.* Palmer, 2 Hill N. Y. 205, 209 ("This case [of a harmless error] is in principle like the case of a judge erroneously receiving evidence to a fact against the party; to which he excepts, but afterwards insists upon and proves the same fact himself; that has been often allowed to defeat the effect of the exceptions. I believe it has generally been called a waiver of the exception"); *North Dakota:* 1915, First State Bank *v.* Kelly, 30 N. D. 84, 152 N. W. 125 (note; improper evidence as to an understanding limiting liability, held not waived by a cross-examination to the inadmissible facts); *Virginia:* 1906, Southern W. Co. *v.* Blanford's Adm'x, 105 Va. 373, 54 S. E. 1 (custom as to switchlights on other railroads).

But it is otherwise where the subsequent evidence is introduced merely in *self-defense*, to explain or rebut the original evidence; 1900, Salt Lake City *v.* Smith, 43 C. C. A. 637, 104 Fed. 457; 1907, Short *v.* Frink, 151 Cal. 83, 90 Pac. 200; 1904, Chicago City R. Co. *v.* Uhter, 212 Ill. 174, 72 N. E. 195 (personal injuries; the plaintiff having introduced against objection hearsay evidence negativing prior injuries received, the defendant was held not to waive by afterwards rebutting with similar hearsay affirming the injuries); 1900, Richardson *v.* Webster City, 111 Ia. 426, 430, 82 N. W. 921 (objection to opinion evidence of damage, not waived by subsequent similar evidence); 1909, United R. & E. Co. *v.* Corbin, 109 Md. 442, 72 Atl. 606 (the mere cross-examination of the witness on the subject is not a waiver); 1906, State *v.* Beckner, 194 Mo. 281, 91 S. W. 892 (murder; the prosecution having erroneously introduced the defendant's bad character for violence, his rebuttal by evidence of good character held not a waiver); 1907, Cheney's Estate, 78 Nebr. 274, 110 N. W. 731

may be dealt with on the theory of waiver in advance (*ante*, § 15). No doubt other conduct of various sorts may require in fairness to be deemed a waiver.[33]

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

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

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

1876, ALLEN, J., in *Lathrop* v. *Bramhall*, 64 N. Y. 365, 374: "The right to object to evidence as it is offered is a legal right of which the party cannot be deprived, and the right to

(opinion evidence); 1921, Macke *v.* Wagener, 106 Nebr. 282, 183 N. W. 360 (slander); 1921, First National Bank *v.* Middleton, — Okl. Cr. —, 201 Pac. 683 (direct examination of a witness to an improper conversation; cross-examination to the same conversation, held not a waiver); 1900, Horres *v.* Chemical Co., 57 S. C. 192, 35 S. E. 500 (objection to improper opinion of speculative damages, held not waived by subsequent similar evidence).

Compare the rule for *curative admissibility* (*ante*, § 15).

Distinguish the rule that an error of *exclusion* is cured by the opponent's subsequent introduction of the same evidence: 1903, Lloyd *v.* Simons, 90 Minn. 237, 95 N. W. 903; here it is not a waiver that cures, but the immateriality of the error (*post*, § 21).

[33] 1922, McClenahan *v.* Keyes, — Cal. —, 206 Pac. 454 (taking the deposition of a plaintiff disqualified by interest is a waiver, and allows the opponent to use the deposition

authorities collected); 1902, Rice *v.* Waddill, 168 Mo. 99, 67 S. W. 605 (taking a deposition of the opponent, though without filing it, held on the facts to be a waiver of objection to incompetency); 1905, Schutz *v.* Union R. Co., 181 N. Y. 33, 73 N. E. 491 ("where an objection has once been distinctly raised and overruled, it need not be repeated to the same class of evidence"); 1904, Southern L. & T. Co. *v.* Benbow, 135 N. C. 303, 47 S. E. 435 (an offer of a part of former testimony was rejected as being too fragmentary; the whole was then offered and admitted; this was held a waiver of the exception); 1904, Cheek *v.* Oak G. L. Co., 134 N. C. 225, 46 S. E. 488 (similar). R. I. St. 1909, c. 418 (cross-examination of a witness does not waive a prior exception).

The tender by an objector of an *instruction limiting the evidential effect* of evidence admitted *against his objection* is not a waiver of the objection to that ruling: 1904, Myers *v.* Manlove, 164 Ind. 128, 71 N. E. 893.

object and to be heard upon the objection, necessarily implies a like right to a decision by a court or referee, and the refusal to entertain an objection or to pass upon it when made is a denial of a legal right to which an exception lies. . . . The judge or referee has, within proper limits, a discretion as to the order of proof, and may permit facts to be proved provisionally, subject to the condition that other facts shall be subsequently proved which are essential to the competency of the evidence admitted. But when all the facts, upon which the party relies for the admissibility of the evidence, have been put before the Court by him and he has rested his case, the adverse party is then entitled to a definite determination as to the competency of the evidence objected to. It is then no longer a question as to the order of proof, nor is it within the discretion of the Court to postpone the decision. . . . It was their right to know before entering upon their defence what evidence they had to meet, and they were necessarily embarrassed in their defence by the refusal of the referee to pass upon the questions made. A decision adverse to the plaintiffs would not have prevented a renewed offer of evidence upon other facts appearing; and had the evidence been either rejected or admitted, the defendants might have shaped their defence entirely differently from what they were compelled to do, proceeding in ignorance of the fact whether the evidence was in or out of the case as against them." [1]

1915, MORELAND, J., in *Lopez* v. *Valdez*, 32 P. I. 644: "It appears from the record that appellee relied on certain written contracts entered into between the appellant and Marcela Emradura during her lifetime to prove the cause of action set out in the complaint. The documents themselves were not produced and when counsel for appellee sought to prove by certain witnesses the contents of these documents, without presenting facts justifying secondary evidence with reference thereto, counsel for appellant made the objection that the evidence was incompetent and improper as the documents themselves were the best evidence. Several of these objections were made, to each of which the Court, without a decision on the objections, stated: 'The objection of Mr. Reyes will be taken into consideration.' . . . A decision on these objections was thus left in abeyance and the trial terminated without a resolution of the questions presented. . . . We are of the opinion that this procedure was prejudicial to the rights and interests of the appellant. Parties who offer objections to questions on whatever ground are entitled to a ruling at the time the objection is made, unless they present a question with regard to which the Court desires to inform itself before making its ruling. In that event it is perfectly proper for the Court to take a reasonable time to study the question presented by the objection; but a ruling should always be made during the trial and at such time as will give the party against whom the ruling is made an opportunity to meet the situation presented by the ruling. The disadvantageous position in which a party may be put by the reservation of a ruling on an objection to a question is illustrated by the case in hand. If the Court had given a prompt ruling on the objections, appellant would have had no opportunity to meet the situation presented. If his objection had been overruled, he could have taken his exception and offered evidence to rebut that adduced by the objectionable questions. If the ruling had been the other way, appellee would have been under the necessity of offering the documents themselves, at which

§ 19. [1] This passage is from a dissenting opinion; but the majority seem to have differed merely in holding that the opponent was under the circumstances not disadvantaged by the postponement. A ruling, reserved and never rendered, upon an offer objected to and left pending, is therefore equivalent to a ruling of exclusion: 1903, Adams *v.* Elwood, 176 N. Y. 106, 68 N. E. 126 (following Lathrop *v.* Bramhall).

Compare the following case: 1906, Stitt *v.* Rat Portage L. Co., 98 Minn. 52, 107 N. W. 824 (collecting prior rulings in this jurisdiction).

Compare the following, said of a trial in chancery: 1904, Asbury *v.* Hicklin, 181 Mo. 658, 81 S. W. 390 ("The practice . . . of reserving the ruling until the decision of the case is erroneous").

But the reservation of a ruling on evidence *admitted* may well require that the opponent should formally except later for failure to rule, in order to raise the point on appeal: 1904, Naas *v.* Welter, 92 Minn. 404, 100 N. W. 211.

A Connecticut statute (Gen. St. 1918, § 5778) dealing with this subject has some purpose not obvious on its face.

time appellant would have been able to present any defense to them which the facts and circumstances might have required or permitted. There having been no decision during the course of the trial, appellant's counsel had no means of knowing what the ruling of the Court would be on the objection and, consequently, he could not know whether or not he would be compelled to meet any evidence at all; for, if the objection were sustained, then appellee had offered no competent evidence to support his case; whereas, if the objection were overruled, then appellant would not have the benefit of a ruling on his objection or of the exception taken thereto."

(2) An objecting opponent is *not entitled to treat a ruling as final*, and therefore he *cannot complain* of a *subsequent revocation* of a ruling, merely in so far as the *temporary admission* of inadmissible evidence against his objection *may obtain consideration for it in the minds of the jurors;* for the instruction which will accompany the subsequent striking out of the evidence must be supposed to be obeyed by the jurors; except in extreme cases which obviously call for a stricter treatment:[2]

[2] This view represents the only sound doctrine; but it is denied in several courts. Compare the following authorities:

CANADA: 1877, Wilmot *v.* Vanwart, 17 N. Br. 456, 462.

UNITED STATES: *Federal:* 1901, Throckmorton *v.* Holt, 180 U. S. 552, 567, 21 Sup. 474; 1909, Chicago M. *v.* St. P. R. Co. & Newsome, 8th C. C. A., 174 Fed. 394; 1909, Turner & American Security *v.* T. Co., 213 U. S. 257, 29 Sup. 420 ("the general rule is that the admission of incompetent evidence is not reversible error if it subsequently is distinctly withdrawn from the consideration of the jury"; this seems an incorrect mode of statement, for in strictness the revocation of the ruling removes the original ruling and its error); 1919, Kelly *v.* U. S., 6th C. C. A., 258 Fed. 392, 404; 1919, Maytag *v.* Cummins, 8th C. C. A., 260 Fed. 74 (here the judge's withdrawal of the evidence was held insufficient, in an action for slander, in which repetition by others had been erroneously admitted); 1920, James Stewart & Co. *v.* Newby, 4th C. C. A., 266 Fed. 287, 295 (personal injury); 1921, U. S. *v.* Boston C. C. & N. Y. Canal Co., 1st C. C. A., 271 Fed. 877, 893 (an example of the crippling of jury trial by misuse of this principle); *Alabama:* 1904, De Yampert *v.* State, 139 Ala. 53, 36 So. 772; 1914, Watson *v.* Adams, 187 Ala. 490, 65 So. 528; 1917, Maryland Casualty Co. *v.* McCallum, 200 Ala. 154, 75 So. 902; *Arizona:* 1919, McCann *v.* State, 20 Ariz. 489, 182 Pac. 96; *California:* 1907, People *v.* Solani, 6 Cal. App. 103, 91 Pac. 654; *Colorado:* 1905, Johnson *v.* People, 33 Colo. 224, 8 Pac. 133; *Connecticut:* 1920, Drazen *v.* New Haven Taxicab Co., 95 Conn. 500, 111 Atl. 86 (record of conviction, to discredit a witness); 1922, State *v.* Farrone, — Conn. —, 116 Atl. 336 (character evidence); *Illinois:* 1906, Illinois C. R. Co. *v.* Bailey, 222 Ill. 480, 78 N. E. 833; 1921, McKenna *v.* Chicago City R. Co., 296 Ill. 314, 129 N. E. 814 (personal injury); *Iowa:* 1903, Bell *v.* Clarion, —Ia. —, 94 N. W. 907; 1906, State *v.* Moran, 131 Ia. 645, 109 N. W. 187 (confession); 1907, Brown Land Co. *v.* Lehman, 134 Ia. 712, 112 N. W. 185; 1907, State *v.* Scott, 136 Ia. 152, 113 N. W. 758; *Kansas:* 1907, Guilliford *v.* McQuillan, 75 Kan. 454, 89 Pac. 927; *Kentucky:* 1904, Allen *v.* Com., — Ky. —, 82 S. W. 589; 1905, White *v.* Com., 120 Ky. 178, 85 S. W. 753; *Maine:* 1918, Kimball *v.* Davis, 117 Me. 187, 163 Atl. 154; *Maryland:* 1916, Rosenburg *v.* State, 129 Md. 418, 99 Atl. 680; 1905, Baumgartner *v.* Eigenbrot, 100 Md. 508, 60 Atl. 601; *Massachusetts:* 1912, Allen *v.* Boston Elevated R. Co., 212 Mass. 191, 98 N. E. 618 (medical books improperly quoted); *Michigan:* 1904, McNaughton *v.* Smith, 136 Mich. 368, 99 N. W. 382; *Missouri:* 1910, State *v.* Martin, 229 Mo. 620, 129 S. W. 881; 1910, Fuller *v.* Robinson, 230 Mo. 22, 130 S. W. 343; *Montana:* 1910, State *v.* Rees, 40 Mont. 571, 107 Pac. 893; *Nebraska:* 1920, Girch *v.* State, 104 Nebr. 503, 177 N. W. 798 (the opponent must ask for an instruction to disregard evidence thus struck out, if he desires such action); *New Hampshire:* 1909, Connecticut River Power Co. *v.* Dickinson, 75 N. H. 353, 74 Atl. 585; 1921, Capelle *v.* Trober, — N. H. —, 112 Atl. 798; *New Jersey:* 1915, State *v.* Dougherty, 86 N. J. L. 525, 93 Atl. 98 (reviewing prior cases); *New York:* 1901, Ives *v.* Ellis, 169 N. Y. 85, 62 N. E. 138; *North Carolina:* 1919, Stephenson *v.* Raleigh, 178 N. C. 168, 100 S. E. 312; N. D. 1915, Crisp *v.* State Bank, 32 N. D. 263, 155 N. W. 78; *Ohio:* 1903, Mauk *v.* Brundage, 68 Oh. 89, 67 N. E. 152; *Oklahoma:* 1906, Morgan *v.* Terr., 16 Okl. 530, 85 Pac. 718; *Oregon:* 1904, State *v.* Eggleston, 45 Or. 346, 77 Pac. 738; 1914, State *v.* Goff, 71 Or. 352, 142 Pac. 564; *Porto Rico:* 1913, Rivera *v.* Diaz, 19 P. R. 524; 1913, Marquez *v.* Jordi, 19 P. R. 679; *Rhode Island:* 1919, Demara *v.* Rhode Island Co., 42 R. I. 215, 107 Atl. 89; *South Carolina:* 1921, Templeton *v.*

1848, REDFIELD, J., in *Northfield* v. *Plymouth*, 20 Vt. 582, 591: "The question, made in regard to permitting the entire deposition of Dancan to be read to the jury, notwithstanding the general objection of the defendants, and the fact that it contained some irrelevant, and perhaps improper, evidence, is a question of practice, upon which the judge, who conducts the jury trial, must be allowed some reasonable discretion. If there were ample time, it might always be better to determine, in advance, how much of a deposition should be read to the jury even upon a general objection; and in practice, ordinarily, that will be done, where the objection is specific. But very often this course will require too much delay, and always the admissibility of evidence, at the opening of the case, depends so much upon what is expected to be proved thereafter, that great latitude must be allowed, or it may become necessary to reconsider the earlier determinations of the court as the trial progresses. And if improper evidence is admitted it may readily be set right in the charge. The recent English practice, upon this point, is much more liberal, than that which obtained as long ago as the time of Chief Justice Willes."[3]

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

Charleston & W. C. R. Co., — S. C. —, 108 S. E. 363 (personal injury; elaborate opinion by Cothran, J.); *Texas:* 1910, Darnell *v.* State, 58 Tex. Cr. 585, 126 S. W. 1122; 1916, Miller *v.* State, 79 Tex. Cr. 9, 185 S. W. 29 (Prendergast, J., examining the prior rulings; Harper, J., diss.); *Utah:* 1908, Loafbourow *v.* Utah L. & R. Co., 33 Utah 477, 94 Pac. 980; *Vermont:* 1916, Squires *v.* O'Connell, 91 Vt. 35, 99 Atl. 268; *Virginia:* 1918, Taylor *v.* Com., 122 Va. 886, 94 S. E. 795; *Washington:* 1914, State *v.* Gay, 82 Wash. 423, 144 Pac. 711 (statutory rape); *West Virginia:* 1921, Hubbard *v.* Equitable L. Ass. Soc., 88 W. Va. 361, 106 S. E. 786; *Wisconsin:* 1920, Gauerke *v.* Kiley, 171 Wis. 543, 177 N. W. 889 (here noting exceptionally that counsel's delay in asking for withdrawal of evidence erroneously offered by him may make the error irreparable for that jury).

Distinguish the question whether *after a case has been submitted* to a *judge without a jury*, he may cure an erroneous ruling duly excepted to, by striking out and disregarding the evidence in his deliberations: 1916, Oates *v.* U. S., 4th C. C. A., 233 Fed. 201; 1903, Robinson *v.* N. Y. El. R. Co., 175 N. Y. 219, 67 N. E. 431.

So, also, conversely, an erroneous exclusion of evidence may be cured by *subsequently admitting it:* 1904, Post *v.* Leland, 184 Mass. 601, 69 N. E. 361; 1915, Zakrzewski *v.* Great Northern R. Co., 131 Minn. 175, 154 N. W. 966 (if the first ruling was a ruling striking out evidence already admitted, then the ruling of reinstatement cannot be made unless the first ruling had been made after case closed; otherwise there would be no opportunity for rebuttal).

Distinguish the question whether the *party objecting* is entitled to do so by a *motion to strike out* or an *instruction to disregard*, made later in the cause; here, on the principle of § 18, par. *a*, *ante*, the motion or instruction comes too late, if the ground of it was knowable at the time of the offer of the testimony: 1904, Harbour *v.* State, 140 Ala. 103, 37 So. 330.

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

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

§ 20. **The Exception.** The exception serves a double purpose. It makes clear that the party unfavorably affected by the ruling is not satisfied but takes issue; and it sums up and preserves the precise terms of the ruling for the purposes of appeal.[1] Both of these are indispensable. Neither of them is attained by the objection alone. Yet the distinction between objection and exception tends to become confused, and in judicial opinions the rules for exceptions are sometimes spoken of when the rules for objections are really being dealt with.[2] But their functions are distinct. No matter how plain and correct the objection, the exception is still necessary, even though the objector and the exceptor be the same party:[3]

§ 20. [1] It was the latter reason which led chiefly to the statute originally providing for the mode of taking exceptions: 1285, St. 13 Edw. I, Westminster Second, c. 31 ("When one that is impleaded before any of the justices doth alledge an exception, praying that the judges will allow it, which if they will not allow, if he that alledged the exception do write the same exception and require that the justices will put to their seals for a testimony, the justices shall do so; and if one will not, another of the company shall; and if the king, upon complaint made of the justices, cause the record to come before him, and the same exception be not found in the roll, and the plaintiff shew the exception written, with the seal of the justice put to," then if the justice admit his seal genuine, the exception shall be adjudged upon).

But the term "exceptio" as originally used, by adoption from Romanesque law, had in the early usage another meaning, and the conditions of oral pleadings, then practiced, led to problems very different from the later ones of written pleadings. Hence the function of the exception has so changed that the early authorities are merely misleading. This history, and the early practice, are noticed in the following works: 1895, Pollock & Maitland, History of the English Law, II, 663–669; 1838, Chitty, General Practice, IV, c. 1, § 1; and, most acutely and lucidly, in John Maxcy Zane's article on "A Year Book of Richard II" (Michigan L. Rev. XIII, 18, No. 6, April, 1915).

[2] *E.g.* in Reed *v.* Chicago B. & O. R. Co., 98 Nebr. 19, 151 N. W. 936, special opinion of Sedgwick, J., the statement "an exception is an objection", and the remaining discussion, is calculated to obscure the real and useful distinction between them.

[3] *Canada:* 1855, Lawton *v.* Tarratt, 4 All. N. Br. 1, 21 (Gibbs *v.* Pike approved); *United States:* 1915, Atlanta & St. Andrews B. R. Co. *v.* Fowler, 192 Ala. 373, 68 So. 283 (an exception not announced until after the witness' answer and a motion to exclude, the objection having been duly made and overruled before the witness' answer, held too late); 1919, Walker *v.* State, 138 Ark. 517, 212 S. W. 319; 1903, Cady *v.* Cady, 91 Minn. 137, 97 N. W. 580; 1905, State *v.* Bailey, 190 Mo. 257, 88 S. W. 733; 1911, Harding *v.* Missouri Pacific R. Co., 232 Mo. 444, 134 S. W. 641 (noting that herein the procedure for opposing

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

1837, STORY, J., in *Poole* v. *Fleeger*, 11 Pet. 185, 211: "In the ordinary course of things at the trial, if an objection is made and overruled as to the admission of evidence, and the party does not take any exception at the trial, he is understood to waive it. The exception need not, indeed, then be put into form, or written out at large and signed; but it is sufficient that it is taken, and the right reserved to put it into form, within the time prescribed by the practice or rules of the court."

1922, HARRIS, J., in *State* v. *Laundy*, — Or. —, 206 Pac. 290: "What is an exception? What is its office and function? Is it nothing more than an arbitrarily prescribed ceremonial amounting to a meaningless mummery; or is it, like most rules of procedure, a rule based, not upon purely arbitrary grounds, but upon substantial reasons, and hence designed to accomplish in a logical and understandable way a definite purpose? In the language of the Code, 'an exception is an objection taken at the trial to a decision upon matter of law.' Section 169, Or. L. An exception is a protest against a ruling of the Court. It is notice to the Court and opposing counsel that the objector does not acquiesce in the ruling. When, for example, in the course of a trial an objection is made to a question asked a witness, and the Court rules on the objection, the objector may or he may not be satisfied with the ruling. If the objector is satisfied with the ruling, the Court and the opposing attorney are entitled to know it; and so, too, they are entitled to know it if the objector is not satisfied. If the objector is silent after the Court announces its ruling, the presumption is that the objector, after hearing the ruling and the reasons for it, acknowledges the correctness of the ruling and acquiesces in it; and, consequently, in order to prevent the presumption of acquiescence, the objector must ordinarily express his nonacquiescence.

"No particular form is required for expressing an exception, although the usual form is to say: 'I except', or 'I save an exception', or 'exception', or the like. Since one of the reasons for an exception is to give notice that the objector does not acquiesce in the ruling, any language which gives notice that the objector protests against the ruling and does not acquiesce in it ought to be sufficient."

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

(1) *Time of the Exception.* The time of the exception, in some form or other, is to be immediately upon the ruling. In special circumstances, a later time prior to the end of the trial may suffice, and local rules of court

an instruction of the court and an offer of evidence is different, in that no objection is needed for the former; overruling Sheets *v.* Ins. Co., 226 Mo. 613, 126 S. W. 413; Woodson, J., diss.; careful opinions); 1921, State *v.* Prouty, 60 Mont. 310, 199 Pac. 281 (in criminal cases; St. 1915, c. 135, applies only to civil cases); 1851, Lisbon *v.* Bath, 23 N. H. 1, 9 (failure to note, in a bill of exceptions, a particular objection made, held a waiver of the objection); 1914, Kargman *v.* Carlo, 85 N. J. L. 632, 90 Atl. 292 (even since the Practice Act of 1912, § 25, abolishing bills of exception); 1904, Alden *v.* Trent, 178 N. Y. 535, 71 N. E. 104 (applying special Code provisions); 1913, Stroberg *v.* Merrill, 67 Or. 409, 135 Pac. 335 (rule applied to findings by court without jury); 1906, Morgan *v.* Lehigh V. C. Co., 215 Pa. 443, 64 Atl. 633 (referee); 1907, Thomas *v.* Com., 106 Va. 855, 56 S. E. 705.

The following seems peculiar: 1905, Close *v.* Chicago, 217 Ill. 216, 75 N. E. 479 (whether a city ordinance is void on its face does not need an exception, otherwise where the objection is to the insufficiency of description, etc.).

Distinguish the question whether a *bill* of *exceptions* is necessary: 1919, Buessel *v.* U. S., 2d C. C. A., 258 Fed. 811 (on a writ of error, a bill of exceptions must be presented, a stipulation as to contents of the record is not enough, even under U. S. St. Feb. 26, 1919, amending Jud. Code § 269, regarding merely technical errors; this ruling either violates the spirit of that Act, or else shows that the Act has failed in its professed purpose).

often make express regulations. But an immediate claim is usually necessary:

1709, *Wright* v. *Sharp*, 1 Salk. 288: "A corporation-book was offered in evidence at the assizes to prove a member of the corporation not in possession, and refused. No bill of exceptions was then tendered, nor were the exceptions reduced to writing; so the trial proceeded, and a verdict was given for the plaintiff. Next term the Court was moved for a bill of exceptions, and it was stirred and debated in Court. It was urged, that the law requires 'quod proponat exceptionem suam', and no time is appointed for the reducing it into writing, and the party is not grieved till a verdict be given against him; and the same memory that serves the judges for a new trial will serve for bills of exceptions. On the other side it was said, that this practice would prove a great difficulty to judges, and delay of justice; that the predecents and entries suppose the exception to be written down upon its being disallowed, and the statute ought to be construed so as to prevent inconvenience; besides the words of the Act [4] are in the present tense, and so is the writ formed on the Act. HOLT, C. J.: 'If this practice should prevail, the judge would be in a strange condition. He forgets the exception, and refuses to sign the bill, so an action must be brought. You should have insisted on your exception at the trial. You waive it if you acquiesce, and shall not resort back to your exception after a verdict against you, when perhaps, if you had stood upon your exception, the party had other evidence, and need not have put the cause on this point. The statute indeed appoints no time, but the nature and reason of the thing requires the exception should be reduced to writing when taken and disallowed, like a special verdict, or a demurrer to evidence; not that they need be drawn up in form; but the substance must be reduced to writing while the thing is transacting, because it is to become a record.'"

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

(2) *Form of the Exception.* The exception must be *written*, for a main object is to preserve in it the fact and the terms of the dispute. A complete and formal writing may be postponed; but some memorandum there must be at the initial time: [5]

1838, Mr. JOSEPH CHITTY, General Practice, IV, c. 1, § 1: "A bill of exceptions need not be in complete form at the instant it is tendered; but the substance of it ought to be then put into writing, since it is to become a record. In practice, the points of the bill of excep-

[4] Quoted in note 1 *supra*.

[5] The practice as to bills of exception, certificates, etc., depends largely on local rules of court; compare the following: 1906, State *v.* Rodriguez, 115 La. 1004, 40 So. 438 (practice in criminal cases, under St. 1896, no. 113); 1906, Lemmert *v.* Lemmert, 103 Md. 57, 63 Atl. 380; 1904, Hillier *v.* Farrell, 185 Mass. 434, 70 N. E. 424 (before a master, under chancery rules 31 and 32).

tion are usually taken down in writing and signed by the counsel of each party, and the bill of exception is prepared at leisure, or at least without reprehensible hurry."

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

(3) *Tenor of the Exception.* The exception, as formally stated, must contain all that is necessary for determining the issue made. It must therefore include the offer of evidence, the objection with its reasons, the ruling, and the notice of exception taken. Furthermore, if the ruling was one excluding a question, so that the offering party is the exceptor, he must *state the tenor of the expected answer* to the question, and if the objecting party is the exceptor, then the tenor of the *answer given;* so that it may be seen whether this answer was favorable or unfavorable, and therefore whether he has lost by the one or been injured by the other.[6] So far as admissibility may be dependent on

[6] *Accord:* Illustrating the case of an exception to *evidence admitted: Florida:* 1905, Starke v. State, 49 Fla. 41, 37 So. 850; 1905, Caldwell v. State, 50 Fla. 4, 39 So. 188 (here the objection to the question was useless, because the question was not shown, and no objection to the answer as such was made by a motion to strike out); 1906, Hoodless v. Jernigan, 46 Fla. 213, 35 So. 656, 51 Fla. 211, 41 So. 194; *Indiana:* 1904, Dunn v. State, 162 Ind. 174, 70 N. E. 521; *Iowa:* 1903, State v. Booth, 121 Ia. 710, 97 N. W. 74; 1915, American Express Co. v. Des Moines Nat'l Bank, 177 Ia. 478, 152 M. W. 625, 630 (reviewing the cases; an interesting controversy as to the precise requirements of the rule); *Louisiana:* 1904, State v. Lewis, 112 La. 872, 36 So. 788; *Maine:* 1906, Purinton v. Purinton, 101 Me. 250, 63 Atl. 925; *Massachusetts:* 1889, Smethurst v. Barton Sq. Church, 148 Mass. 261, 267, 19 N. E. 387; 1905, Robinson v. Old Colony St. R. Co., 189 Mass. 594, 76 N. E. 190; *Oklahoma:* 1919, Rhoades v. State, 16 Okl. Cr. 446, 184 Pac. 913; *Utah:* 1902, Rio Grande W. R. Co. v. Utah N. Co., 25 Utah 187, 70 Pac. 859; *Vermont:* 1862, Randolph v. Woodstock, 35 Vt. 291, 296 ("Suppose a party offers to prove by a witness some fact which is clearly improper and inadmissible, and the offer is objected to, but the inquiry is allowed, and the witness answers that he has no knowledge on the subject, is this error for which the party objecting is entitled to a new trial? We think not"); 1902, State v. Buck, 74 Vt. 29, 51 Atl. 1087.

Illustrating the case of an exception to *questions excluded: Federal:* 1893, Shaver v. Alterton, 151 U. S. 626, 636, 14 Sup. 442 (answer to a question in a deposition excluded, without a showing in the exception "what answer was made to that question"; "we cannot therefore say that the exclusion of the answer was prejudicial to the plaintiff"; following Packet Co. v. Clough, 20 Wall. 528; but the rule of the present case was misapplied in Buckstoff v. Russell, U. S., cited *infra*, this note); 1911, Harris v. Brown C. C. A., 187 Fed. 6 (stating the modified Federal form of the rule); 1917, Cole Mfg. Co. v. Mendenhall, 4th C. C. A., 240 Fed. 641 (applying Court Rule 11); *Alabama:* 1904, Ross v. State, 139 Ala. 144, 36 So. 718; 1909, Harris v. Basden, 162 Ala. 367, 50 So. 321; 1912, Birmingham R. L. & P. Co. v. Barrett, 179 Ala. 274, 60 So. 262 (reviewing prior cases in this State); *Arkansas:* 1921, Green v. Freeman, 148 Ark. 654, 227 S. W. 982 (conviction of crime); 1921, Webb v. State, 150 Ark. 75, 233 S. W. 806 (murder); *California:* 1919, People v. Bray, 42 Cal. App. 465, 183 Pac. 712 (certificate of death rejected; the motion was not accompanied by an affidavit as to the contents, but counsel orally stated it; held insufficient; this is too strict); *Columbia* (Dist.): 1907, Riddle v. Gibson, 29 D. C. App. 237, 248; 1919, M'Curley v. National Savings & Trust Co., — D. C. App. —, 258 Fed. 154; *Georgia:* 1903, Griffin v. Henderson, 117 Ga. 382, 43 S. E. 712 (see quotation *supra*); Andrews v. State, 118 Ga. 1, 43 S. E. 852 (even on cross-examination, the motion for new trial "should in some way in-

other evidence introduced or offered to be, that other evidence must also be set out. Finally, with reference to determining the materiality of the error if any, the tenor of sufficient of the remaining evidence must be stated; but this is a consequence of the doctrine of new trials (*post*, § 21) and not of the doctrine of exceptions:

1874, DUNNE, C. J., in *Rush* v. *French*, 1 Ariz. 99, 121, 25 Pac. 816: "The cases where we are called on to review rulings on the admission of evidence may be reduced to two classes: 1. When the party objecting was overruled and he appeals; 2. When the party objecting was sustained and the other side appeals. 1. In the first case, where the party objecting was overruled and he appeals, he must show by the record: (1) What the question was, and what answer was given to it, or what the evidence was which was introduced against his objection. This is important because the evidence admitted may not injure him. The answer may have been in his favor. It is not necessary that he should show clearly that he

dicate when the party had been injured by the exclusion"); 1905, Macon *v.* Humphries, — Ga. —, 50 S. E. 986; 1904, Georgia N. R. Co. *v.* Hutchins, 119 Ga. 504, 46 S. E. 659; *Indiana:* 1883, Mills *v.* Winter, 94 Ind. 329, 331 (offer of witnesses to character, rejected; ruling sustained because "the party excepting should see to it that the bill of exceptions is so made up as to show affirmatively that the offer should have been sustained"); 1889, Kern *v.* Bridwell, 119 Ind. 226, 21 N. E. 664; 1901, Pittsburgh C. C. & St. L. R. Co. *v.* Martin, 157 Ind. 216, 61 N. E. 229 (for direct examination); 1902, Hoover *v.* Patton, 158 Ind. 524, 64 N. E. 10; 1903, Dunn *v.* State, — Ind. —, 67 N. E. 940 (reviewing the cases); *Kentucky:* 1904, Com. *v.* Bavarian B. Co., — Ky. —, 80 S. W. 772; *Massachusetts:* 1908, Cook *v.* Enterprise Transp. Co., 197 Mass. 7, 83 N. E. 325; 1921, Rosell *v.* Herscovitz, 237 Mass. 513, 130 N. E. 69 (letters excluded); *Minnesota:* 1914, Uhlman *v.* Farm S. & H. Co., 126 Minn. 239, 148 N. W. 102 (but otherwise for a cross-examination); 1914, In re Buck's Will, Buck *v.* Buck, 126 Minn. 275, 148 N. W. 117; *Missouri:* 1908, State *v.* Page, 212 Mo. 224, 110 S. W. 1057; *Montana:* 1908, Milwaukee G. E. Co. *v.* Gordon, 37 Mont. 209, 95 Pac. 995 (mining claims); *Nebraska:* 1901, Savary *v.* State, 62 Nebr. 166, 87 N. W. 34; 1904, South Omaha *v.* Sutliffe, 72 Nebr. 746, 101 N. W. 797; *North Carolina:* 1913, Smith's Will, 163 N. C. 464, 79 S. E. 977; *Oklahoma:* 1911, Warren *v.* State, 6 Okl. Cr. 1, 115 Pac. 812; 1915, White *v.* State, 50 Okl. 104, 150 Pac. 718; 1918, Johnson *v.* State, 15 Okl. Cr. 297, 176 Pac. 256; *Oregon:* 110, State *v.* Goodager, 56 Or. 198, 106 Pac. 638 (noting some exceptions to the rule, *e.g.* on cross-examination); *Tennessee:* 1905, Union R. Co. *v.* Hunton, 114 Tenn. 609, 88 S. W. 182 (stating the rule's limitations); *Vermont:* 1897, State *v.* Noakes, 70 Vt. 247, 40 Atl. 249; *Virginia:* 1904, Richmond & P. E. R. Co. *v.* Rubin, 102 Va. 809, 77 S. E. 834; 1920, Jeffress *v.* Virginia R. & P. Co., 127 Va. 694, 104 S. E. 393; *West Virginia:* 1904, Williams *v.* Belmont C. & C. Co., 55 W. Va. 84, 46 S. E. 802; *Wisconsin:* 1868, Dreher *v.* Fitchburg, 22 Wis. 675, 680; *Wyoming:* 1903, Keffer *v.* State, 12 Wyo. 49, 73 Pac. 550.

The following provisions apply generally: 1891, *U. S.* Circuit Court of Appeals Rules (150 Fed. XXV), Rule No. 24, Briefs ("... the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected"); *Wyo.* Comp. St. 1920, § 5865 ("The exception must be stated, with the facts, or so much of the evidence as is necessary to explain it"). Distinguish the following ruling: 1893, Buckstaff *v.* Russell, 151 U. S. 626, 636, 14 Sup. 448 (a question without the answer, but to which a relevant answer might obviously have been made, was objected to generally, and the objection was sustained; held on writ of error that the ruling was erroneous, and that it was not necessary to set out the expected answer, but also that the rule should have been otherwise for a question asked on the taking of a deposition; here, it is submitted, the learned Court confounded two distinct rules, viz. (1) the present rule requiring the exception to show the expected answer, which rule is designed to advise the appellate court as to the prejudice if any caused by the trial Court's error, and applies equally to depositions and to 'viva voce' testimony, and (2) the rule of § 18 *ante*, that a general objection sustained will not suffice if on the face of the question no specific ground of objection is obvious; the latter rule was the one really involved).

The subject is treated in Elliott, General Practice (1894), II, § 587.

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

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

1903, LAMAR, J., in *Griffin* v. *Henderson*, 117 Ga. 382, 43 S. E. 712: "While the motion says what she would have testified, it does not appear that the Court was informed thereof *at the time* he excluded her; and therefore we are not permitted to consider this assignment of error. . . . In a few instances there may be one exception, particularly in cross-examinations, where the examining counsel may not know what the answer would be, or is exercising a right to test the witness. But ordinarily the exclusion of oral testimony can be made available as error only by asking some pertinent question, and, if an objection is sustained, informing the Court at the time what the answer would be, so that he can then determine whether the fact is or is not material. It will not do to state thereafter what the witness would have answered. . . . If a new trial should be granted because the answer was excluded, it might happen that on the second trial the question would be again propounded, allowed, and the witness give hearsay, inadmissible, or irrelevant testimony, or the answer might be harmful instead of helpful, or the witness may reply, 'I do not know', with the result that the time and money of the parties and the country has been wasted for so inconsequent a conclusion. That this is not unlikely to occur is shown by the experience of all practising lawyers, who have often seen a long and heated argument as to the right to ask a question, followed by the laughter of all bystanders when the Court held it competent, and the witness replied that he knew nothing about the matter. Parties can often agree in the presence of the Court as to what the witness would testify, or, if not, the witness or examining attorney can state what the answer would be; and, where the subject-matter is important, the judge may, in his discretion, retire the jury until its admissibility has been settled. We are well aware that the rule may be perverted into a means of getting inadmissible evidence before the jury, or, by forcing their constant withdrawal, retard the trial. The Courts must rely upon the good faith of counsel not to bring about such a result. But it would never do to grant a new trial until it appeared not only that the question was proper, but that the answer was material, and would have been of benefit to the complaining party."

(4) *Confirmation by Motion for New Trial.* By the orthodox English practice (doubtless still followed in some of our jurisdictions) the remedies

of new trial and of bill of exceptions were regarded as alternative and mutually exclusive.[7] Moreover, the bill of exceptions came to be only rarely chosen for establishing errors in evidence-rulings, partly because of its greater formality and expense, partly because the extensive discretion in granting new trials gave an ample remedy,[8] and partly because the tradition persisted (ever since the statute of Edward I) that a bill of exceptions involved in some degree a reflection on the trustworthiness of the trial judge, as being incapable or unwilling to note correctly the point of dispute.[9] But in the United States the orthodox practice fell extensively out of use. The bill of exceptions came to be the usual method of raising questions upon evidence, — chiefly, no doubt, because the English judicial custom of taking full notes of evidence was not kept up, except in early times in a few of the older jurisdictions. The two remedies not only ceased to be mutually exclusive, but a rule arose that a bill of exceptions *must be confirmed afterwards by a motion for a new trial,* as a condition precedent to the consideration of the bill on appeal.[10] The reason for this rule has been thus stated:

1885, GREEN, J., in *Danks* v. *Rodeheaver,* 26 W. Va. 274, 298: "If either party were allowed to have the rulings of the Court below, which had been properly excepted to and a bill of exceptions taken at the proper time, reviewed without his making a motion for a new

[7] 1818, Doe *v.* Roberts, 2 Chitty 272; 1828, Tidd's Practice, 9th ed., 11, 863.

[8] 1838, Chitty, General Practice, V, c. 1, § 1.

[9] Gibbs *v.* Pike, 9 M. & W. 351 (quoted *supra*); Bulkeley *v.* Butler, 2 B. & C. 445. Campbell says of Lord Mansfield (Lives of the Chief Justices, III, 293): "In all his time, there was never a bill of exceptions tendered to his direction." It is worth noting that the old reason, namely, distrust of the judge's accuracy, which led to the original English statute, produced recently in Louisiana, in consequence of the overt-act doctrine for a deceased's threats in homicide, a statute stiffening the practice as to the immediate recording of the evidence leading to the exception (*post,* § 246, n. 13).

[10] The opinion in the above case collects and examines the authorities. *Accord:* 1853, Phelps *v.* Mayer, 15 How. U. S. 160; 1905, McClintock *v.* Frohlich, 75 Ark. 111, 86 S. W. 1001; 1905, Spring Valley Coal Co. *v.* Chiaventone, 214 Ill. 314, 73 N. E. 420; 1905, Storer *v.* Markley, 164 Ind. 535, 73 N. E. 1081; 1921, Welch *v.* Jenkins, 190 Ky. 475, 227 S. W. 798; 1917, Bergh *v.* Calmenson, 136 Minn. 322, 162 N. W. 353; 1903, Glaser *v.* Glaser, 13 Okl. 389, 74 Pac. 944; 1911, James *v.* Jackson, 30 Okl. 190, 120 Pac. 288; 1904, Schouweiler *v.* McCaull, 18 S. D. 70, 99 N. W. 95; 1905, Foss *v.* Van Wagenen, 20 S. D. 39, 104 N. W. 605; 1917, Freeburn *v.* Baltimore & O. R. Co., 79 Va. 789, 91 S. E. 990.

Contra: 1908, Yarber *v.* Chicago & A. R. Co., 235 Ill. 589, 85 N. E. 928 (overruling the prior cases; Dunn, J., in a learned opinion, reviews the history of the Illinois practice, distinguishing and repudiating various cases, and codifying the declared rule as follows: "[1] Decisions of the Court made . . . upon instructions, objections to evidence, or other matters of law arising in the cause, which have been incorporated in a bill of exceptions, may be assigned for error and reviewed by an appellate court *without any motion for a new trial.* [2] They are not waived by making a motion for a new trial if such motion is submitted *without* any points stated in writing. [3] But if a motion is made for a new trial and the grounds thereof are stated in writing, the party is *limited to those reasons,* and all other errors are deemed to have been waived. . . . [4] The exceptions taken to the decision of the Court in these particulars . . . are available to the appellant, *whether exception was taken to the order overruling the motion* for a new trial *or not*"); 1863 McCoy *v.* Julien, 15 Ia. 371, 374.

See also the following: 1904, Chicago & E. I. R. Co. *v.* Schmitz, 211 Ill. 446, 71 N. E. 1050 (motion overruled must be excepted to, etc.)

So, too, in *any other form* of carrying the case higher, the specific errors relied upon must be mentioned: 1905, Barker *v.* State, 73 Nebr. 469, 103 N. W. 71 (petition of error).

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

trial and its being overruled, he never would make such motion, when his only ground for it was these erroneous rulings against him during the trial; as, if he failed to make the motion, the appellate Court would have to presume, that such rulings were prejudicial to him; but if he be required to make such motion before he can avail himself of such rulings against him during the trial, he will afford his opponent an opportunity of having all the evidence spread upon the records, and when this is done, the appellate Court may see that these rulings at the trial were not really prejudicial to him, and in that case, though the rulings were against him, and he properly excepted to them and made them a part of the record, still the appellate Court will not reverse the case, though the rulings were erroneous, the presumption that they were prejudicial to him having been rebutted by the evidence in the case when all certified."

§ 21. **The Judgment of Error; Materiality, and New Trial.** An erroneous ruling having been made and excepted to, and the excepting party having received an adverse verdict on the law and the evidence, the great question on appeal [1] then becomes: *Shall a new trial be granted because of the erroneous admission or exclusion of the particular piece of evidence?*

It is a great question, because, although it does not directly involve the tenor of the rules of Evidence, yet the whole status of the law of Evidence, as well as the efficiency of our methods of doing justice, is dependent upon the answer. Whether that law of Evidence shall be a mere means to an end, — the end being a just settlement of particular controversies, — or whether it shall be an end in itself — an end so independent of justice, and so superior thereto, that it must be attained even at the cost of justice, — this depends practically upon whether it can be conceded that an erroneous ruling on evidence is 'ipso facto' a ground for a new trial.

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

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

§ 21. [1] The other questions on appeal concerning evidence have already been considered under other heads, — whether the *record* of the exception *must show* the evidence excluded or admitted (*ante*, § 20); whether an erroneous ruling can be *cured* by subsequent instruction of the trial Court (*ante*, § 19); whether a *ground of objection not named* upon the trial can be considered in the appellate Court (*ante*, § 18); and whether an erroneous ruling of admission is *waived* by the objector's own subsequent use of similar evidence (*ante*, § 18).

Such was the rule in the King's Bench, in criminal [2] as well as in civil cases.[3] Such was the rule in the Common Pleas,[4] plainly stated in *Doe* v. *Tyler*. Such was equally the practice in Chancery,[5] when issues had been sent to a jury in a common law court. All this lasted down to the decade of 1830.

In that decade the Court of Exchequer, in *Crease* v. *Barrett*,[6] announced a

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

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

[4] 1807, Mansfield, C. J., in Horford *v.* Wilson, 1 Taunt. 12, 14 ("Neither will the Court set aside a verdict on account of the admission of evidence which ought not to have been received, provided there be sufficient without it to authorize the finding of the jury"); 1830, Doe *v.* Tyler, 6 Bing. 561 (rule explicitly approved).

So too, in the Federal Supreme Court, for *new trials* as distinguished from *writs of error:* 1828, Story, J., in M'Lanahan *v.* Ins. Co., 1 Pet. U. S. 170, 183 ("In such cases, the whole evidence is examined with minute care, and the inferences which a jury might properly draw from it are adopted by the Court itself; if therefore upon the whole case justice has been done between the parties, and the verdict is substantially right, no new trial will be granted, although there may have been some mistakes committed at the trial").

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

So, too, generally in the United States today: 1905, McClelland *v.* Bullis, 24 Colo. 69, 81 Pac. 771 (opinion by Bailey, J., collecting the authorities); 1903, Dowie *v.* Driscoll, 203 Ill. 480, 68 N. E. 56; 1904, Heyman *v.* Heyman, 210 Ill. 524, 71 N. E. 591; 1921, Miller *v.* Gordon, 296 Ill. 346, 129 N. E. 809; 1920, Bryant *v.* Shinnabarger, 285 Mo. 484, 227 S. W. 55; 1904, Young *v.* Valentine, 177 N. Y. 347, 69 N. E. 643; 1909, Walston *v.* Allen, 82 Vt. 549, 74 Atl. 225.

So, too, for a judge *sitting without a jury:* 1905, Kreiling *v.* Northrup, 215 Ill. 195, 74 N. E. 123 ("The rule is that no improper or immaterial evidence will be presumed to have influenced the Court in reaching a decision, where there is sufficient proper evidence to justify the judgment"); 1907, McCready *v.* Crane, 74 Kan. 710, 88 Pac. 748; 1904, Mankato Mills Co. *v.* Willard, 94 Minn. 160, 102 N. W. 202; 1904, Dennison *v.* Christian, 72 Nebr. 703, 101 N. W. 1045; 1916, Enyart's Estate, 100 Nebr. 337, 160 N. W. 120; 1905, State *v.* Harris, 14 N. D. 501, 105 N. W. 621; 1904, Godfrey *v.* Faust, 18 S. D. 567, 101 N. W. 718; 1905, Godfrey *v.* Faust, 20 S. D. 203, 105 N. W. 460 (local rule revised in statement).

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

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

The Exchequer rule duly obtained recognition in the United States in a majority of jurisdictions. In its most extreme form, and in language exhibiting in the most radical manner the theory that the rules of Evidence form an end in themselves, the new doctrine — which had indeed given sporadic signs of independent growth — was now rapidly promulgated. During the second half of the 1800s the Exchequer heresy gained the ascendance in virtually all courts.[9]

There are, to be sure, Courts that still cling to the old-fashioned notion, resting on the orthodoxy of *Doe* v. *Tyler*, and refusing to bow the knee to the Baal-worship of the rules of Evidence.[9] A model example of such an opinion is the following:

1866, PORTER, J., *People* v. *Fernandez*, 35 N. Y. 49, 59: "The circumstances which were established by evidence, confessedly competent, were so conclusive as to the guilt of the prisoner that no honest jury could refuse to convict him of the crime. To acquit him would be to shield guilt from justice and deny the protection of law to the innocent. If, therefore, the Court below was right in holding that the judge erred in admitting additional evidence tending to the same conclusion, we think it was clearly wrong in reversing the conviction; for, upon the facts disclosed, the supposed error could work no legal injury to the prisoner. As it was shown, beyond all question, by undisputed and competent proof,

[7] 1835, Rutzen *v.* Farr, 4 A. & E. 53 (the Exchequer rule in Crease *v.* Barrett followed, and the Common Pleas rule in Doe *v.* Tyler rejected); 1837, Wright *v.* Tatham, 7 A. & E. 313, 330 (Denman, C. J. "As this Court has so lately, on full consideration, and in conformity with a decision of the Court of Exchequer, renounced the discretion which was in that case [of Doe *v.* Tyler] exercised, we need not repeat our reasons for holding that . . . the losing party has a right to a new trial"); 1887, Coleridge, C. J., in R. *v.* Gibson, L. R. 18 Q. B. D. 537, 540 ("Until the passing of the Judicature Acts, the rule was that if any bit of evidence not legally admissible, which might have affected the verdict, had gone to the jury, the party against whom it was given was entitled to a new trial").

So also in *Canada:* 1895, Merritt *v.* Hepenstal, 25 Can. Sup. 150, 152, *semble;* 1867, Key *v.* Thomson, 1 Han. N. Br. 295, 2 Han. N. Br. 224, 228; 1877, Wilmot *v.* Vanwart, 17 N. Br. 456, 462; 1883, Doe *v.* Gilbert, 22 N. Br. 576, 587.

[8] 1875, Judicature Act, 1883, Rules of the Supreme Court, Order 39, rule 6 ("A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence . . . unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned on the trial"); 1893, Pearce *v.* Lansdowne, 69 L. T. Rep. 316; 1921, The King *v.* Beecham, 3 K. B. 464 (manslaughter: even if the illegal evidence had not been admitted, "still the jury must have found the defendant guilty of manslaughter").

So also in *Canada:* Can. Crim. Code 1892, § 746, R. S. 1906, c. 146, § 1019; N. Br. Cons. St. 1903, c. 111, § 376; Newf. Cons. St. 1916, c. 83, Ord. 35, R. 6; N. Sc. Rules of Court 1900, Ord. 37, R. 6; for rulings applying these statutes, see *infra*, n. 17.

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

[9] The cases and statutes for the several jurisdictions are collected in Note 17, at the end of the section; and the ensuing citations refer to the authorities there given.

that the accused was one of the murderers, we are under no legal or moral obligation to assume that the jury might have rendered a false verdict of acquittal but for the erroneous admission of other and needless evidence. In this respect, there is no distinction between civil and criminal cases. The reception of illegal evidence is presumptively injurious to the party objecting to its admission; but where the presumption is repelled, and it clearly appears, on examination of the whole record, beyond the possibility of rational doubt, that the result would have been the same, if the objectionable proof had been rejected, the error furnishes no ground for reversal."

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

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

1918, DODD, J., in *Flanagan* v. *Fahy*, 2 Ir. R. 373: "Mr. Healy in the course of the argument made an allusion to the struggle between advocates in Court as a game; he complained that something said or done was 'not cricket,' 'was not playing the game.' There is this foundation for the remark: The object of our jurisprudence is not to get at the truth and fact in each case; it is to get at the truth and fact *in accordance with settled rules* regulating evidence, — rules that may seem artificial, and in some instances are illogical, but are binding upon the Court. I think it is more dignified and more illuminative to take the analogy of a struggle of war, in which each contestant relies not merely on the troops he can bring into the field, but also on the strategy with which they are handled."

1838, MORTON, J., in *Ellis* v. *Short*, 21 Pick. 142, 144: "Some of the evidence objected to was not only clearly irrelevant, but might have prejudiced the jury against the plaintiff. We therefore find ourselves constrained to grant a new trial. We regret that we find it necessary to do this; because the action involves no principle of law, is attended with an expense disproportionate to its importance, has been fully and elaborately tried, and been brought to a result, which was entirely satisfactory and which there is very little reason to suppose will be changed on another trial, by the exclusion of the evidence which was improperly admitted. The English Courts and those of some of our sister States exercise a much broader discretion in relation to the granting of new trials than we do. Their practice is to refuse new trials for the improper admission or rejection of evidence, whenever, in their opinion, such erroneous admission or rejection of evidence, whether material or immaterial, ought not to have affected the verdict, or substantial justice has been done. This seems to us to trench upon the province of the jury. How can the Court know how much influence each particular piece of evidence had upon the minds of the jury, or that the illegal evidence was not the weight, however small it may be, which turned the balance, and that without it the opposite scale would not have preponderated? To sustain a verdict, under such circumstances, may be to make a decision contrary to the convictions, which the legal evidence would have produced upon the minds of the jury. . . . It is

the province of the Court to guard the decisions of the jury from the influence of foreign or irrelevant matter and preconceived opinions and prejudices; and this imposes upon it the duty, on proper occasions, of giving to the jury an opportunity to revise its decisions; but never authorizes it to weigh the evidence or to determine how they should ultimately decide upon matters of fact."

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

As to this theory of *legal right*, it may be said in reply that no man has a legal right to have his cause wrongly decided, — for that is what this "right" comes to. He has indeed a legal right to a jury trial; and he has a right to a fair trial in general. But these are ends in themselves, because the one by constitution and the other by common sense of justice becomes a paramount object. But none can justify the exaltation of the ordinary rules of Evidence, which are mere instruments of investigation, into an end in themselves. As well might a gardener cut down a thriving vine because his henchman has used a hoe instead of a spade in planting it; or a farmer bring valuable bantams to the block because they were hatched by a meddlesome duck instead of by their lawful parent. A glance at common affairs will awaken us to the intrinsic absurdity of the theory of "legal right."

As for the theory of *usurpation*, it ignores the doctrine and the history of the jury's function. It has always been under the control and correction of the trial judge and the appellate courts.[10] The judge determines questions of fact upon which the admissibility of evidence depends. The judge draws inferences of fact on a demurrer of evidence. The judge rules whether the whole evidence is sufficient to go to the jury, and whether the verdict is against the weight of evidence. He has never been without this revisory function. Moreover, upon a question of new trial because of erroneous ruling on evidence, the appellate Court is not asked to overturn the verdict; on the contrary, it is asked to let the verdict stand, and the precise question which the appellate Court decides is, not whether the jury have been correct or incorrect, but whether, subtracting or adding the evidence admitted or excluded, the truth seems to be identical with the jury's verdict. This is a collateral question, and is entered upon merely as a help to avoiding, if possible, the disturbance of the verdict. The "usurpation", if any, consists in setting aside the verdict, not in confirming it. The advocates of the Exchequer rule concede that, for the purpose of overturning the verdict, they may scrutinize and interfere with it, so as to say that it goes against the weight of the whole mass of evidence; yet, for the purpose of supporting the verdict, they profess to be unable to weigh a particular piece of evidence, so as to say that it ought not to have affected the same weight of evidence. This is one of the most indefen-

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

sible cases of Tweedledum *v.* Tweedledee that has ever been sanctioned in our books.

As to the *practical working* of the Exchequer rule, the results are lamentable. Whether in civil or criminal cases, it has done more than any other one rule of law to increase the delay and expense of litigation, to encourage defiant criminality and oppression, and to foster the spirit of litigious gambling. Added to this is the indirect result produced upon the ever-lurking animal instinct of gregarious human brutality, which takes the failures of criminal justice as its pretext and sates itself with cruel lynchings. That the law has gone to the extremes of absurd and provoking technicality in applying this rule is plain enough, even in a casual glance through the reports. Some of the instances of its enforcement would seem incredible even in the justice of a tribe of African fetish-worshippers. As types of what is done in a lesser way every day in every court, they would explain well enough, even if there were no further reason, why poor men may hesitate to send their cause to trial, — why a rich oppressor or a desperate criminal may hope to tire out all endeavors to do justice on him, — why the decisive question for the suitor before litigation often is, not who is right, but who can longest endure, — why ignorant mobs have a patent pretext for distrusting the distant gallows and substituting a near-by tree or stake. Just so long as an erroneous ruling on evidence, however trifling, is described by the highest judges (and in many courts it habitually is) as "working a reversal", just so long will the reproach of technicality and futility mark our litigation. Until the rules of Evidence cease to be assimilated to the play of a hand at whist or the operations of an automatic cash-register, they must remain, as often as not, the instruments of injustice.

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

1897, BRANNON, J., diss., in *State* v. *Musgrave*, 43 W. Va. 672, 28 S. E. 813: "If we could say there was any misstep in matter of law in this long trial, it is one of very immaterial character, weighing not a feather in the trial, utterly inadequate to justify the reversal of a long, laborious trial bearing to us the face of having been full, patient, and fair. The scope of harmless error is, in these days, widening. Courts do not nowadays, even in grave trials, reverse such trials for trivial errors, evidently not affecting them; so light, and plainly playing so unimportant a part, as not to be appreciably influential or prejudicial when the whole trial, all in all, is regarded. In days gone by, technicalities and rigid procedure sprang up and were enforced to defend accused parties against the demand of monarchic power for conviction, and they then answered, 'Good purpose'; but in this country there is not the same need of them, as the danger now is that the guilty will go free, and something is necessary to protect the public against crime. The great press is declaiming against the courts for lax administration of criminal law. The New York 'World' recently stated that statistics show that for ten years past only 2.20 per cent of homicides have been punished, and

that the people are afraid of the courts, and for quick justice resort to lynch law; and further says that this is attributable to the laxity and languor with which the law is enforced, the quibbles, subtleties, and technicalities of the courts fortressing criminals, and causing the administration of justice to appear a mere mockery. Such, I observe, is now almost the universal expression of the press. I would not overturn the solemn verdicts of juries rendered after fair trials, and approved by the trial court, unless I could see that on the whole case something substantially wronging the prisoner had been done. I would therefore affirm."

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

1905, JAGGARD, J., in *State* v. *Crawford*, 96 Minn. 95, 104 N. W. 822: "We are satisfied that as a matter of strict technical construction there is no error in this record entitling the accused to a new trial as a matter of right. . . . The decision in this case, however, is not based upon compliance or noncompliance with technical rules of practice or evidence. Such rules are primarily different from the constitutional guaranties, without the strict observance of which punishment even by a properly constituted court is little better than the punishment by a mob. Matters of mere procedure, however, have no such sanctity. When a court exercises its traditional power to regulate a trial, to pass on the competency, materiality, or sufficiency of evidence, or the propriety of the form of a question, and to revise the action of a jury, it violates no constitutional right; nor does it when it confirms the verdict of a jury. Rules of practice and evidence are primarily designed to secure the orderly administration of the laws of the land. They serve their purpose so far as, and only so far as, they conduce to a fair trial. But, instead of serving as a means of securing justice, they have been made to usurp dominion as if their observation were the end to be attained.

"Decisions of many Courts have determined controversies concerning them as if they were the constitutional requirements, as if the object of the law was their evolution into a

perfect system, and as if the function of even the highest judicial tribunals was to secure their consistent enforcement. Under the guise of protecting the 'rights of the accused', this perversion in the use of these rules has been and must be the source of wrong, alike to the accused and to the public. For, on the one hand, cases involving human lives may arise in which an appellate Court would properly feel that there was imposed on it the duty of setting aside a verdict of conviction and of granting a new trial for errors committed by the trial Court resulting in an unfair trial of the defendant, although no objection or exception was made or taken to the improper admission or exclusion of evidence, or to the improper conduct or ruling of a trial court, because of the mistake or misconduct, neglect, or incompetency of his counsel. The strict application of practice rules would then make a new and fair trial impossible. On the other hand, the exaggeration of the value of such technicalities has opened the doors for the escape of unnumbered and undoubted criminals. 'Some of the instances of enforcement would seem incredible, even in the justice of a tribe of African fetish worshipers.' (1 Wigmore on Evidence, p. 73.) There is a current impression on the part of the profession of law, and of the community in general, that all Courts are hopelessly committed to this apotheosis of an artificial system, as repugnant to common sense as it is subversive of common justice. In point of fact, this is far from being true. The original English rule was that erroneous admission or exclusion of evidence, duly objected to, would not be a basis for new trial if the rest of the testimony be sufficient to warrant the conclusion to which the jury have come. Later, and about 1835, a different rule came to be generally accepted, viz., that an error or ruling created per se for the defeated party a right to a new trial. It remained the law of England until it was reformed away for civil cases in 1875. In the United States this rule is the law in the majority of jurisdictions; but it is not sustained by the better opinion or reason and is distinctly not the law in this State."[11]

(3) *Future of the Exchequer Rule.* What is to be the remedy? Unfortunately, it does not seem to be merely in legislation. The fetters of the pernicious rule of the Exchequer were not forged by mere precedent, but by professional habit and tendency. They cannot be struck off by a simple statute. This has been tried; but almost in vain. There was already, at the very beginning, ample precedent and tradition for the better principle; yet the judges of the King's Bench and the Common Pleas and of our own Courts, when they could choose, made deliberate choice of the worse way. So, too, when legislation has sought to turn them back, they have persisted nevertheless, driven by this same strong professional habit of mind. In many jurisdictions statutes expressly authorized and commanded that a new trial shall be granted only when justice requires it; and their object was to abolish the Exchequer rule.[12] What was the consequence? In New York, for ex-

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

[12] *Form of Statutes:* These statutes are of four general types, in respect to the form of rule inculcated.

A. In one form, the error of ruling is not to be ground for a reversal unless it has led to a "*miscarriage of justice*", or has "affected the *substantial rights of the parties.*" This form was among the earliest, but is too broad, and proved to have no intrinsic power to help the situation. The technical legal mind can readily perceive a miscarriage of justice or an injury to substantial rights in the mere non-observance of a rule of admissibility.

B. In a second form, the *burden of proof* only is changed, by declaring that no error shall be presumed to have affected the substantial rights, etc. Thus the excepting party is obliged to show how the error has injured the result of the case. This form effects some good, but is unsound in principle because it does not define any standard for determining the bad effect, if any, of the error.

C. In a third type, the error is not to be ground for reversal unless it *might* have affected

ample, both the earlier statute and the later statute proved alike ineffectual. In New Jersey the same fate ensued. Occasionally, indeed, the true spirit was for a while communicated, — as in Kentucky. But on the whole the effort has been fruitless. By an emasculating interpretation, or by a virtual obliteration, the statutes have effected little progress, — so far as their mere legislative command is concerned. Professional instinct from within, and professional pressure from without — the demands of the bar to be allowed to win by technicalities — have been too strong.

But the thing can be done. It *has* been done. In England, to-day, the whole odious practice of misusing the rules of evidence as petty stratagems in litigious tactics has passed away. In the reports of decisions, there now occur annually not more than a dozen rulings upon points of evidence, as against many hundreds in the reports of the United States,—and that in a community which though almost half as populous as ours is much more litigious. The reformatory legislation in England, commencing with the Common Law Procedure Act of 1852 and culminating in the Judicature Act of 1875 and the Rules of Court of 1883, seems to have been based upon a profound professional revolution, and to have signified not merely a change of rules but a change of spirit. The same thing is possible among us.

No doubt the contributing conditions to such a change must be numerous. But among the marks of regeneration there must surely be found two vital ones:

First, the judge must cease to be merely an umpire at the game of litigation. Often he is little more. This, to be sure, is in part the continuance of a tradition, inherited from the spirit of gentlemanly sportsmanship which dominated the administration of British justice. But it has been intensified, instead of lessened, by the spirit of strenuous struggle and unrestrained persistence which drives the bar of our country to wage their contests to the extreme of technicality. The judge weakly resigns himself to the position of "a mere automaton, or at most the attitude of the presiding officer of a deliberative assembly, with no greater powers than those of announcing the utterances or conclusions of others."[13] To this many circumstances conspire. But it is an old and a marked tendency among us; and, until it is rooted out, that early warning of one of the Nestors of our judiciary will still be worth heeding:

the verdict. This form adopts as its standard the jury's possible state of mind. Obviously, that is inscrutable to the Supreme Court. Hence an over-technical court is prone to declare, "We cannot say that the jury *might* not have been affected", etc.

D. The fourth form is represented by Sir J. F. Stephen's Indian Evidence Act, § 167 (quoted *supra*, n. 8), viz. the error shall not lead to reversal unless it *ought* to have affected the verdict. This form defines as a standard the objective facts in the case as disclosed by all the evidence when scrutinized by the Supreme Court. If in view of the whole case the Court concludes that the verdict is correct, then obviously the error of admission or exclusion affords no reason for setting that verdict aside.

This is the only form consistent with common sense and the theory of trials, — which theory is, of course, to ascertain the facts. This form, in varying terms, has been adopted by several courts — *e.g.* Oklahoma — and should be the basis of all future progress.

[13] 1885, Poché, J., in State *v.* Ford, 37 La. An. 443, 461; 1912, Young *v.* Corrigan, D. C. N. D. Oh., 208 Fed. 431 (above text approved by Killits, J.).

1852, NISBET, J., in *Cook* v. *State*, 11 Ga. 53, 57: "It is to be feared, in these days of reform, that the Judges will be so strictly laced, as to lose all power of vigorous and healthful action. I have but little fear of judicial power in Georgia so aggrandizing itself, as to endanger any of the powers of other departments of the government; or to endanger the life and liberty of the citizen; or to deprive the Jury of their appropriate functions. The danger rather to be dreaded in making the Judges men of straw, and thus stripping the Courts of popular reverence, and annihilating the popular estimate of the power and sanctity of the law." [14]

Secondly, the maudlin sentimentality of judges in criminal cases must cease. Reverence for the Constitution is one thing, and a respect for substantial fairness of procedure is commendable. But the exaltation of technicalities of every sort merely because they are raised on behalf of an accused person is a different and a reprehensible thing. There seems to be a constant neglect of the pitiful cause of the injured victim, and the solid claims of law and order. All the sentiment is thrown to weight the scales for the criminal — that is, not for the mere accused, who may be assumed innocent, but for the man who upon the record plainly appears to be the villain that the jury have pronounced him to be. We have long since passed the period (as a modern judge has pointed out) [15] "when it is possible to punish an innocent man; we are now struggling with the problem whether it is any longer possible to punish the guilty." The dignity, the truth, and the lofty inspiration of great constitutional principles are frittered away and degraded. While on the one hand certain fundamental ideals of political liberty have come to be lightly questioned as impracticable or cynically ignored as obsolete, on the other hand the constitutional safeguards of procedure and evidence are invoked with such fatuous philanthropy and such misplaced magnanimity that their respect is lowered and their true purposes are defeated. "I do not understand," protested a great judicial interpreter of the organic law,[16] "that the Constitution is an instrument to play fast and loose with in criminal cases, any more than in any other; or that it is the business of Courts to be astute in the discovery of technical difficulties in the punishment of parties for their criminal conduct." Yet they seem to make it their business. A false sentiment misapplies their energies. This they must unlearn. The epoch of governmental oppression has passed away; the epoch of individualistic anarchy has taken its place. They must learn the lesson of transferring the emphasis

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

[15] 1893, Freeman, J., in Roper v. Territory, 7 N. Mex. 272, 33 Pac. 1014.

[16] 1883, Cooley, J., in People v. Murray, 52 Mich. 291.

of their sympathies, — a lesson more than once read to them by the voices of their own fellow-members of the judiciary:

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

1873, MCCOY, J., in *Eberhart* v. *State*, 47 Ga. 598, 610: "We have, however, no sympathy with that sickly sentimentality that springs into action whenever a criminal is at length about to suffer for crime. It may be a sign of a tender heart, but it is also a sign of one not under proper regulation. Society demands that crime shall be punished and criminals warned, and the false humanity that starts and shudders when the axe of justice is ready to strike is a dangerous element for the peace of society. We have had too much of this mercy. It is not true mercy. It only looks to the criminal. But we must insist upon mercy to society, upon justice to the poor woman whose blood cries out against her murderers. That criminals go unpunished is a disgrace to our civilization; and we have reaped the fruits of it in the frequency with which bloody deeds occur."

This much had to be said here, in order to redeem the law of Evidence from that reproach which belongs rather to the law of new trials.[17]

[17] The following list of decisions and statutes for the several jurisdictions is by no means complete; but it will serve to show the trend, past and present, of the various Supreme Courts in respect to ordering new trials for erroneous trial-rulings upon the law of Evidence:

CANADA: 1911, Allen *v.* The King, 44 Can. Sup. 331; 1915, R. *v.* May, 21 D. L. R. 728, B. C. (Can. Cr. C. § 1019 considered and applied); 1915, R. *v.* Romano, 21 D. L. R. 195, Que. (Can. Cr. C. § 1019 considered and applied); 1917, R. *v.* Spain, 36 D. L. R. 522, Man. (murder); 1916, R. *v.* Doyle, 28 D. L. R. 649, N. Sc. (stealing); 1916, R. *v.* Duckworth, 31 D. L. R. 570, Ont. (murder); 1919, Larson *v.* Boyd, 46 D. L. R. 126, Can. S. C. (false representations); 1919, Veuillette *v.* The King, 48 D. L. R. 158, Can. S. C. (murder); 1920, R. *v.* Mah Hong Hing, 53 D. L. R. 356, B. C. (wounding); 1918, Boyd *v.* Larson, 42 D. L. R. 516, Sask. (false representations preceding a contract); 1920, R. *v.* Trenholme, 61 D. L. R. 316, Que.; 1921, R. *v.* Sileski, 63 D. L. R. 146, Que.

FEDERAL. In the Supreme Court, the canon of Mr. Justice Story (quoted *supra*, n. 4), for motions for new trials, if applied to writs of error, would have set an admirable standard for the State Courts. But on the contrary the extreme theory of a party's "legal right to legal evidence" found favor: 1894. Waldron *v.* Waldron, 156 U. S. 380, 15 Sup. 383; 1898, Northern P. R. Co. *v.* Hayes, 30 C. C. A. 576, 87 Fed. 131 ("It is elementary that the admission of illegal evidence over objection necessitates a reversal"). During the latter part of the 1800s the Court was in criminal cases especially callous in pushing the technical rule to extremes, notably in its treatment of some of the rulings of the late Judge Parker, of the Western Arkansas District, one of the greatest trial judges of the Federal bench, whose work for law and order in that region was inestimable; examples may be found in Allen *v.* U. S. tried in 1893, reversed in 150 U. S. 551, reversed again in 157 U. S. 675, finally affirmed in 1896 in 164 U. S. 492, 17 Sup. 154; in Carver *v.* U. S., 160 U. S. 553, 16 Sup. 388, 1896 (a dying declaration was sanctioned as admissible, but the deceased on a subsequent day had said to an inquirer that her former declaration "was true in every particular"; this being erroneously admitted, a new trial was granted solely because of the error; later the case was again reversed in 164 U. S. 694, 17 Sup. 228); in Starr *v.* U. S., reversed in 1894, in 153 U. S. 614, and again in 1897, in 164 U. S. 627, 17 Sup. 223; and in Brown *v.* U. S., reversed three times, in 150 U. S. 93, 159 U. S. 100, and 164 U. S. 221. Of the above last three defendants (all charged with homicide) whose cases were reversed, Starr subsequently pleaded guilty to manslaughter and to several charges of robbery; Brown pleaded guilty to manslaughter; and Carver was on a third trial convicted of murder; in short, the appellate Court's total achievement proves to have consisted merely in blocking justice for several years, and to have helped to diminish in a turbulent community that respect for law and justice which the trial Court, if unhampered, was able to maintain. These cases

give to volume 164 of the Federal Supreme Court reports an unenviable mark in our jurisprudence. An instance of a juster doctrine in the same Court is found in Motes *v.* U. S. (1899), 178 U. S. 458, 20 Sup. 993.

In the intermediate Courts the same attitude was found, in many or most of the circuits, for another generation; 1905, Sanborn, J., in Union Pacific R. Co. *v.* Field, 137 Fed. 14, C. C. A.; 1905, National Biscuit Co. *v.* Nolan, 138 Fed. 6, C. C. A. (Philips, J.: "Error presumptively works a prejudice to the party against whom it was committed"); 1906, Sparks *v.* Terr., 146 Fed. 371, C. C. A. (the admission of irrelevant evidence "is a violation of a legal right, and it constitutes fatal error").

The public sentiment of the bar finally made itself felt in a statute of 1919: U. S. St. 1919, Feb. 26, 40 Stat. L., amending Judicial Code § 269 ("On the hearing of any appeal, certiorari, writ of error, or motion for a new trial in any case, civil or criminal, the court shall give judgment, after an examination of the entire record before the court, without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties").

Gradually this statute will doubtless produce a beneficent effect: 1919, Dye *v.* U. S., C. C. A., 262 Fed. 6; 1920, Sneierson *v.* U. S., 4th C. C. A., 264 Fed. 268, 275; 1920, Trieber, J., in Smith *v.* U. S., 8th C. C. A., 267 Fed. 665, 670 ("The evidence of the guilt of these defendants was so conclusively established that, even if there had been some error in the admission of evidence, and we do not hold that there was, the modern law so clearly stated by Judge Hook in Williams *v.* United States, (C. C. A.) 265 Fed. 625 (opinion filed April 29, 1920), applies; Judge Hook there said: 'Whether prejudice results from the erroneous admission of evidence at a trial is a question that should not be considered abstractly or by way of detachment. The question is one of practical effect, when the trial as a whole and all the circumstances of the proofs are regarded. . . . It is manifest that he was not prejudiced by the admission of the testimony to which reference has been made'"); U. S. St. June 4, 1920, ch. V, subchapter II, Articles of War, Art. 37 (error must have "injuriously affected the substantial rights of the accused"); 1921, Haywood *v.* U. S., 7th C. C. A., 268 Fed. 795 ("From recent legislation we gather the congressional intent to end the practice of holding that an error requires the reversal of the judgment unless the opponent can affirmatively demonstrate from other parts of the record that the error was harmless, and now to demand that the complaining party show to the reviewing tribunal from the record as a whole that he has been denied some substantial right whereby he has been prevented from having a fair trial"); 1921, Rich *v.* U. S., 8th C. C. A., 271 Fed. 566 (approving the foregoing).

ALABAMA: 1896, Louisville & N. R. Co. *v.* Miller, 109 Ala. 500, 19 So. 989 (more than a dozen exceptions to rulings on evidence; one only of these being found wrong, though no substantial prejudice was asserted, a new trial was granted); 1896, Louisville & N. R. Co. *v.* Malone, 109 Ala. 509, 20 So. 33 (similar; here there were twenty rulings and exceptions); 1904, Southern R. Co. *v.* Morris, 149 Ala. 672, 42 So. 19 (on several exceptions, the only one sustained was that, upon a proper question to a witness as to the defendant's payment of his expenses, the witness' answer showed that no more had been paid than was due; solely for failing to strike out this answer, the verdict for the plaintiff was reversed and a new trial ordered; this was a plain failure of justice); 1905, Shelton *v.* State, ib., 42 So. 30 (murder; out of two dozen exceptions, the verdict was set aside solely because of a charge upon confessions, the defendant's statement being finically construed not to be a confession); 1905, Smith *v.* State, 142 Ala. 14, 39 So. 329 (on some thirty exceptions, and twenty refused charges, the judgment was reversed solely because of an error in refusing to admit the details of the deceased's intoxication); 1906, Jacobs *v.* State, 146 Ala. 103, 42 So. 70 (murder; out of a dozen exceptions, the only one sustained was to a casual phrase of the judge amounting to a charge upon the evidence; and for this the verdict was set aside); 1917, Maryland Casualty Co. *v.* McCallum, 200 Ala. 154, 75 So. 902 (accident policy; fine dissenting opinion by Gardner, J.; a rare voice of protest in a judicial fraternity slow to reject old habits).

ARIZONA: Const. 1910, Art. I, § 22 ("No [criminal] cause shall be reversed for technical error in pleading or proceedings where upon the whole case it shall appear that substantial justice has been done"); 1919, Elmer *v.* State, 20 Ariz. 170, 178 Pac. 28 (rape).

CALIFORNIA: Here the Code had from the very beginning laid down a sane rule; P. C. 1872, § 1258 ("The Court must give judgment without regard to technical errors or defects, or to exceptions, which do not affect the substantial rights of the parties"). But this Code provision was virtually ignored by the Supreme Court for more than a generation; 1878, People *v.* Bell, 53 Cal. 119 (here the defendant's testimony that the deceased, with whose murder he was charged, was habitually profane, was erroneously allowed to be contradicted by the prosecution, and though the matter was held to have "had no reference whatever to the guilt or innocence of the defendant", a new trial was ordered, solely on this error); 1903, Rulofson *v.* Billings, 140 Cal. 452, 74 Pac. 35 ("A party cannot, after insisting upon the admission of improper evidence, over an objection to its admissibility,

defend his course by contending that the error was harmless. . . . This Court in such cases sits only as a Court for the correction of errors. The judgment upon the facts, to which every litigant is entitled as of right absolute, is the judgment of the trial Court." Here is indeed frankly the Trilogy of Technicalism, which may be thus restated: "1. It is a crime to violate by mistake the rules of evidence; the penalty is the forfeiture of one's just rights and estates. 2. The Supreme Court is not a real Court of Justice, but only a Referee to decide Bets on Rules of Evidence. 3. Every person has an Absolute Right to profit unjustly by the trial Court's mistakes in deciding such Bets"); 1904, People *v.* Creeks, 141 Cal. 532, 75 Pac. 101.

The new Court of Appeal seemed to be making a better start in enforcing the rational doctrine: 1905, Greene *v.* Murdock, 1 Cal. App. 136, 81 Pac. 993; and a marked turn for the better was for a while observable in the Supreme Court, in People *v.* Weber, 149 Cal. 325, 86 Pac. 671 (1906); Dolbeer's Estate, 149 Cal. 227, 86 Pac. 695 (1906).

Then came a relapse, illustrated by the following case: 1911, People *v.* Coffey, 161 Cal. 433, 119 Pac. 901 (another of the Ruef-Gallagher trolley-system bribery cases; the reversal was grounded on the lack of corroboration of an accomplice; the definition of an accomplice was expounded learnedly and lengthily, and a very pretty and scientific distinction was laid down, which however was not the one used by the trial judge; thus was fatal error committed; in other words, the credibility, man to man, on all the circumstances of the case, of this witness and thus the safety of the verdict as founded on fact, was made to turn on a subtle discussion of criminal theory; it might just as well have been made to turn on the authenticity of the Pentateuch).

Then came retribution, in the shape of a Constitutional Amendment, a humiliating rebuke to all Courts of Justice, forbidding new trials except for "miscarriage of justice": Const. Art. 6, § 4½ (Nov. 3, 1914) ("No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice").

The Court then acted in the full spirit of the Amendment: 1913, People *v.* O'Bryan, 165 Cal. 55, 130 Pac. 1042 (here the Court, speaking through Sloss, J., call attention to the constitutional amendment of 1911 forbidding new trials for errors, etc., unless involving "miscarriage of justice"; affirm that it was meant to remedy the unsatisfactory doctrine of "reversible error"; and proceed to apply it wholeheartedly and sensibly, on the canon, "If it appears to our satisfaction that the result was just, and that it would have been reached if the error had not been committed, a new trial is not to be ordered"; three judges, in a minority opinion, show a hesitation, erroneously believing that a constitutional principle was involved); 1913, People *v.* Fleming, 166 Cal. 357, 136 Pac. 291 (the majority ordered a new trial, for erroneous use of evidence, "in the interests of justice"; but Chief Justice Beatty, non-concurring, very properly pointed out that the term "miscarriage of justice" (Const. Art. 6, § 4½, recently added) can mean, "only the correlation of such miscarriage in cases of acquittal, viz. *the conviction of a person who is innocent*"); 1922, People *v.* Mayen, — Cal. —, 205 Pac. 435.

See the article by Professor A. M. Kidd, "Criminal Law: Miscarriage of Justice: Constitutional Amendment" (California Law Review, I, 375).

CONNECTICUT: This Court seems always to have accepted sound principles: 1885, State *v.* Beaudet, 53 Conn. 536, 539, 4 Atl. 237 (if evidence excluded "could not properly have changed the result, then he was not aggrieved by the ruling"); 1903, Munroe *v.* Hartford St. R. Co., 76 Conn. 201, 56 Atl. 498, per Hamersley, J.

FLORIDA: A statute of 1911 laid down a sound rule: St. 1911, May 26, Rev. G. S. 1919, § 2812 (no reversal of judgment for error unless "after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice"). This statute has been applied in the best spirit: 1918, Bailey *v.* State, 76 Fla. 213, 79 So. 730; 1919, Riggins *v.* State, 78 Fla. 459, 83 So. 267 (no reversal for technical errors "where the evidence of guilt is clear and ample, and no fundamental rights of the defendants were violated, and it appears from the whole record that such technical errors if any were not prejudicial to the defendant"); 1920, McQuagge *v.* State, 80 Fla. 768, 87 So. 60 (judgment will not be reversed, "even if technical errors have been committed in the rulings on questions of the admissibility of evidence, . . . where the evidence of guilt is clear, and no fundamental rights of the defendant were violated").

GEORGIA: This Court started well, but afterwards fell into the usual over-technical ways of thought: 1846, McCleskey *v.* Leadbetter, 1 Ga. 551, 556 ("The Courts will not set aside a verdict on account of the admission of evidence which ought to have been rejected, provided there be sufficient without it to authorize the finding"); 1906, Young *v.* State, 125 Ga. 584, 54 S. E. 82 (third conviction for murder; the first two were set aside for minor technicalities; this third was set aside by a majority, because the trial judge erro-

neously assumed that the defendant did not dispute the death of the deceased; in fact, the victim assaulted was riddled with shot "from about the middle", and at the time of this ruling his corpse had been putrefying in the graveyard for two years; yet the trial Court, in withdrawing that issue from the consideration of the jury, is deemed to have committed a fatal error; this kind of ruling is itself a putrefaction of justice).

IDAHO: Sound principles have here been placed on record: 1904, State *v.* Levy, 9 Ida. 483, 75 Pac. 227; 1918, Bumpas *v.* Moore, 131 Ida. 668, 175 Pac. 339.

ILLINOIS: Here, since People *v.* Cleminson, sound principles have been fully accepted, with only occasional relapses; 1908, Greinke *v.* Chicago City R. Co., 234 Ill. 564, 85 N. E. 327 (declines to disturb a verdict which had been "clearly established by other competent evidence"); 1911, People *v.* Cleminson, 250 Ill. 135, 95 N. E. 157 (errors were found, but "we cannot escape the conclusion that the verdict could not have been otherwise than 'Guilty', even if none of the errors referred to had been committed"); 1913, People *v.* Newman, 261 Ill. 11, 103 N. E. 589 (here the Court relapses to the mechanical theory; character-evidence erroneously admitted leads to a reversal, regardless of "what we may think of the guilt or innocence of the plaintiff in error"); 1916, People *v.* Duzan, 272 Ill. 478, 112 N. E. 315 (error as to reputation-evidence; but "the guilt of plaintiff in error is so conclusively shown from this record that it is not possible to conceive how the jury could have come to any other conclusion, even if they had believed" the evidence in question); 1916, People *v.* Montgomery, 271 Ill. 580, 111 N. E. 578 ("It was error to admit this evidence; but if it had not been received the evidence in the case was such that the jury could not reasonably have returned any other verdict than that which they did return"); 1917, People *v.* O'Brien, 277 Ill. 305, 115 N. E. 123 (bribery; "Where guilt is conclusively proven by competent evidence, and no other rational conclusion could be reached but that defendant is guilty, it would require more substantial errors . . . to justify a reversal"); 1917, People *v.* Michael, 280 Ill. 11, 117 N. E. 193 ("Courts no longer adhere to the technical rule that a judgment must be reversed where the record shows that error was committed on the trial"); 1920, People *v.* Lardner, 296 Ill. 190, 129 N. E. 697 ("We are convinced that plaintiff in error is guilty of the offense for which he was convicted, and we do not consider the errors occurring on the trial of sufficient importance to demand a reversal of the judgment", per Thompson, Farmer, and Duncan, JJ., diss.); 1921, People *v.* Cardinelli, 297 Ill. 116, 130 N. E. 355 (murder; rule in People *v.* Cleminson followed); 1921, People *v.* Lane, 300 Ill. 422, 133 N. E. 267 (murder; "it is impossible for us to know what the jury would have done, and much less our province to say what they should have done in the absence of this incompetent evidence"; backsliding; no former cases cited).

INDIANA: Burns Ann. St. 1914, § 407 (civil cases; no judgment to be reversed for error or defect not affecting "the substantial rights of the adverse party"); § 700 (civil cases; no reversal where the "merits of the cause have been fairly tried and determined in the court below"); 1903, Coppenhaver *v.* State, 160 Ind. 540, 67 N. E. 453; 1907, Sanderson *v.* State, 169 Ind. 301, 82 N. E. 525; 1921, Coff *v.* State, — Ind. —, 133 N. E. 3 ("if it was proved by undisputed evidence which was competent that he did those acts, a judgment of conviction should not be reversed, even if it appears that incompetent evidence tending to prove the same facts was also admitted").

IOWA: A rich piece of judicial artificiality, as it contrasts with natural justice, is found in State *v.* Wheeler, 129 Ia. 100, 105 N. W. 374 (1905), and State *v.* Brown, 130 Ia. 57, 106 N. W. 379 (1906); in the former case, a verdict of guilty was found against one Wheeler, for throwing acid in the eyes of Mrs. R., but the verdict was set aside for improper evidence; in the latter case, the jury found one Brown guilty of instigating the criminal act of Wheeler as above, and this verdict was affirmed by the Supreme Court, with the incidental statement that "there is ample evidence in the case to establish Wheeler's guilt." *I.e.* Wheeler was not guilty when he was himself tried, yet he was guilty when Brown was tried! Of course there is a legal twist of thought by which this can be easily explained. But the fact remains that Justice was bungled here, and that it was bungled because the judges are slaves of a machine-like method and are not bold enough as Justiciars to put two such cases together and solve them rationally and sensibly.

In civil cases, the following represents a rational view: 1906, Wiltsey's Will, 135 Ia. 430, 109 N. W. 776 ("We are not justified in reversing a case because of the improper admission of evidence, where the result could not have been different had such evidence been excluded").

KANSAS: Gen. St. 1915, § 7209 (in civil cases "a new trial shall not be granted unless . . . the Court shall be of opinion that the verdict or decision is wrong in whole or in some material part"); § 7485 ("The appellate court shall disregard all mere technical errors and irregularities which do not affirmatively appear to have prejudicially affected the substantial rights of the party complaining, where it appears upon the whole record that substantial justice has been done by the judgment or order of the trial court; and in any case pending before it, the court shall render such final judgment as it deems that

justice requires, or direct such judgment to be rendered by the court from which the appeal was taken, without regard to technical errors and irregularities in the proceedings of the trial court"); ibid. § 8215 ("On an appeal, the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties"); 1905, State *v.* Miller, 71 Kan. 200, 80 Pac. 51 (rape under age; the Court overruled three exceptions, but sustained the fourth and granted a new trial solely because at the trial was admitted a priest's copy, brought over by the family from Russia, of an extract of the parish-register showing the girl's age, the girl herself and both her parents having testified to her age, and the certificate being merely cumulative; the excuse is made, "How much weight may have been given by the jury, we are unable to say, etc."); 1906, Federal B. Co. *v.* Reeves, 73 Kan. 107, 84 Pac. 560 (among numerous alleged errors, the Court declared many of the objections "frivolous", and found only one error, and even this was by the better rule not an error; without the slightest consideration whether it could or should have affected the verdict, a new trial was ordered); 1918, State *v.* Peterson, 102 Kan. 900, 171 Pac. 1153.

KENTUCKY: Ky. Cr. C. 1877, § 340 ("A judgment of conviction shall be reversed for any error of law to the defendant's prejudice appearing on the record"); St. 1880, March 4 (amended by omitting "to the defendant's prejudice", and by adding: "whenever upon the consideration of the whole case the Court is satisfied that the substantial rights of the defendant have been prejudiced thereby"); 1880, Rutherford *v.* Com., 78 Ky. 639, 643 (dealing with the trial Court's erroneous refusal to allow the defendant to be present at a view; "If all the evidence that the jury could have received on the view . . . had been excluded, it is clear that the verdict must have been 'guilty of murder'; under such circumstances, we are authorized in saying that the record affirmatively shows that the error complained of was not 'prejudicial' to the defendant"). The interpretation of the Code provision continues to fluctuate: 1909, Hargis *v.* Com., 135 Ky. 578, 123 S. W. 239 (liberally treated); 1904, Marks *v.* Hardy's Adm'r, 117 Ky. 663, 78 S. W. 864, 1105; 1905, Whitt *v.* Com., — Ky. —, 84 S. W. 340 (reversal for a single error in evidence); 1916, Cavanaugh *v.* Com., 172 Ky. 799, 190 S. W. 123 (murder).

LOUISIANA: 1895, Miller, J., in State *v.* Callahan, 47 La. An. 497, 15 So. 50 ("The admission of illegal evidence in a civil case is comparatively unimportant. . . . But in a criminal case . . . it is for the jury to convict, and it is presumed to act on all the evidence submitted. . . . It is the right of the accused to be tried on legal evidence alone. . . . The conviction must be by legal evidence only"); 1906, State *v.* Rugero, 117 La. 1040, 42 So. 495 (verdict of manslaughter set aside solely because, on the defendant having read his affidavit for continuance on account of a witness whom he could secure "in due time for trial at this term", the prosecuting attorney read the sheriff's return for the witness as not found because out of the State in Texas; the defendant's affidavit being by fiction of law deemed conclusive, this return of the sheriff was treated as reflecting fatally upon the defendant's veracity; the prosecution having argued that this error was trivial, the Supreme Court warmly retorts, "Why jeopardize the result of a trial by insisting on evidence so utterly insignificant?)."

MARYLAND: 1904, Joseph Bros. Co. *v.* Schonthal I. & S. Co., 99 Md. 382, 58 Atl. 205 (good statement by McSherry, C. J.); 1921, Chiswell *v.* Nichols, 139 Md. 442, 115 Atl. 790.

MASSACHUSETTS: This Court early went wrong, and in some modern decisions it still shows itself as stubbornly technical as any in the country: 1808, Sewall, J., in Bartlet *v.* Delprat, 4 Mass. 708 ("And upon the whole, although the other facts appearing in this case leave very little doubt of the justice of the verdict, yet as the competency of the evidence excepted to is not supported by any of the authorities we have examined, we think the verdict must be set aside"); 1894, Com. *v.* White, 162 Mass. 403, 38 N. E. 707; 1917, Akeson *v.* Doidge, 225 Mass. 574, 114 N. E. 726 (declarations by a bastard's mother in travail); Gen. L. 1920, c. 231, § 132 (no new trial for erroneous rulings on evidence if "the error complained of has not injuriously affected the substantial rights of the parties").

MICHIGAN: 1905, Seymour *v.* Bruske, 140 Mich. 644, 103 N. W. 613 (there was one error in the admission of evidence; reversed; "the testimony . . . impresses us with the idea that the jury was not in fact prejudiced by this evidence. We cannot say, however, that it was not prejudicial. We *can* say that it was incompetent." And the plain-minded observer can say that such language is that of the helpless slave of a legal treadmill, not that of an administrator of justice).

MINNESOTA: 1897, Murphy *v.* Backer, 67 Minn. 510, 70 N. W. 799 (new trial granted solely because of a single improper contradiction of a witness on a collateral point); 1903, State *v.* Nelson, 91 Minn. 143, 97 N. W. 652 (good statement); 1905, State *v.* Crawford, 96 Minn. 95, 104 N. W. 822 (Jaggard, J., for the Court, fully and emphatically proclaims the adherence of this Court to the orthodox and enlightened rule); 1905, State *v.* Williams, 96 Minn. 351, 105 N. W. 265 (Start, C. J., explaining the rule laid down in the preceding cases).

MISSOURI: 1896, Gardner *v.* R. Co., 135 Mo. 90, 36 S. W. 214 ("The judgment was

manifestly for the right party; and where such is the case, the judgment will not be reversed because some incompetent testimony was admitted"); 1903, State *v.* Faulkner, 175 Mo. 546, 75 S. W. 116 (St. Louis municipal corruption case; judgment reversed, apparently on no other ground than two minor errors in the rules of evidence, and a quibble upon a variance between the indictment and an instruction); 1904, State *v.* Schnettler, 181 Mo. 173, 79 S. W. 1123 (St. Louis bribery case; reversed on a technicality); 1904, Alexander *v.* Wade, 106 Mo. App. 141, 80 S. W. 19 (Bland, P. J.: "Whether or not there was error committed in the admission of evidence, the error will not avail appellant, for the reason that under the competent evidence, . . . the judgment is clearly for the right party and should not be reversed"); 1905, Swope *v.* Ward, 185 Mo. 316, 84 S. W. 895 (under Rev. St. 1899, § 865); 1906, State *v.* Barrington, 198 Mo. 23, 95 S. W. 235 (showing a healthy attitude on this subject); 1906, State *v.* Feeley, 194 Mo. 300, 92 S. W. 663 (sound principle); Rev. St. 1919, § 1513 (Supreme Court shall reverse for error unless for one "materially affecting the merits of the action").

The preposterously illogical result of the heresy often is that the greater the probative value of the erroneously admitted evidence, the more necessary to order a new trial; *e.g.*, in Redmon *v.* Metropolitan St. R. Co., 185 Mo. 1, 84 S. W. 26, the Court, having declared a conductor's statement, made just after the accident, to have been erroneously admitted, proceeds: "Coming as it did from the conductor of the train, it was *calculated to carry conviction* that the cause of the accident was, etc.", and therefore "the admission of this evidence was reversible error." A system of proof pretending to call itself rational should not be found employing such a parody on reasoning. In the above opinion, the new trial was ordered for that error alone.

MONTANA: Rev. C. 1921, § 12125 (like Cal. P. C. § 1258); 1906, State *v.* Fuller, 34 Mont. 12, 85 Pac. 369.

NEBRASKA: Rev. St. 1922, § 8657 (in civil cases, "no judgment shall be reversed or affected by reason of . . . any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party"); 1886, Cobb, J., in Masters *v.* Marsh, 19 Nebr. 467, 27 N. W. 438 (excluding certain books of account: "While I do not think that the books would have proved any fact of the least value in the case had they been properly admitted, yet the party presenting them would scarcely be permitted to escape the consequence of an erroneous ruling on that ground"); 1894, Carpenter *v.* Lingenfelter, 42 Nebr. 728, 60 N. W. 1022 (new trial granted for allowing the contradiction of a witness on an immaterial point); 1906, McCook *v.* McAdams, 76 Nebr. 1, 106 N. W. 988 (a very pretty piece of machine-made justice; after two trials, a verdict for the plaintiff was reversed solely because of testimony to the total damage to the goods, the objections being, first, that it was an opinion, and secondly that it was based in part on cost price); 1918, Shaul *v.* Mann, 102 Nebr. 265, 166 N. W. 619 (judge without a jury); 1921, Macke *v.* Wagener, 106 Nebr. 282, 183 N. W. 360 ("The long-established rule in this State is that where immaterial and irrelevant testimony has been admitted over objection, and which *may* have tendency to mislead the jury, it is good ground for a new trial"; here the court apparently hesitated; but it finally threw away its chance to enlist in the ranks of progress; this particular lawsuit, having lasted six years already, now was made a fit subject for lay jesting upon the speed and certainty of legal justice; Henry had in 1915 publicly called Mary a lecher; a week later, Mary's friends, threatening Henry with something or other, obtained from him notes and a mortgage for $3000; another week later, Henry files a bill in equity for cancellation on the ground of duress; a year later, the decree is entered for Henry; two years later the Supreme Court affirms this decree; then Mary, having lost her settlement, starts suit for the original slander, and obtains a verdict for 1 cent damages; on appeal, this judgment is reversed because the pleadings in the equity case had been read to the jury in the slander case; and so, five years after the original verbalities, the wheels of justice are still grinding; is this an exhibit of efficient justice, or the reverse?).

NEVADA: State *v.* Williams, 28 Nev. 395, 82 Pac. 353; Rev. L. 1912, § 5066 (no judgment shall be reversed for any error "which shall not affect the substantial rights of the parties"); § 7302 (criminal cases; similar); § 7469 (similar).

NEW HAMPSHIRE: 1903, Pattee *v.* Whitcomb, 72 N. H. 249, 56 Atl. 459 (new trial for a single error, in excluding cumulative opinion in evidence); 1912, Holman *v.* Boston & M. R. Co., 76 N. H. 496, 84 Atl. 979 (this opinion shows that no Court, even in the State once honored by the tradition of the great Charles Doe, is to-day advanced enough not to need self-scrutiny for the present fault).

NEW JERSEY: St. 1894, May 9, c. 163 (new trial is to be granted where any "manifest wrong or injury" has been suffered); 1897, Kohl *v.* State, 59 N. J. L. 445, 37 Atl. 73 (murder; the trial judge told the jury that a question was whether there was a motive, in particular, whether the deceased had any money; the defendant's mother, with whom the deceased lived, had said on the direct examination that the deceased showed no large sums of money, and on the cross-examination, that he had no money but a dollar a week; she was then allowed to be contradicted by B. who testified that she had elsewhere said

the defendant had $800; this statement, however, it was ruled, not being precisely inconsistent with her direct examination, and not being available to impeach the cross-examination where she had been made the examiner's own witness, was therefore inadmissible, and hence there was no evidence to show that he had money, except this contradiction; "for that reason alone, the judgment, in my opinion, should be reversed and a new trial granted"). This ruling apparently led to another statute, which made a further effort to control the judicial monomania (St. 1898, c. 237, § 136) by adding that "no judgment shall be reversed . . . for any error except such as shall or may have prejudiced the defendant in maintaining his defence upon the merits." This statute seems to have been followed by an improvement: 1904, State *v.* Simon, 71 N. J. L. 142, 58 Atl. 107.

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

A statute again attempted to impose a more liberal rule, and for a while something was achieved; and then the practice fell back into the old rut: C. Cr. P. 1881, § 542 (the Court shall "give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties"); 1896, Gray, J., in People *v.* Hoch, 150 N. Y. 299, 301, 44 N. E. 976 ("The spirit of this legislation, as is its letter, is that if the accused has had a fair trial upon his accusation, and if this Court is satisfied that the conviction is sufficiently supported by competent evidence, that conviction shall stand"); 1897, People *v.* Conroy, 153 N. Y. 174, 185, 47 N. E. 258 (preceding case approved); 1897, People *v.* Burgess, 153 N. Y. 561, 47 N. E. 889 (same); 1897, People *v.* Strait, 154 N. Y. 165, 47 N. E. 1090 ("That statute [C. Cr. P. § 542] is but little more than a codification of the previously established rule . . . ; neither that rule nor the statute affects the well-established principle that the rejection of competent and material evidence, which is harmful to the defendant and excepted to, presents an error requiring a reversal. Such a ruling affects a 'substantial right', even though the appellate court, with the rejected evidence before it, would still come to the same conclusion reached by the jury; the defendant has the right to insist that material and legal evidence offered by him shall be received and submitted to the jury"); 1897, People *v.* Sutherland, 154 N. Y. 345, 48 N. E. 518 (O'Brien, J., concerning letters of a murdered paramour to show motive; "It is impossible to say with any reason that the result of the trial should have been different if the letters had not been introduced at all. If they had been excluded by the court as immaterial, the case against the defendant would have remained the same, and there is not the slightest ground for the belief that the jury could or would have rendered any other verdict").

In civil cases the Court promulgated an enlightened principle: 1906, Hindley *v.* Manhatten R. Co., 185 N. Y. 335, 78 N. E. 276 ("If no reasonable view of all the evidence in the record would permit a conclusion favorable to the defendants on that issue, it is clear that the erroneous rulings [of admission for the plaintiffs], did no harm, and that the judgment [for the plaintiffs] should be affirmed").

The vacillations were then resumed. In criminal cases (*e.g.* 1904, People *v.* Bonier, 179 N. Y. 315, 72 N. E. 226) the Court had observed the old rule that "a presumption of injury *conclusively arises* whenever it is apparent that the erroneous ruling *may have* affected the verdict"; yet in an opinion filed on the very same day (People *v.* Davey, Nov. 15, 1904, 179 N. Y. 345, 72 N. E. 244) the same Court asserted that "it has become one of the accepted maxims of our jurisprudence that appellate courts will not be astute to find mere technical errors upon which to reverse judgments"; in the Davey case, the opinion does not make a pretence of considering whether the conviction was actually just upon the evidence; its own condemnation is furnished by the language of the same Court in an opinion written by the very same judge, filed one month later (People *v.* Rimieri, 180 N. Y. 163, 72 N. E. 1002), and ruling the opposite way upon almost precisely the same facts (cited *post*, § 1157, n. 3), in which the proper criticism is made that "to hold that a jury, sitting in judgment in a case involving a human life, would be influenced by such an incident to render a verdict not warranted by the evidence, would be an unjust imputation on the system."

A turn for the good was then observable: 1908, People *v.* Gillette, 191 N. Y. 107, 83 N. E. 680 (murder); reaction followed: 1915, People *v.* Risley, 214 N. Y. 75, 108 N. E. 200 (forgery; in this case the whole Court falls back to the days of its most devoted technicalism; the new judge, Seabury, dissents in a gallant but unsuccessful effort to hold the ground won in recent years); 1915, People *v.* Marendi, 213 N. Y. 600, 107 N. E. 1058 (reactionary opinion by Miller, J.); 1916,

People *v.* Swersky, 216 N. Y. 471, 111 N. E. 212; 1916, People *v.* Watson, 216 N. Y. 565, 111 N. E. 243, 1921, People *v.* Slover, 232 N. Y. 264, 133 N. E. 633 (murder; liberal test applied).

NORTH CAROLINA: 1899, State *v.* Jefferson, 125 N. C. 712, 34 S. E. 648 (a mob had almost lynched the accused, at the time of the arrest; but a new trial was awarded on the merest quibble of evidence, while conceding that the whole evidence "warranted conviction"); 1904, State *v.* Parker, 134 N. C. 209, 46 S. E. 511 (corroborating a child under ten in rape, by her prior statements; the judge's failure to charge as to the precise nature of the corroboration, though no request was made of him by defendant's counsel, and no objection taken, held ground for a new trial; a second trial also having been already ordered for a mere technicality; Clark, C. J., diss.); 1921, State *v.* Mundy, 182 N. C. 907, 110 S. E. 93 ("Courts do not now grant new trials for merely technical objections, unless the error is of sufficient importance to justify a belief that if the error had not been committed the result, reasonably, would have been different").

NORTH DAKOTA: 1910, State *v.* Staber, 20 N. D. 545, 129 N. W. 104 (different phrasings considered).

OHIO: St. 1911, p. 132, May 18, Gen. Code Ann. § 11364 (upon review of a judgment, the Court shall certify "whether or not in its opinion substantial justice has been done to the party complaining, as shown by the record of the proceedings and judgment under review"; if certifying in the affirmative, all errors shall be "deemed not prejudicial to the party complaining", and judgment shall be affirmed, or modified "if in the opinion of such reviewing court a modification thereof will do more complete justice to the party complaining"); 1922, Burke *v.* State, — Oh. —, 135 N. E. 644 (forgery).

OKLAHOMA: 1912, Landon *v.* Morehead, 34 Okl. 701, 126 Pac. 1027 (this is an extreme example of the sporting theory of litigation; a document being proved by copy, and the evidence of opponent's possession etc. being inadequate, an affidavit filed after verdict and showing the needed fact, was held not to obviate a reversal; for "the making of this subsequent affidavit *could not cure the Court's error* committed at the trial"; thus the Supreme Court rules exactly as if it were a question of whist).

But in criminal cases the Court of Criminal Appeal, under the leadership of (the late) Presiding Justice Furman, the greatest American criminal judge of the present generation, adopted an enlightened attitude, and promulgated one of the soundest formulas; 1912, Mitchell *v.* State, 7 Okl. Cr. 563, 124 Pac. 1112 ("As the verdict rendered is the only one which could have been rendered by the jury, we cannot say that the appellant has been deprived of any substantial right to his injury"); 1919, Wilson *v.* State, — Okl. Cr. —, 183 Pac. 613 (Rev. L. § 6005, as to a miscarriage of justice, applied to prevent a reversal where "the evidence abundantly sustains the verdict" and "the conviction was at all events inevitable"); 1919, Siebenaler *v.* State, 16 Okl. Cr. App. 576, 185 Pac. 448 ("Where the legal evidence in a case shows conclusively that a defendant is guilty, and where the jury could not rationally arrive at any other conclusion, ordinarily errors committed . . . will not constitute grounds for reversal").

OREGON: Laws 1920, § 1626 (criminal cases; like Cal. P. C. § 1258); 1904, Carter *v.* Wakeman, 45 Or. 427, 78 Pac. 362 ("When it is manifest that an error has been committed, prejudice will be presumed"); 1917, State *v.* Morris, 83 Or. 429, 163 Pac. 567 ("the jury could not . . . reasonably have found" otherwise).

PENNSYLVANIA: 1908, Com. *v.* Cate, 220 Pa. 138, 69 Atl. 322 (judgment set aside solely because of a slight verbal inaccuracy in a charge on good character; "we cannot say no harm was done appellant in this respect, although the case in other respects was tried with exemplary care, and the rulings of the learned judge were fair and impartial"; here the rules of the game must be obeyed strictly, on penalty of "tries over again"); 1921, Curtis *v.* Miller, 269 Pa. 509, 112 Atl. 747 ("The evidence [rejected] was merely cumulative, and, if admitted, would not have changed the result"); 1915, Com. *v.* Vitale, 250 Pa. 548, 95 Atl. 723 (murder; the old-fashioned technical rule at its worst).

PHILIPPINE ISL.: C. C. P. 1901, § 503 ("No judgment shall be reversed on formal or technical grounds, or for such error as has not prejudiced the real rights of the excepting party"); 1908, Paez *v.* Berengner, 8 P. I. 454; 1908, Chung Kiat *v.* Lim Kio, 11 P. I. 31.

PORTO RICO: 1903, Pereda's Succession *v.* Rodrigues' Succession, 3 P. R. 345; 1904, People *v.* Bird, 5 P. R. 387; 1907, People *v.* Rivera, 12 P. R. 386, 399; 1906, Horton *v.* Robert, 11 P. R. 168, 182; 1907, People *v.* Cancel, 13 P. R. 179, 187 (rape; the opinion takes the astounding view, as to erroneous charge on corroboration, that "although the error may have been in favor of the accused, still a judgment based on such palpably erroneous instructions cannot be approved"); 1910, People *v.* Espanol, 16 P. R. 203; 1912, People *v.* Calero, 18 P. R. 44, 50 (the rule in People *v.* Cleminson, Ill., *supra*, "meets our entire approbation"); 1917, People *v.* Julia, 25 P. R. 262, 277.

RHODE ISLAND: One of the broadest and best statements of the rule is as follows: "Where the evidence is such that a new trial would be of no avail, it will be denied, although there may have been error in the trial"; per

Stiness, C. J., in Clarke *v.* N. Y. N. H. & H. R. Co., 26 R. I. 59, 58 Atl. 245.

South Carolina: 1839, State *v.* Ford, 3 Strobh. 528 (Earle, J., dissents as to the propriety of admitting certain evidence, but agrees to dismiss the motion for a new trial: for "in such a case as this, where the prisoner's guilt is very manifest . . . I think it would exhibit unnecessary squeamishness to say he has not been legally convicted on abundant evidence"); 1906, State *v.* Rowell, 75 S. C. 494, 56 S. E. 23 (murder; out of twelve errors only one was sustained, and that was a quibble over the trial judge's wording of his instruction as to self-defence; for this alone a new trial was ordered, though the jury had only condemned him to five years' imprisonment for manslaughter on facts which made this a paltry penalty).

South Dakota: 1904, Fowler *v.* Iowa Land Co., 18 S. D. 131, 99 N. W. 1095 ("Where there is sufficient evidence to sustain the judgment, independently of the evidence objected to and admitted, the admission of such evidence does not constitute reversible error").

Tennessee: Shannon's Code 1916, § 6351 (no judgment shall be reversed "unless for errors which affect the merits of the judgment"); § 6351*a* 1 (no judgment shall be set aside for errors in rulings on evidence, etc., unless "after an examination of the entire record in the case it appears that the error complained of has affected the results of the trial"). The following phrasing of the rule, under Tenn. Code, § 6351, would be the ideal one, if the last two clauses were omitted: 1904, Pennsylvania R. Co. *v.* Naive, 112 Tenn. 239, 79 S. W. 124 (Neil, J.: "The rule has been laid down by this Court that there can be no reversal for error in the charge of the Court below, where we can clearly see that a correct result was reached by the jury, and that an other trial with a proper charge could not change that result. The same rule must obtain where evidence was improperly excluded in the Court below, if it be perfectly apparent to this Court that the result was the correct one, that the excluded evidence could not have changed the result, and that upon a new trial . . . the jury could not fail to reach the same conclusion"); 1918, Frank *v.* Wright, 140 Tenn. 535, 205 S. W. 434 (personal injury).

Texas: 1906, Chancey *v.* State, 50 Tex. Cr. 85, 96 S. W. 12 (the judge remarked, excluding evidence of a witness' intoxication, that if he was drunk his testimony "would not amount to much"; it was held that this *might* apply to the defendant, who was also drunk, and on this ground alone the judgment was set aside!); 1905, Watkins L. M. Co. *v.* Campbell, 98 Tex. 372, 84 S. W. 424 (reversed for a single error in admitting cumulative evidence; the same pitiable 'non possumus' recurs, "It cannot be known that the jury was not influenced, etc.").

Utah: The following series of rulings in this State is commended to the judgment of the profession: 1905, State *v.* Shockley, 29 Utah 25, 80 Pac. 865 (this is perhaps the most glaring example of our modern failures of justice to be found in the records of a decade; the defendant, who had in July, 1903, three times robbed street cars in Salt Lake City, was charged with murder of two passengers in a fourth attempted robbery of a car in January, 1904; the defendant took the stand and confessed all the facts, endeavoring to make exculpation by declaring that he had only intended "to try to hit his arm"; the verdict was reversed by the majority, solely on two erroneous rulings of evidence, first, because the claim of witness' privilege was required to be made by the defendant himself and not his counsel, and secondly, because of improper cross-examination to past misconduct; not only were the trial Court's rulings easily supportable on orthodox principles, but the Supreme Court majority opinion gave not even one word's consideration to the question whether the alleged errors should have affected the verdict; on a perusal of the testimony of the defendant, full of the self-justifying ethics of a reckless desperado, it is hard to say whether one is more aghast at the cold-bloodedness of the robber in taking the lives of his innocent victims, or the cold-bloodedness of the Supreme Court in mechanically grinding out a reversal without a regard to the demands of justice); 1910, State *v.* Vance, 38 Utah 1, 110 Pac. 434 (strict muzzling rule here applied, to limit cross-examination to matters testified to on the direct examination; the Shockley case reviewed and approved); 1911, State *v.* Thorne, 39 Utah 208, 117 Pac. 58 (another "cold-blooded" case; the defendant was charged with murder while burglarizing; he fully admitted the burglary and the killing and even by his own story the most to be said for him was that while the deceased, the owner of the store, was backing away with his hands up as commanded, the defendant "poked" or "punched" him in the ribs, and the gun "went off", and that he did not intend to kill the man; the Court's opinion expressly concedes that "upon the undisputed evidence in the case he is shown guilty of murder in the first degree", but reverses the judgment because, partly, of an erroneous cross-examination of the accused to former crimes (which crimes we here may believe to have been committed, inasmuch as the defendant did not deny them but claimed the privilege against self-crimination); and since this cross-examination "had a tendency" to deter the jury from the recommendation to life imprisonment which they might have made, hence the reversal; the result then is that a professional thug who came to a peaceable citizen's store to rob the till, and on the citizen's submission meanly killed him, was strictly protected by the Court because

The rules of Evidence are not arbitrary. They are not in themselves mere instruments of stratagem for the bar and of logical exercitation for the judiciary. As a whole and as a system, they are founded on rational purposes and practical experience. They are always reasoned, and usually reasonable. They have a right to exist, but not to be abused. As a system and as individual rules, they must be judged by themselves, and not by the improper consequences which the law of new trials has often caused to be attributed to their enforcement. That they have often seemed technical and inconsistent is due chiefly to the habit of ignoring the study of their reasons, — which nevertheless (as the ensuing pages attempt to exhibit) have been at all times copiously vouchsafed by the judges. That they are often difficult to apply is due mainly to their inherent nature, — to the possible applicability of scores of rules of exclusion at one and the same moment to one and the same offer of evidence. That they have in many respects been unpractical and unnecessary

the jury *might* have recommended him to mercy, but the interests of the peaceable citizen and his bereaved family, to whom the thug showed no mercy, were not regarded as at all affecting criminal law administration); 1912, State *v.* Romeo, 42 Utah 46, 128 Pac. 530 (in this opinion, the attitude toward the present question showed a change; the case was another one of brutal and cruel murder with robbery; there was an error in the phraseology of the trial judge's charge upon the jury's power to recommend less than the death penalty; the opinion terms the error "more technical than substantial", and proceeds: "A charge with the objectionable features eliminated would not have produced a different result"); 1916, State *v.* Cluff, 48 Utah 102, 158 Pac. 701 (adultery; Comp. L. 1907, § 4975, as amended by St. 1915, c. 113, applied); 1921, State *v.* Nell, — Utah —, 202 Pac. 7 (murder; "in this jurisdiction, presumption of prejudice from error does not obtain").

VERMONT: 1897, Cutler *v.* Skeels, 69 Vt. 154, 37 Atl. 228 (eighteen exceptions; a new trial granted simply because the plaintiff's counsel in his address said that he knew his clients to be of good reputation and that this was the best kind of evidence for them); 1908, Holman *v.* Edson, 81 Vt. 49, 69 Atl. 143 ("an improper answer by a witness to a proper question is not ground of error if given without fault of the Court or examining counsel", and when a party is the witness, "fault" is presumed: here is the perverted notion that a trial is to be had over again as a "penalty" for a "fault", — just as a misdeal in cards vitiates the hand; here a new trial was granted solely because the plaintiff when testifying made one answer based on hearsay); 1920, State *v.* Williams, — Vt. —, 111 Atl. 701 ("under our present practice the burden is upon the excepting party to show that he has been prejudiced by the alleged error").

VIRGINIA: Code 1919, § 6331 ("No judgment or decree shall be arrested or reversed . . . for any error committed on the trial where it plainly appears from the record and the evidence given at the trial that the parties have had a fair trial on the merits and substantial justice has been reached").

WASHINGTON: 1912, State *v.* Stone, 66 Wash. 625, 120 Pac. 76 (a vicious instance of the party being entitled to exact an observance of the minutest rules of the game, regardless of his guilt); 1919, State *v.* Herwitz, 109 Wash. 153, 186 Pac. 290 (excessive technicality in reversing because of the trial judges reference to a witness' credibility).

WEST VIRGINIA: 1905, Tucker *v.* Colonial F. Ins. Co., 58 W. Va. 30, 51 S. E. 86 ("If it appear to the Court on the whole matter that the verdict ought to be affirmed", no new trial will be granted); 1920, State *v.* Miller, 85 W. Va. 326, 102 S. E. 303; (sound rule).

WISCONSIN: 1874, Cole, J., in Schaser *v.* State, 36 Wis. 434 ("It may be shown by the most irrefragable proof that the defendant is guilty of the offence charged against him; but this does not justify the violation of well-settled rules of evidence in order to secure his conviction"); 1917, Hommel *v.* Badger State Inv. Co., 166 Wis. 235, 165 N. W. 20 (applying State § 3072 *m*); 1919, Beel *v.* Milwaukee E. R. & L. Co., 169 Wis. 408, 172 N. W. 791 (applying St. 1917, § 3072 *m*, in a liberal opinion by Vinje, J.); 1920, State *v.* Barber, — Wis. —, 179 N. W. 798 ("the defendant is entitled to have not only a fair, but a legal trial, and to have the question of his guilt or innocence determined upon evidence legally admissible to establish it"; that is the fallacy, viz., that the defendant is "entitled" to it; a party is not entitled to any rule of procedure); 1921, Behnke *v.* Kroening, 174 Wis. 224, 182 N. W. 837 ("the competent evidence fully sustains the Court's findings on this subject, and hence an erroneous admission of these conversations was in no way prejudicial error").

has been largely due to the occasional anachronous survival of rules which had arisen in a former epoch and had ceased to correspond to the new commercial and moral conditions, — such as the rule for attesting witnesses and the rule for disqualification by interest. But that they have gained, in great extent, the stigma of instruments of quibbling, chicane, and injustice, is due to other and extrinsic circumstances, and chiefly to the law of new trials. Like a false and artificial incubus — that spirit of darkness which visits and consorts with one against his will — the law of new trials has associated its reproach with the law of Evidence. But this identity must be constantly repudiated, in our thought of the rules of Evidence. We may then be satisfied to respect and preserve those rules for whatever is good in them; and we shall be the better able to perceive the extent of that good.

Just as English legislators, after yielding to the twenty years' pleading of Romilly, discovered after all that the enjoyment of the right of property in chattels could survive, without the fancied protection of the death-penalty for larceny, — so we shall some day awake to be convinced that a system of necessary rules of Evidence can exist and be obeyed, without affixing indiscriminately to every contravention of them the monstrous penalty of a new trial.

PART I

RELEVANCY

INTRODUCTORY: GENERAL THEORY OF RELEVANCY

CHAPTER III.

1. Kinds of Evidentiary Facts

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

Autoptic Proference. The first mode above mentioned has been termed Immediate or Direct Real Evidence.[1] "Thus," says Mr. Best,[2] "where an offence or contempt is committed in presence of a tribunal, it has direct real evidence of the fact. So formerly, on an appeal of mayhem, the court would in some cases inspect the wound, in order to see whether it were a mayhem or not. . . . Immediate Real Evidence is where the thing which is the source of the evidence is present to the senses of the tribunal." A preferable term is Autoptic Proference;[3] this avoids the fallacy of attributing an evidential quality to that which is in fact nothing more nor less than the thing itself. With reference to this mode of producing persuasion no question of relevancy arises. 'Res ipsa loquitur.' The thing proves or disproves itself. No logical process is employed; only an act of sensible apprehension occurs, — apprehension of the existence or non-existence of the thing as alleged. Bringing a knife into Court is in strictness not giving evidence of the knife's existence. It is a mode of enabling the Court to reach a conviction of the existence of the knife, and is in that sense a means of producing persuasion, yet it is not giving evidence in the sense that it is asking the Court to perform a process of inference,[4] and it therefore gives rise to no questions of relevancy.[5] There is direct apprehension and conviction as to the truth or falsity of the desired proposition.

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

Furthermore, though no question of Relevancy can arise with reference to Autoptic Proference, yet there may be and are special rules for safeguarding its employment and preventing its dangers. These auxiliary rules are examined under that subject (*post*, §§ 1157–1168). Moreover, though Relevancy is not involved in Autoptic Proference, yet there are in other connections certain questions of relevancy which commonly arise when it is em-

§ 24. [1] Mr. Bentham, in his Treatise on Judicial Evidence (tr. Dumont, London, 1825), p. 12, used "real evidence" to mean the inferences from a 'res'; this of course is a different usage.

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

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

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

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

ployed. Some of these are, (*a*) Whether it is permissible to infer from voice, features, and other outward appearances, to inward qualities; this is a question of the relevancy of the former to the latter; the outward appearances are the only things autoptically presented; (*b*) Whether a jury may infer the race of a person from his skin-color or his hair, or may infer paternity from resemblance, and the like; these again are questions of relevancy, for the real question is whether we have a right to assume the physiological generalization that a peculiarity of features is an indication of race or of relationship; (*c*) Whether models, photographs, etc., may be exhibited; this involves usually the inquiry whether they are substantially correct reproductions of the original, and concerns the principle of testimonial trustworthiness. Still further, certain of the Auxiliary Rules and of the rules of Extrinsic Policy may be involved; for example, (*d*) Whether an accused person or a plaintiff in a suit for bodily injuries may be compelled to exhibit his person or submit to tests; (*e*) Whether the exhibition of certain things should be forbidden when it involves indecencies or the likelihood of unduly exciting prejudice; (*f*) Whether at a jury's view the hearsay rule has been violated by the reception of unsworn testimony. These are some of the instances in which Autoptic Proference is employed, and yet the rule involved is but an instance of some general principle belonging in another place.[6]

§ 25. **Distinction between Circumstantial and Testimonial Evidence.** Aside from Autoptic Proference, then, all evidence must involve an *inference from some Fact to the Proposition to be proved*.

The kinds of inferences, with regard to the material taken as their subject, fall naturally into two great classes; or, rather, a single special class of evidentiary facts separates itself from the mass and calls for a distinct treatment, attended as it is with uniform and peculiar qualities, affecting its probative features and long recognized in experience and acknowledged by jurists. This special class of facts is the assertions of human beings regarded as the basis of inference to the propositions asserted by them. This may be called Testimonial Evidence;[1] Direct Evidence is an alternative term sanctioned by usage, though not so satisfactory in theory. All remaining facts form a class known as Circumstantial Evidence.

The distinction has been thus stated:

1824, Mr. *Thomas Starkie*, Evidence, I, 13: "Where knowledge cannot be acquired by means of actual and personal observation, there are but two modes by which the exis-

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

§ 25. [1] The word "evidence" was until the middle of the 1700s used distinctively of testimonial evidence, — circumstantial evidence being either not reckoned with or else conceived of under the term "presumptions"; hence, in the trials of that period "an evidence" is used to mean "a witness": 1628, Coke upon Littleton, 282 *b*; ("Evidence, 'evidentia': This word in legall understanding doth not only containe matter of record, . . . and writings under seale and other writings without seale, . . . which are called evidences, 'instrumenta'; but in a larger sense it containeth also 'testimonia', the testimony of witnesses, and other proofes to be produced and given to a jury for the finding of any issue betweene the parties. And it is called evidence, because thereby the point in issue is to be made evident to the jury"); 1746, Lord Lovat's Trial, 18 How. St. Tr. 798; 1754, Canning's Trial, 19 How. St. Tr. 478, 488, 514, 580.

ence of a bygone fact can be ascertained: 1st, By information derived either immediately or mediately from those who had actual knowledge of the fact; or, 2dly, by means of inferences or conclusions drawn from other facts connected with the principal fact which can be sufficiently established. In the first case, the inference is founded on a principle of faith in human veracity sanctioned by experience. In the second, the conclusion is one derived by the aids of experience and reason from the connection between the facts which are known and that which is unknown. In each case the inference is made by virtue of previous experience of the connection between the known and the disputed facts, although the grounds of such inference in the two cases materially differ."

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

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

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

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

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

The special tests of this distinction and the peculiar results which follow from the segregation of assertive or Testimonial Evidence will be examined under that topic (*post*, § 475).

It is here necessary merely to call attention to the general nature and limits of the class first to be considered — Circumstantial Evidence. The term "circumstantial" is unfortunately but inevitably fixed upon us.[3] It must suffice here to take note that this class embraces all offered evidentiary facts not being assertions from which the truth of the matter asserted is desired to be

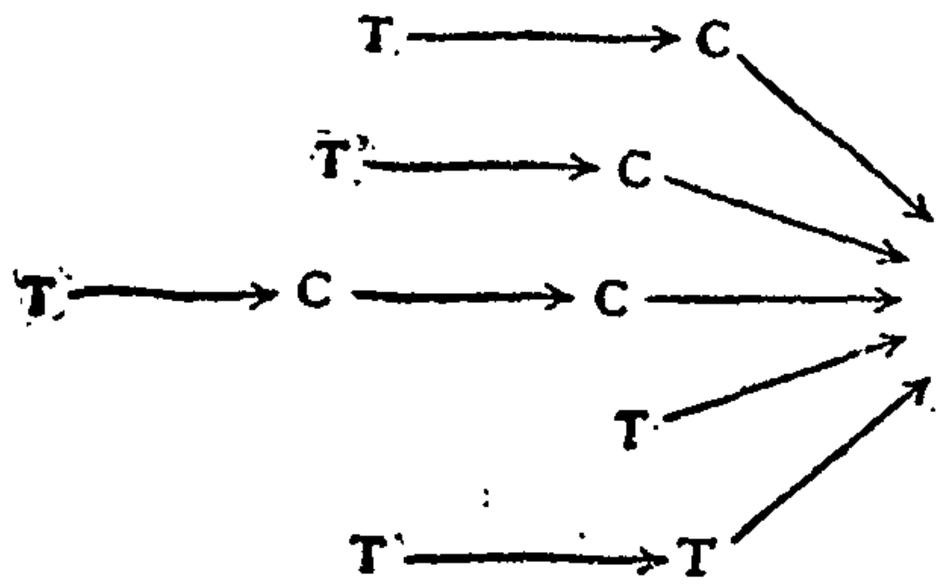
[2] This, as will be seen, is too narrow; for the tribunal may learn the fact of its own knowledge, as by a jury's view or by judicial notice.

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

inferred. The doubtful instances lying on the line between the two classes may be examined in connection with the assertive or testimonial class (*post*, § 475).

In the grouping of Circumstantial Evidence, difficulty has arisen from not keeping in mind that most circumstantial evidentiary facts must ultimately in turn become themselves a Proposition [4] and be proved by "direct" evidence, and also from confining the latter term to assertions of some main fact in issue. For example, the finding of a bloody knife upon the accused after a secret killing is a circumstance from which an important inference may be drawn; yet this fact of the finding must be proved by some person's assertion; here the special rules of assertive or testimonial evidence must be applied in receiving the assertion, and the ordinary rules of circumstantial relevancy in receiving the fact of finding, assuming it as proved by the assertion. But this mixture of both kinds is not necessary and inevitable. At one extreme, as in a jury's view of a corpse or in a matter of judicial notice, we may have a circumstance given us as the basis of inference without the intervention of an assertion. At the other extreme we may have assertions, as of the signing of a deed or of the perceived felonious abstraction of a bank-note, directly positing the main proposition of the pleadings, and needing no intervening inference, except from the fact of the assertion. But between these extremes lies the mass of ordinary evidence, for which at least two distinct steps of inference are required, — the inference from the fact of an assertion to the matter asserted, and then the inference from the matter asserted to another matter. Moreover, just as we may need even two or three inferences of the latter sort before reaching a main proposition of the pleadings, so (as in using hearsay) we may often need to use two inferences from assertions, — first from one assertion on the stand to the fact of the making of the extra-judicial assertion, and then from the latter to the truth of the matter asserted by it.

Using P to represent the Proposition to be proved, T to represent a testimonial assertion, and C to represent a circumstance, the following chart will illustrate the analysis of a typical mass of evidence for any Proposition whatever:



Now, so far as the principles of relevancy are concerned, it is apparent that it does not matter how we have come to our knowledge of these so-called "cir-

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

cumstances," *i.e.* things not assertions, — whether we get at them through believing assertions, or otherwise; what matters is the nature of the particular evidentiary fact in hand, whether it is assertive or circumstantial. In dealing with the probative value of the circumstantial class, we are to take the alleged circumstantial (or non-assertive) fact as assumedly proved, and then determine its relevancy. It is immaterial whether it has itself to be proved by testimony (as ordinarily) or by another circumstance (as often) or by the tribunal's use of its own senses or existing knowledge (as occasionally).

§ 26. **Relative Value of the two Classes.** The rules of Admissibility have nothing to say concerning the weight of evidence when once admitted. The relative weight of circumstantial and testimonial evidence, therefore, does not present itself in this place.[1] Indeed, it can be said that there are no rules, in our system of Evidence, prescribing for the jury the precise effect of any general or special class of evidence. So far as logic and psychology assist us, their conclusions show that it is out of the question to make a general assertion ascribing greater weight to one class or to the other. The probative effect of one or more pieces of either sort of evidence depends upon considerations too complex. Science can only point out that each class has its special dangers and its special advantages.

But the question has long been discussed, within and without the profession, whether circumstantial or testimonial evidence is relatively the more persuasive;[2] and, rather to eradicate possible 'a priori' misconceptions than to declare any positive rule of law, the judicial utterances have often dealt with this question:

1838, Mr. *William Wills*, Circumstantial Evidence, 26: "The best writers, ancient and modern, on the subject of evidence, have concurred in treating circumstantial as inferior in cogency and effect to direct evidence; a conclusion which seems to follow necessarily from the very nature of the different kind of evidence. But language of a directly con-

§ 26. [1] For a systematic and detailed survey of the considerations affecting weight of testimony, see the following: Jeremy Bentham, Rationale of Judicial Evidence, b. IX, pt. VI, c. X (Bowring's ed. vol. VII, p. 563); Charles C. Moore, A Treatise on Facts, or the Weight and Value of Evidence (1908).

The whole subject is dealt with in a compilation by the present author, entitled The Principles of Judicial Proof, as given by Logic, Psychology, and General Experience, and illustrated in Judicial Trials (1913).

[2] The following anecdote illustrates the conventional prejudice: 1916, L. Esarey and E. V. Shockley, eds., Courts and Lawyers of Indiana (Vol. I, p. 119). "[In the trial courts of early Indiana] the following case of circumstantial evidence is culled from the same 'Sketches' as the others. It happened in Judge Eggleston's court, presided over, however, by the associates. The case was for five dollars damages for killing a dog. The plaintiff testified that he saw the defendant pick up his rifle, run across a lot, rest it on a fence, saw a flash, heard the report, saw the dog fall, went up to him, and saw the bullet hole just behind his front leg. The evidence seemed conclusive. All appeared lost, but the defendant's attorney was not disconcerted. He knew the associates had just been reading a new law book, Philipp's Evidence, which cautioned judges against the pitfalls of circumstantial evidence. He therefore recalled the witness, had him repeat his evidence and ended by asking him if he saw the bullet hit the dog. When the witness refused to testify to the fact, the lawyer casually observed to the court, 'A case of mere circumstantial evidence', and rested his cause. After due deliberation, the court announced, 'This is a plain case of circumstantial evidence, judgment for the defendant.'"

trary import has been so often used of late, by authorities of no mean note, as to have become almost proverbial.

"It has been said that 'circumstances are inflexible proofs; that witnesses may be mistaken or corrupted, but things can be neither.' 'Circumstances,' says Paley, 'cannot lie.' It is astonishing that sophisms like these should have passed current without animadversion. The 'circumstances' are assumed to be in every case established, beyond the possibility of mistake; and it is implied, that a circumstance established to be true, possesses some mysterious force peculiar to facts of a certain class. Now, a circumstance is neither more or less than a minor fact, and it may be admitted of all facts, that they cannot lie; for a fact cannot at the same time exist and not exist: so that in truth the doctrine is merely the expression of a truism, that a fact is a fact. It may also be admitted that 'circumstances are inflexible proofs', but assuredly of nothing more than of their own existence: so that this assertion is only a repetition of the same truism in different terms. It seems also to have been overlooked that circumstances and facts of every kind must be proved by human testimony; that although 'circumstances cannot lie', the narrators of them may; and that, like witnesses of all other facts, they may be biased or mistaken. So far then, circumstantial possesses no advantage over direct evidence.

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

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

"Perhaps no single circumstance has been so often considered as certain and unequivocal in its effect, as the anno-domini water-mark usually contained in the fabric of writing-paper, and in many instances it has led to the exposure of fraud in the propounding of forged as genuine instruments. But it is beyond any doubt (and several instances of the kind have recently occurred) that issues of paper have taken place bearing the water-mark

of the year succeeding that of its distribution, — a striking exemplification of the fallacy of some of the arguments which have been remarked upon. How often has it been iterated in such cases, that circumstances are inflexible facts, and facts cannot lie!

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

1846, GIBSON, C. J., in *Com.* v. *Harman*, 4 Pa. St. 269, 271: "No witness has been produced who saw the act committed; and hence it is urged for the prisoner, that the evidence is only circumstantial, and consequently entitled to a very inferior degree of credit, if to any credit at all. But that consequence does not necessarily follow. Circumstantial evidence is, in the *abstract*, nearly, though perhaps not altogether, as strong as positive evidence; in the *concrete*, it may be infinitely stronger. A fact positively sworn to by a single eye-witness of blemished character, is not so satisfactorily proved, as is a fact which is the necessary consequence of a chain of other facts sworn to by many witnesses of undoubted credibility. . . . The only difference between positive and circumstantial evidence is, that the former is more immediate, and has fewer links in the chain of connection between the premises and conclusion; but there may be perjury in both. A man may as well swear falsely to an absolute knowledge of a fact, as to a number of facts from which, if true, the fact on which the question of innocence or guilt depends must inevitably follow. No human testimony is superior to doubt. The machinery of criminal justice, like every other production of man, is necessarily imperfect, but you are not therefore to stop its wheels. Because men have been scalded to death or torn to pieces by the bursting of boilers, or mangled by wheels on a railroad, you are not to lay aside the steam-engine. Innocent men have doubtless been convicted and executed on circumstantial evidence; but innocent men have sometimes been convicted and executed on what is called positive proof. What then? Such convictions are accidents which must be encountered; and the innocent victims of them have perished for the common good, as much as soldiers who have perished in battle. All evidence is more or less circumstantial, the difference being only in the degree; and it is sufficient for the purpose when it excludes disbelief; that is, actual, and not technical disbelief; for he who is to pass on the question is not at liberty to disbelieve as a juror while he believes as a man. It is enough that his conscience is clear. Certain cases of circumstantial proofs to be found in the books, in which innocent persons were convicted, have been pressed on your attention. These, however, are few in number, and they occurred in a period of some hundreds of years, in a country whose criminal code made a great variety of offences capital. The wonder is, that there have not been more. They are constantly resorted to in capital trials to frighten juries into a belief that there should be no conviction on merely circumstantial evidence. But the law exacts a conviction wherever there is *legal* evidence to show the prisoner's guilt beyond a reasonable doubt; and circumstantial evidence is legal evidence."

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

1851, CARRUTHERS, S. J., in *Coles* v. *Perry*, 7 Tex. 109, 145, 168: "I do not yield unqualified assent to the proposition, as a rule of law, that circumstantial evidence is never to be weighed against positive testimony. There may be cases, and there are cases every day occurring, where the testimony of a witness testifying positively to an asserted fact as transpiring within his view (and honestly testifying, too) is disproved and falsified by proof of facts and circumstances known to exist, and the existence of which is wholly incompatible with the fact deposed to. In such cases, circumstantial evidence outweighs positive testimony; and I think the present one of those cases. The saying often quoted, but with the most perverse application, both in ordinary conversation and in argument at the bar, that 'circumstances never lie, but a witness may', is, when stated with legal precision, a truth."[3]

[3] See also the earlier but very instructive exposition, in 1785, by Dr. William Paley, Principles of Moral and Political Philosophy, b. VI, c. IX, par. beginning, "There are two popular maxims"; the striking passage in the argument of Attorney-General Knowlton, in Com. v. Borden, Mass., 1893, quoted in 27 Amer. Law Rev. 837; and the following opinions: 1910, State v. Marren, 17 Ia. 766, 107 Pac. 993 (propriety of giving a charge on this subject); 1905, State v. Foster, 14 N. D. 561, 105 N. W. 938 (whether an instruction must be given); 1909, Spick v. State, 140 Wis. 104, 121 N. W. 664 (excellent opinion by Marshall, J.).

The exposition of this subject which has now become the classical one is that of Furman, P. J., in Ex parte Jeffries, 1912, 7 Okl. Cr. 544, 124 Pac. 924. All laymen would profit by reading it.

The following anecdote illustrates the pervasive danger lurking in testimonial evidence, — a danger which, if laymen fully reflected upon it, would amply countervail the defects popularly ascribed to circumstantial evidence: Minneapolis "Journal", quoted in 217 Fed. (Dec. 24, 1914, flyleaf): *She had witnesses.* Every now and then Judge Mulqueen makes a pertinent comment on the advisability of those having eyes using them to see with, says the New York correspondent of the Cincinnati "Times-Star." He especially directs his attention toward the magistrates on the city bench, most of whom are so bound by the thongs of custom that, with all the will in the world to deal justly, they often make serious mistakes. "I had a colored woman before me to-day as a complaining witness," said Judge Mulqueen. "She had a man held for trial by a city magistrate on the charge that he had attacked her with a pair of scissors. 'He mout' near gouge mah eye out, Jedge,' she said to me. 'Jes' come at me lak a lion, he did, a-roarin', suh. He poke me in de face wiv dem scissors, Jedge, not once, but four or five times. He jes' cut up mah face lak if it was a yahd of ribbon, Jedge. The magistrate what held him

1893, Mr. Attorney-General 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!"

2. General Considerations affecting Relevancy

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

(1) The *first* consideration is that, so far as the tribunal can attempt expressly to deal at all with logical questions, it can do so only *roughly and loosely and in a general way*. To begin with, in courts as elsewhere, while the laws of reasoning must underlie inevitably all the operations of reasoning, they are, as a rule, followed instinctively and not with conscious skill. Little attempt is made deliberately to recognize or to apply them. The process of demonstration and decision in legal tribunals is an employment of the principles of reasoning upon a grander scale than is found in any other activity of life; yet the methods of logic are seldom alluded to in terms by judges or by advocates. Again, wherever a rule or a principle may be adopted in the effort to employ the recognized tests of reasoning, no attempt can be made to furnish ideal tests. Details, refinements, contingencies, exact distinctions, which the ideal principle would demand, may be and must often

to dis heah court says he navah did hear tell of no more dang'rous man.'

"Then I looked her over. She had a wide, smooth, yellow face that *didn't have a mark on it*. I told her to repeat her story, and she went all over it again, telling how the man had slashed her face with that pair of scissors.

"'But, madam,' I said, 'there isn't a mark on your face.'

"'Marks!' said she, indignantly, 'marks! What I care for marks; lem me ask you dat? *I got witnesses*, I tell you.'"

be neglected in order that the test may be serviceable. Perhaps it may be necessary to take a mean of convenience, and to lay down a specific and unshifting rule which will sometimes operate arbitrarily or unequally. Where general principles are declared, they may satisfy themselves with reaching fairness in the main. Finally, the logical powers employed must be those of everyday life, not those of the trained logician or scientist. The conclusions and tests of everyday experience must constantly control the standards of legal logic. Moreover, the possibilities of fraud must exclude much that is probative but capable of abuse. These considerations rest on the circumstances of the situation, patent to all. In the main, they are created by the need of speed in the settlement of litigation, and the impossibility of expecting aught else in a proceeding where parties, witnesses, advocates, jury, and judge represent so many grades of training and accomplishment. The principles of legal proof are in fact affected by these just as we should have expected them to be. This feature of the legal rules of relevancy has been emphasized, from different points of view, by two of the most original thinkers in the law of evidence:

1872, Sir J. F. STEPHEN, Indian Evidence Act, 33: "The leading differences between judicial investigations and inquiries into physical nature are as follows: 1. In physical inquiries the number of relevant facts is generally unlimited, and is capable of indefinite increase by experiments. In judicial investigations the number of relevant facts is limited by circumstances, and is incapable of being increased. 2. Physical inquiries can be prolonged for any time that may be required in order to obtain full proof of the conclusion reached, and when a conclusion has been reached, it is always liable to review if fresh facts are discovered, or if any objection is made to the process by which it was arrived at. In judicial investigations it is necessary to arrive at a definite result in a limited time; and when that result is arrived at, it is final and irreversible with exceptions too rare to require notice. 3. In physical inquiries the relevant facts are usually established by testimony open to no doubt, because they relate to simple facts which do not affect the passions, which are observed by trained observers who are exposed to detection if they make mistakes, and who could not tell the effect of misrepresentation, if they were disposed to be fraudulent. In judicial inquiries the relevant facts are generally complex. They affect the passions in the highest degree. They are testified to by untrained observers who are generally not open to contradiction, and are aware of the bearing of the facts which they allege upon the conclusion to be established. 4. On the other hand, approximate generalizations are more useful in judicial than they are in scientific inquiries, because in the case of judicial inquiries every man's individual experience supplies the qualifications and exceptions necessary to adjust general rules to particular facts, which is not the case in regard to scientific inquiries. 5. Judicial inquiries being limited in extent, the process of reaching as good a conclusion as is to be got out of the materials is far easier than the process of establishing a scientific conclusion with complete certainty, though the conclusion arrived at is less satisfactory."

1898, Professor *J. B. Thayer*, Preliminary Treatise on Evidence, 271–275: "It is a proper qualification when we use the phrase *legal* reasoning; not because, as compared with reasoning in general, it calls into play any different faculties or involves any new principles or methods, or is the creature of technical precepts; but because in law, as elsewhere, in adjusting old and universal methods to the immediate purposes in hand special limitations, exclusions, and qualifications have to be taken into account. . . . This does not, like mathematical reasoning, have to do merely with ideal truth, with mere mental conceptions; it is not aiming at demonstration and ideally exact results; it deals

with probabilities and not with certainties; it works in an atmosphere, and not in a vacuum; it has to allow for friction, for accident and mischance. Nor is it, like natural science, occupied merely with objective truth. It is concerned with human conduct, and all its elements of fraud, inadvertence, wilfulness, and uncertainty. Nor, as in history, is the purpose in hand merely that of ascertaining and setting forth the facts, or the habits, of human life and action. . . . The peculiar character and scope of legal reasoning is determined by its purely practical aims and the necessities of its procedure and machinery. Litigation imports, for the most part, as we have seen, a contest, and adversaries. It has in it, therefore, a personal element, and it requires not merely a consideration of what is just in general, but what is just as between these adversaries. It has often to be conducted with the aid of a tribunal whose peculiarities in point of number and of physical and mental capacity, and whose danger of being misled, must constantly be considered. It must shape itself to various other exigencies of a practical kind, such as the time that it is possible to allow to any particular case, the reasonable limitations of the number of witnesses, the opportunities for reply, and the chance to correct errors. It must adjust its processes to general ends, so as generally to promote justice, and to discourage evil, to maintain long-established rights, and the existing governmental order. The judicial office is really one of administration. . . . While these are some of the chief characteristics of legal reasoning, it will be noticed that they are only, in the nature of them, so many reasonable accommodations of the general process to particular subject-matters and particular aims. Amidst them all the great characteristics of the art of reasoning and the laws of thought still remain constant. As regards the main methods in hand, they are still those untechnical ways of all sound reasoning, of the logical process in its normal and ordinary manifestations; and the rules that govern it here are the general rules that govern it everywhere, the ordinary rules of human thought and human experience, to be sought in the ordinary sources, and not in law books."

§ 28. **Judge and Jury as a Tribunal; Relevancy, as distinguished from Minimum Probative Value.** (2) The *second* condition peculiar to litigious proof is that the question with which the law of Evidence in the strict sense has to do (that is, the rules regulating the production of evidence by opposing parties) is one of *Admissibility, not of Demonstration or Proof* (*ante*, § 12), — whether a particular fact is fit to be considered, and not whether it suffices for a demonstration. For example, the existence of a habit of doing a particular act under certain circumstances points forward to a doing of the act under those circumstances on a particular occasion. This is not a demonstration that the act was done, for the influence of the habit may have been counteracted by other considerations; there is not an invariable sequence. The jury may ultimately decide that the habit, with all the other circumstances, is not adequate to prove the doing; though the judge may at the outest have ruled that the course of conduct was at least sufficiently regular to have some value as an indication. The latter question is one of Admissibility, and under our system is a preliminary one for the judge only. The former question is one of completeness of proof; it is the final one, and is for the jury. Thus a peculiar and otherwise anomalous class of questions is raised. While the historian or the naturalist may as he pleases set aside and preserve data of the slightest helpfulness, or may pass judgment upon his facts immediately and finally, the legal tribunal is, with us, divided in function; the judge passes first upon the evidence and sets aside the tidbits for the jury; that which is not worth

considering, for one reason or another affecting its value, never reaches the auxiliary functionaries, the jurors.

This process, then, of determining the Admissibility of evidence, as distinguished from demonstrative and conclusive quality, is from the point of view of Logic a decidedly unique process, worked out clearly in no other department of life. Little considered by our logicians, it is a commonplace in the judicial experience. It owes its persistence and emphasis (peculiar as it is to the Anglo-American legal system) in some part, no doubt, to the tradition of our practice which looks almost solely to the parties in a case for such evidence as may be mustered (*post*, § 2483), leaving the judge almost entirely passive; for the question of the uselessness, or the contrary, of the spending of time on evidence offered is thus constantly required to be raised and settled at the outset. But chiefly it owes its origin, maintenance, and system to the separation of function between judge and jury. If this separation of judge and jury had not existed as it has, with all its history, nothing marked would probably have developed. Under the Continental systems, in which the jury is but a recent borrowing, little of the sort appears.

(*a*) This second feature, to some extent, eventuates merely in another phase of the first feature, the rough and practical quality already mentioned, noticeable in the whole law of probative value; for the Court will of course allow to be considered only such evidence as is worth submitting to men who will judge only by the most common and practicable tests. But to a more important extent the effect is to require a generally *higher degree of probative value for all evidence to be submitted to a jury* than would be asked in ordinary reasoning. The judge, in his efforts to prevent the jury from being satisfied by matters of slight value, capable of being exaggerated by prejudice and hasty reasoning, has constantly seen fit to exclude matter which does not rise to a clearly sufficient degree of value. In other words, legal relevancy denotes, first of all, *something more than a minimum of probative value*. Each single piece of evidence must have a plus value.[1]

This feature is seen in the form of scores of detailed rules, applying and shaping the fundamental principles of probative value, *i.e.* the rules of admissibility with reference to simple relevancy. There has been a raising of the standard of probative value all along the line, — very unequal in its effects, because it has been done without system, and with numerous inconsistencies; yet almost always done in pursuance of this spirit of safeguarding the decision of the jury, and on the whole with good practical results:

1794, Mr. *Edmund Burke*, Report to the House of Commons, Debrett's Hastings' Trial, 1796, Part VII, Suppl. p. xliii, 31 Parl. Hist. 357: "In the trials below, the Judges decide on the competency of the evidence before it goes to the jury, and (under the correctives in the use of their discretion, stated before in this report) with great propriety and wisdom. Juries are taken promiscuously from the mass of the people; they are composed of men who

§ 28. [1] The degree of admissible probative value is more particularly considered, for circumstantial evidence, *post*, § 38, and for testimonial evidence, *post*, §§ 475–478.

in many instances, in most perhaps, were never concerned in any causes, judicially or otherwise, before the time of their service. They have generally no previous preparation or possible knowledge of the matter to be tried; and they decide in a space of time too short for any nice or critical disposition. These Judges, therefore, of necessity must forestall the evidence where there is a doubt on its competence, and indeed observe much on its credibility, or the most dreadful consequences might follow. The institution of juries, if not thus qualified, could not exist."

1837, BOSANQUET, J., in *Wright* v. *Tatham*, 7 A. & E. 375: "[The Ecclesiastical Courts] are constituted upon principles very different from those which regulate the courts of common law. Where judges are authorized to deal both with the facts and the law, a much larger discretion with respect to the reception of evidence may not unreasonably be allowed than in courts of common law, where the evidence, if received by the judge, must necessarily be submitted entire to the jury. By the rules of evidence established in the courts of law, circumstances of great moral weight are often excluded, from which much assistance might in particular cases be afforded in coming to a just conclusion, but which are nevertheless withheld from the consideration of the jury upon general principles, lest they should produce an undue influence upon the minds of persons unaccustomed to consider the limitations and restrictions which legal views upon the subject would impose." [2]

1898, Professor *J. B. Thayer*, Preliminary Treatise on Evidence, 2: "The very structure of the system thus produced points to the reason, when we observe its constant, anxious, and over-anxious endeavor to prevent the tribunal to which the evidence is principally addressed from being confused and misled, and from dealing with questions which it has no right to deal with. It might seem strange and not worth while to keep alive so long a tribunal which has needed so much watching and so many safeguards, if one did not recall the immense persistence of legal institutions and usage, as well as the deep political significance of the jury and its relation to what is most valued in the national history and traditions of the English race. It is this institution of the jury which accounts for the common-law system of evidence, — an institution which English-speaking people have had and used, in one or another department of their public affairs, ever since the Conquest."

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

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

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

their nature and principle, are very subject to be confounded, and which therefore in every discussion should be most carefully kept distinct."

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

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

1829, MARSHALL, C. J., in *Columbian Ins. Co.* v. *Lawrence*, 2 Pet. 44: "This blending of an objection to the admissibility of evidence in the same application which questions its sufficiency is said to be not unusual, but to confound propositions distinct in themselves. . . . It is undoubtedly true that questions respecting the admissibility of evidence are entirely distinct from those which respect its sufficiency or effect. They arise in different stages of the trial, and cannot with strict propriety be propounded at the same time." [1]

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

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

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

§ 29. [1] So also: 1840, Verplanck, Sen., in Mayor *v.* Pentz, 24 Wend. 676 ("That distinction between admissibility and credibility which our jurisprudence has always maintained"); 1897, Brickell, C. J., in Nelms *v.* Steiner, 113 Ala. 562, 22 So. 435; 1905, McSherry, C. J., in Bowman *v.* Little, 101 Md. 273, 61 Atl. 223, 1084 (supplementary opinion). As early as 1745 Chief Justice Willes had declared that "the distinction between the competency and credit of a witness is a known distinction" (Omichund *v.* Barker, 1 Atk. 21); but the first emphasis on it for evidence in general seems to have been given in Mr. Burke's Report, quoted *supra*, § 28.

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

§ 29 *a*. **Irrelevancy and Practical Policy, distinguished.** A fact may be logically relevant, and thus far admissible, and yet be excluded by reason of one of the auxiliary principles of policy dealt with in Part II (*post*, § 1171 ff.), particularly those of Confusion of Issues, Unfair Surprise, or Undue Prejudice (*post*, § 1906).

For example, the moral disposition of an accused may be probatively of considerable value as indicating the probability of his doing or not doing a particular act of crime, yet it may be excluded because of the *undue prejudice* liable to be caused by taking it into consideration; for its probative value may be exaggerated, and condemnation be visited upon him, not for the act, but virtually for his character (*post*, § 55). Again, a witness' character as to veracity is probatively capable of being evidenced by specific mendacious acts of his; but if these were allowed to be evidenced without restriction, false testimony might be brought forward, specifying time, place, and conduct, and for lack of prior notice of these supposed details, it would be impossible for him to demonstrate their falsity; thus the principle of *unfair surprise* would apply (*post*, §§ 979, 1849). Again, in proving the dangerous qualities of a place or a machine, repeated instances of its injurious operation would be of high probative value; yet the unrestricted admission of such instances might result in so multiplying the subordinate issues in a cause that *confusion of mind* would ensue and the main controversy would be lost sight of in the great mass of minor issues (*post*, §§ 443, 1863, 1906). Thus at every point the logical dictates of Relevancy are subject to be balked and counteracted by these Auxiliary general Principles of Policy.

The detailed consideration of their operation can be fully considered under the specific rules; but the following passages will suffice here to illustrate the judicial methods in allowing the one kind of principle to counteract the other:

1824, BAYLEY, J., in *May* v. *Brown*, 3 B. & C. 113, 127 (libel; the trial judge had admitted, in mitigation of damages, the general fact the plaintiff had published libels of the defendant, but not the particular libels; affirming this on appeal, the judges put the exclusion on the following grounds): "The reasons of the distinction is that the admission of evidence of particular facts would be calculated not only to produce general inconvenience, but would operate as a surprise upon the party against whom it is offered. [As to the latter,] when a party knows what the issue is, he knows on what points to prepare himself; he may also be prepared upon general points not connected with the issue; but he certainly would not be prepared upon particular points. [As to the former,] suppose, in answer to an action for a libel, the defendant gives in evidence that the plaintiff at another time published a libel of the defendant. There might be first a question whether the plaintiff did or did not publish; secondly, whether it was or was not true; and then in this action for one libel, the matter tried would be that which ought to be in issue in another action brought for another libel. Besides, if the defendant might give in evidence one libel, he might give in evidence twenty; and so instead of trying one point and one issue joined, twenty different issues would be tried at one time, the inconvenience of which would be incalculable."

1876, STONE, J., in *Mattison* v. *State*, 55 Ala. 224, 232: "In inquiries of fact dependent on circumstantial evidence for their solution, no certain rule can be laid down which will define with unerring accuracy what collateral facts and circumstances are sufficiently

proximate to justify their admission in evidence. Human transactions are too varied to admit of such clear declaration of the rule. Whatever tends to shed light on the main inquiry, and does not withdraw attention from such main inquiry by obtruding upon the minds of the jury matters which are foreign or of questionable pertinency, is as a general rule admissible evidence. On the other hand, undue multiplication of the issues is to be steadily guarded against, as tending to divert the minds of jurors from the main issue."

1881, RUFFIN, J., in *State* v. *Brantley*, 84 N. C. 766: "Amongst other hazards and inconveniences, it was found that to allow evidence to be given touching every collateral matter that could be supposed, however remotely, to throw any light upon the main fact sought to be established, had the effect to render trials complicated, and to confuse and mislead, rather than enlighten, the juries, and at the same time to surprise the party on trial, who could not come prepared to disprove every possible circumstance, but only such as he might suppose to be germane and material. And therefore the main rule was adopted of restricting the inquiry to such facts as, though collateral to the matter at issue, had a visible, reasonable connection with it; not such a connection as would go to show that the two facts, the collateral one and the main one, sometimes — or, indeed, often — go together, but such as would show that they most usually do so."

1842, *Edgar Poe*; "The Mystery of Marie Roget." "I would here observe that very much of what is rejected as evidence by a Court is the very best of evidence to the intellect. For the Court, guided itself by the general principles of Evidence — the recognized and booked principles — is averse from swerving at particular instances. And this steadfast adherence to principle, with rigorous disregard of the conflicting exception, is a sure mode of attaining the maximum of attainable truth, in any long sequence of time. The practice, *in mass*, is therefore philosophical. But it is not the less certain that it engenders vast individual error."

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

But it is worth while to note that such rules can be properly used only by keeping in mind the *composite nature of their principles*. Under differing circumstances, one or the other of the principles may cease to operate, and then the rule would vary. To recur to the simile of an obstacle race

(*ante*, § 13); suppose a series of three races, open respectively to adults, to lawyers, and to club-members; suppose that one of the obstacles is a stream of water twenty feet deep and twenty feet across, so that no one has any chance for success who cannot swim. Now when we hear that A has failed to run in the race, although his name was entered, we cannot tell whether it is because he was disqualified as not being an adult or a lawyer or a club-member, or because he cannot swim; he may be eligible in one or in all three classes, and yet may be obliged to abandon his entry because he is no swimmer; or he may be able to swim but may be neither club-member nor lawyer nor adult. So with the exclusion of a fact to which some Auxiliary Rule of Convenience is capable of applying. The mere result of exclusion tells us nothing as to the reason or principle of exclusion. Yet it is necessary that we should know the kind of reason involved. The fact may be relevant, but in the particular instance obnoxious to some auxiliary rule of policy; if so, we may be able to use it on some occasion to which that policy does not apply. Or, the fact may be obnoxious to no such auxiliary policy, but merely irrelevant under the circumstances; if so, we may be able to cure its irrelevancy by changing the terms of our offer, and thus use it without hindrance.

It is therefore indispensable, when any fact or class of facts is found excluded, to ascertain if possible whether the reason of exclusion is based on its irrelevancy or on some auxiliary rule of policy. Without knowing these reasons, we are helpless and our rules are mere rules of thumb. In practice, Courts almost invariably indicate the reasons for exclusion. Though these reasons have seldom been much studied by the bar, the material is plentiful enough for a correct understanding of the principles concerned.

3. Modes of Inference and Types of Argument

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

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

1884, Professor *Alfred Sidgwick*, Fallacies, A View of Logic from the Practical Side, 212 ff.: "The real foundation of Proof is always the recognition of resemblance and differ-

§ 30. [1] "Argument" is here used in the logician's sense of "a proposed inference."

ence between things or events known and observed, and those which are on their trial, — whether such recognition is based (1) on knowledge already reached and formulated in names or propositions or (2) on direct observation and experiment. In proportion as we openly and distinctly refer to known principles (already generalized knowledge) is Proof *deductive;* in proportion as we rapidly and somewhat dimly frame new principles for ourselves from the cases observed is Proof *inductive, empirical,* or (in its loosest form) analogical. . . . The whole history of the rise and growth of knowledge (it has been also already remarked) is a record of fruitful rivalry and interaction between two opposite processes. Observation of facts has demanded theory — statement of 'laws' or uniformities — to explain, and even to name, the things and events observed; theory in its turn has always been more or less liable to purging criticism of 'fact.' . . .

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

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

weak point of an argument, much value may still be extracted from it in economy of time. . . . However we choose to name the two different kinds of arguments, the distinction between them has a certain real importance, as already shown; and all that is intended to be done with it is to recognize that so far as the given argument may be seen to belong to one or the other class, so far we are already on the track of special dangers."

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

It may be replied, however, that in all the above instances, the argument is implicitly based upon an understood law or generalization, and is thus capable of being expressed in the deductive or syllogistic form. Thus, in the first instance above, is not the true form: "Men's fixed designs are probably carried out; A had a fixed design to kill B; therefore, A probably carried out his design and did kill B"? There are two answers to this. (1) It has just been seen that every inductive argument is at least capable of being transmuted into and stated in the deductive form, by forcing into prominence the implied law or generalization on which it rests more or less obscurely. Thus it is nothing peculiar to litigious argument that this possibility of turning it into deductive form exists here also. It is not a question of what the form might be — for all inductive may be turned into deductive forms —, but of what it is, as actually employed; and it *is* actually put forward in inductive form. (2) Even supposing this transmutation to be a possibility, it would still be undesirable to make the transmutation for the purpose of testing probative value; because it would be useless. We should ultimately come to the same situation as before. Thus, in one of the instances above: "A repaired machinery after the accident; therefore, A was conscious of a negligent defect in it"; suppose we turn this into deductive form: "People who make such repairs show a consciousness of negligence; A made such repairs; there-

fore, A was conscious of negligence." We now have an argument perfectly sound deductively, *i.e.* if the premises be conceded. But it remains for the Court to declare whether it accepts the major premise, and so the Court must now take it up for examination, and the proponent of the evidence appears as its champion and his argument becomes: "The fact that people make such repairs indicates (shows, proves, probably shows, etc.) that they are conscious of negligence." But here we come again, after all, to an inductive form of argument. The consciousness of negligence is to be inferred from the fact of repairs, — just as the presence of electricity in the clouds was inferred by Franklin from the shock through the kite-string, *i.e.* by a purely inductive form of reasoning. So with all other evidence when resolved into the deductive form; the transmutation is useless, because the Court's attention is merely transferred from the syllogism as a whole to the validity of the inference contained in the major premise; which presents itself again in inductive form. For all practical purposes, then, it is sufficient to treat the use of litigious evidentiary facts as inductive in form.

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

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

1884, Professor *Alfred Sidgwick*, Fallacies, 270: "There is at bottom one primary source of fallacy in the inductive argument, call it by whatever name may be most convenient. We may name it, for instance, the danger of overlooking plurality of causes, or of neglecting possible chance or counteraction, or the possibility of unknown antecedents, or of arguing either 'post hoc ergo propter hoc' or 'per enumerationem simplicem', or of neglecting to exclude alternative possibilities, or of forgetting that facts may bear more than one interpretation, or of stating the law too widely, or of failing to see below the surface, or — perhaps on the whole the best of all — of unduly neglecting points of difference. . . . [The form of argument is] a case or cases brought forward of which such law is asserted to be the best explanation. If, then, some better explanation is possible, the theory as stated is impeachable. . . . By the 'best' explanation is meant . . . that solitary one out of all possible hypotheses which, while explaining all the facts already in view, is narrowed, limited, hedged, or qualified, sufficiently to guard in the best possible way against undiscovered exceptions. . . . Hence, the 'best' explanation of the facts A and B and C is that explanation which, while neglecting certain points of difference among them, and thus forming some generalization, neglects only those differences which are 'unessential.' The best explanation of (*i.e.* generalization from) one solitary sequence observed is that which neglects only its unessential elements or features. . . . It is in every case, then, through undue neglect of the essential difference between the specific case or cases observed and the wider genus to which the assertion professes to refer, that we rise to a generalization not sufficiently guarded against possible exceptions. . . . All positive proof depends . . . on the care, the precautions with which observation has been interpreted and experiment conducted. So far only as these exclude alternative possibilities

are they of real value. . . . Because all positive assertion can only justify itself . . . when mistakes have been either one by one eliminated or in a body prevented, the burden of doubt to be removed by evidence consists essentially in the group of alternative theories remaining undiscarded. . . . The important point is, always, to show that all other possible theories are weighed in the balance and found wanting, — that is to say, that all precautions have been taken against that crudest kind of unchecked generalization which the least trained mind possesses in the greatest abundance. This objection against a theory, that alternative theories are not yet discarded, appears, however, more directly applicable, more fruitful of results, against a concrete or an abstract-concrete thesis than against a directly abstract one. . . . And the right of the theory chosen, over all its possible rivals, depends entirely upon the depth of our insight into the conditions under which the experiment or observation was really made. This is the main lesson of Logic as regards Induction. . . .[1] These alternatives have to be faced as possible explanations of each observed case; and the immediate question in each case is, What certainty can we obtain that the alternative chosen is the right one out of all those conceivable? The methods of Inductive Proof may be viewed as attempts to answer this question."

The peculiar danger, then, of Inductive Proof is that *there may be other explanations* than the desired one for the fact taken as the basis of proof. But in the study of Logic we are concerned with discovering the defects of a mode of Proof, while, in judicial rulings upon evidence, we are concerned (*ante*, § 29) merely with the propriety of admitting the fact at all, — with its quality as a possible *Inference*, not as absolute *Proof*. What are the safeguards and requirements and opportunities, then, which are suggested to us for this peculiar judicial process by the nature of the inductive argument?

§ 32. **Same: (1) with reference to the Proponent of Evidence.** If, then, the potential defect of inductive Proof is that the fact offered as the basis of the conclusion may be open to one or more other explanations or conclusions, the test or requirement for mere Admissibility (as distinguished from Proof) must be something far short of this in strictness. The failure to exclude a single other rational hypothesis would be from the standpoint of Proof a fatal defect; and yet, if only that single other hypothesis were open, there might still be an extremely high degree of probability for the conclusion first claimed. When Robinson Crusoe saw the human footprint on the sand, he could not argue inductively that the presence of another human being was absolutely proved. There was at least (for example) the hypothesis of his own somnambulism. Nevertheless, the fact of the footprint was for his conclusion evidence of an extraordinary degree of probability, *i.e.* it passed beyond the line of mere Admissibility. The requirement or test, then, for this lower standard — Admissibility — would be something like this: Does the evidentiary fact point to the desired conclusion (not as the only rational hypothesis, but) as the hypothesis (or explanation) more plausible or more natural out of the various ones that are conceivable? Or (to state the requirement more weakly), *is the desired conclusion* (not, the most natural, but) *a natural or plausible one among the various conceivable ones?* In practice

§ 31. [1] P. 339.

it will be found that the Courts vary between these two, according to the practical possibilities of producing evidence and according to the dangers of its misuse. Sometimes they require in effect that the alleged conclusion (to which the evidentiary fact is directed) must be a more probable one than others; sometimes they merely require that it must be a probable or a possible one, irrespective of the greater probability of others.[1]

This general judicial attitude may be illustrated from various sorts of evidentiary facts. (1) The fact that A left the city soon after a crime was committed will be received by some Courts without further conditions, while others require that his knowledge that he was suspected shall first be shown. Here the evident notion is that the mere fact of departure by one unaware of the charge is open to too many innocent explanations; but the addition of the fact that A knew of the charge tends to put these other hypotheses into the background, and makes the desired explanation or conclusion — *i.e.* a guilty consciousness — stand out prominently as a more probable and plausible one. Even then there are other possible hypotheses — such as a summons from a dying relative or the fear of a yellow-fever epidemic in the city; but these are not the immediately natural ones, and the greater naturalness of the desired explanation suffices to admit the evidentiary fact of flight. (2) The fact that A makes repairs after an accident tends to the probable conclusion that he is conscious of the machine's being negligently defective. It is also open to the explanation, not perhaps equally probable, that he was conscious of its being merely defective, yet not negligently so. Nevertheless, the injustice of allowing the former inference to be made, if in truth the latter should be the correct one, is so great that (in the opinion of most Courts) the evidence should be excluded. Here the notion is that the desired explanation is not so preeminently the most probable one, as against others, as to make it desirable to consider it; the standard of the requirement being somewhat higher than in the preceding instance. (3) The fact that A before a robbery had no money, but after it had a large sum, is offered to indicate that he by robbery became possessed of the large sum of money. There are several other possible explanations, — the receipt of a legacy, the receipt of a debt, the winning of a gambling game, and the like. Nevertheless, the desired explanation rises, among other explanations, to a fair degree of plausibility, and the evidence is received. (4) The fact that A, charged with stealing a suit of clothes, was a poor man is offered to show him to be the thief. Now the conclusion of theft from the mere fact of poverty is, among the various possible conclusions, one of the least probable; for the conclusions that he would preferably work or beg or borrow are all equally or more probable, and the hypothesis of stealing, being also a dangerous one to adopt as the habitual construction to be put on poor men's conduct, has the double defect of being less probable and more hard upon the innocent. Such evidence, then, is seldom admitted to show that conclusion. (5) The fact that a person of unbalanced delusions asserts

§ 32. [1] For judicial phrasings of the test for circumstantial evidence, see § 38, *post*.

on the stand that he saw A strike B would formerly have been excluded absolutely. But nowadays it is recognized that a delusion may affect the powers of observation and memory to a limited extent only, and may not concern the subject of the testimony. If it does concern that subject, the witness is excluded, because the hypothesis that the fact occurred as he states it is too feeble and improbable, alongside of the hypothesis that his delusion is the only source of his statement. But if the delusion does not concern that subject, then his statement is received, even though it is still possible that his statement has been affected by the delusion. Thus the notion is, as before, that the evidentiary fact — *i.e.* the assertion on the stand — will be received where the correctness of the assertion is at least one among probable hypotheses. (6) The fact that A makes his statement on the witness-stand in response to a leading question of his counsel is not received, because in experience the chances are so great that his answer is based on the counsel's suggestion and not on his own knowledge. On the other hand, where the leading question deals merely with the preliminary matters of his name, age, and residence, the answer is receivable because, there being so little motive for falsification on those subjects, the conclusion that he answered truly is far the most probable one. Still further, where the witness cannot be made to understand what the inquiry is about, his statement answering a leading question is received, because although the conclusion that he is falsifying is perhaps still as probable as ever, yet there is no other way of obtaining evidence from that source (*i.e.* this witness), and hence the evidentiary fact (*i.e.* his answer), though furnishing an inference otherwise so weak as to be inadmissible, comes in because of the paucity of material and the practical necessities of the situation. (7) Formerly the presence of a pecuniary interest of any sort sufficed to exclude a witness, *i.e.* to exclude the evidentiary fact of his assertion. It was always conceded (and often declared by the Courts) that the hypothesis that such persons' assertions were usually false was a contingent and less probable one; but the mere possibility that they might be false was enough to exclude them. To-day the law has harmonized its treatment of such assertions with the treatment of all other evidentiary facts, *i.e.* it does not allow the less probable hypothesis of falsity to exclude the evidence, particularly in view of the availability of other methods of overthrowing or confirming that hypothesis. (8) The fact that A, the witness, has had a lawsuit with B, the defendant, is offered to show that A has feelings of animosity towards B which make it probable that he cannot testify correctly against him. Most Courts admit such evidence; but the Courts that reject it do so on the expressed theory that the inference of such animosity is a forced and unnatural one, and that the mere fact of a lawsuit is consistent with so many other more probable hypotheses that the evidence does not reach a sufficient degree of probative value.

Thus, throughout the whole realm of evidence, circumstantial and testimonial, the theory of the inductive argument, as practically applied from the standpoint of Admissibility, is that the evidentiary fact will be considered

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

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

(*a*) *Method of Agreement.* The canon which this applies may be thus stated: "Whatever circumstances can be excluded without excluding the phenomenon whose effect (or cause) is being sought; or can be absent notwithstanding its presence, are not causally connected with it. . . . The remainder, those circumstances which are not eliminated by this process, are supposed to be thus shown to be essential to the phenomenon, — to be the proved effect (or cause)." [1] From the point of view of Proof, then, when we argue that the observed instances of *a*, viz. a', a'', a''', being always followed by *b*, prove *a* to be the cause of *b*, we can avoid the danger of ignoring other causes as the true explanation, by providing that the various instances shall be attended by identically the same circumstances or conditions; then, and then only, when *a*, under identically the came conditions, is followed always by *b*, have we the right to claim that *b* is the effect of *a* and not of some other cause. Applying this method from the standpoint of mere Admissibility, we of course do not need to exclude so rigorously the possibility of other explanations; accordingly our test would be whether the evidential instances occurred under substantially similar (not identically the same) conditions, *i.e.* so that the supposed conclusion is at least the more probable, though not the only possible, explanation. This subordinate test — which is merely a practical aid to the ultimate or fundamental one — will naturally be most available and useful where the evidential fact consists of a supposed parallel instance. To illustrate: (1) In showing that a person's illness was due to the eating of certain food, the fact is offered that other persons were ill after eating

§ 33. [1] Sidgwick, *ubi supra*, 340.

of the same food. Here the test naturally to be applied is whether the other illnesses occurred under substantially similar conditions of time, surroundings, and symptoms. (2) To show that a portion of a pavement caused an injury because dangerous to passers-by, the fact is offered that other persons who passed fell down at that place. Here a similar test is called for. Judicial annals contain a vast variety of instances in which this same subordinate test is the natural one to be applied, and is in practice used by the Courts.[2]

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

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

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

§ 34. **Same: (2) with reference to the Opponent.** It is important to notice the double treatment of which every offer of evidence may admit. Where we are dealing with the general subject of Proof in Logic, the single inquiry is whether the argument offered as involving Proof does really fulfil the logical requirements. But wherever, in the applications of logical principles to specific practical purposes, two parties are found contending, the proponent and the opponent, — as in a formal debate, a controversy of scientific investigators, and, preëminently, a trial at law, — the mode of argument must be studied from two points of view. It has been seen that, in applying the principles of logic to Admissibility, the judicial standard falls far short of

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

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

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

the standard of complete Proof. Where even the possibility of a single other hypothesis remains open, Proof fails, though it suffices for Admissibility if the desired conclusion is merely the more probable, or a probable one, even though other hypotheses, less probable or equally probable, remain open. It is thus apparent that, by the very nature of this test or process, a specific course is suggested for the opponent. He may now properly show that one or another of these hypotheses, thus left open, is not merely possible and speculative, but is more probable and natural as the true explanation of the originally offered evidentiary fact. Thus every sort of evidentiary fact may call for treatment in two aspects: 1. What is the extent to which other hypotheses must be excluded before the fact is admissible? 2. What are the other hypotheses which are then available for the opponent as explaining away the force of the fact thus provisionally admissible?

This second aspect of each class of facts will hereafter be treated usually, for the respective subjects of Relevancy, under the head of Explanation. To illustrate: (1) In showing the defendant's connection with a murder, the fact is admitted of the finding of a knife, bearing his name, near the body of the deceased; the defendant, to refute the claimed conclusion that he was present with the knife at the murder, will be allowed to show that he lost the knife a month before; thus giving greater color of probability to the hypothesis that some one else was present with the knife. (2) To show the defendant's animosity against the deceased, the fact of a serious quarrel ten years before is offered; some Courts will exclude this, thinking that the claimed conclusion, namely, that the animosity existed at the time of the killing, is an hypothesis of too low relative probability; other Courts will admit it, believing that this hypothesis has sufficient 'prima facie' probability, and leaving it to the opponent to show — *e.g.* by the fact of a reconciliation in the interim — that the fact of the quarrel does not lead to the conclusion claimed. (3) To show the injurious vibrative qualities of a bridge in causing cracks in adjacent buildings, the fact of the existence of cracks in other adjacent buildings is received; this may be explained away by the fact that the operation of a railway, and not the bridge-vibrations, had been their cause.[1] (4) A witness must be shown in advance to have had adequate opportunity to observe the facts related, and to have sufficient experience to judge, if the matter is out of the ordinary; the hypothesis that he may be mendacious by disposition, being not a normal but an exceptional one, need not be discounted in advance by showing his good character for truth; but it is left to the opponent, if this derogatory circumstance exists, to show it; a showing of bad character will tend to explain away all his assertions as those of a confirmed liar. (5) The rest of a conversation or writing, of which a part has been received as an admission, may be presented by the opponent to explain away the apparent effect of the fragment; thus, to adopt Algernon Sidney's famous illustration (frequently used by Erskine in his arguments for the accused in the sedition

§ 34. [1] 1882, Abend *v.* Mueller, 11 Ill. App. 257.

trials of the 1790s), the prosecution, on a charge of blasphemy, might offer a statement of the defendant: "There is no God"; but this could be instantly explained away as part of a quotation from the Bible of the passage, "The fool hath said in his heart, 'There is no God.'" Such is the complementary process of Explanation, by the opponent, as suggested by and related to the evidentiary fact received from the proponent.[2]

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

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

§ 35. **Same: Occasional Subordinate Forms.** It has been seen that the proponent's evidentiary fact is occasionally subjected to a subordinate test, usually involving a substantial similarity of conditions, and peculiarly useful in a few situations (*ante*, § 33). In the same way, the opponent, desirous of explaining away the force of an evidentiary fact by showing that another hypothesis is equally or more probable than the one claimed, finds that the pro-

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

cess, just described in its common form, sometimes takes on a specific subordinate form peculiarly useful in certain situations. These forms, as noticed in judicial annals, seem to be practically three in number.

(1) *Explanation by Inconsistent Instances.* Where the proposition is that y is the effect of x, and the evidentiary fact is that in instances a, a', and a'', the circumstance y followed and the circumstance x was present, a convenient way of annulling the effect of these instances is to show that in a fourth instance a''' the circumstance x was present and yet the circumstance y did not follow.[1] To illustrate: In arguing that the vibrations of the defendant's railway bridge cracked the plaintiff's buildings at the eastern end, the injured condition of various buildings at that end is received for the plaintiff; to explain this away, the fact is received for the defendant that at the western end the vibrations were even more severe and yet no buildings there were cracked.[2] The requirement for this mode of explanation is merely that the inconsistent instances shall have occurred under substantially similar conditions, so as to exclude the likelihood that any other cause — *e.g.* in the above illustration, the peculiar strength of the buildings at the western end — could have counteracted the operation of the supposed cause.

A chief use for this mode of argument is to demonstrate an alleged *possibility* or *impossibility*. When A's argument is that an event or deed x is possible or impossible, it is obvious that the whole force of his evidentiary facts is at once destroyed by a single instance of its impossibility or its possibility, provided the conditions are substantially similar in both cases. In this way the hypothesis originally set up as the exclusive one is shown not to be an exclusive one at all, by the fact that a contrary one has occurred in the instance offered by the opponent. A universal or absolute affirmative can be thus exploded equally well as a universal or absolute negative. It is the universality of the alleged indication that lays it open to fatal attack by an inconsistent instance. To illustrate: (*a*) A burglar was alleged to have entered through a certain window; but the accused affirmed the impossibility of a man's getting through it; the prosecuting attorney suddenly put the frame over the defendant's head and drew it completely down, thus disproving the alleged impossibility; (*b*) at a trial for murder, there was testimony that the accused was seen going up a certain hill, wearing a pepper-and-salt suit, the witness looking from the rear and facing the sun; experiments showed that under such circumstances it was impossible for an observer to distinguish any color at all; (*c*) at a trial for arson, the prosecution claimed that the fire was set with a candle set in a closed box so as to burn down into a bunch of shavings; experiment showed that under the conditions alleged a candle would have gone out in a shorter interval than that which must have elapsed.[3]

(2) *Explanation by Dissimilarity of Conditions.* Where the proponent's evidentiary fact has been admitted under the subordinate test of § 33, *ante*,

§ 35. [1] Sidgwick, *ubi supra*, 275.
[2] 1882, Abend v. Mueller, 11 Ill. App. 256.
[3] Cited by Mr. Irving Browne, Green Bag, 1893, 186 ff.

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

(3) *Explanation by Cumulative Instances.* Where the proposition is that y is the effect of x, and the evidentiary fact is that in instances a, a', and a'', the circumstance y followed and the circumstance x was present, another way of annulling the effect of these instances is to show that in a fourth instance a''' the circumstance y again followed, and yet the circumstance x was not present. This argument is in a manner the opposite of (1) *supra*, and consists in offering other instances in which the same effect is found, but without the presence of the alleged causing circumstance; and this forces us to look upon its presence in the proponent's original instances as merely accidental, and not really causative. The requirement of this argument is that the conditions of the additional instances shall be substantially similar in every respect except the alleged causing circumstance; for if they were not then the elimination of the alleged cause as harmless is not accomplished. For example, the fact of the defendant's flowage of certain lands of the plaintiff is alleged to be the cause of deterioration in their productiveness during the previous ten years; to refute this, the defendant offers the fact of similar deterioration of other lands that had not been subjected to the flowage; this is admissible only so far as the other lands are near by and presumably under the same influences of soil and climate.[4]

§ 36. **Summary.** It has thus been seen that every evidentiary fact or class of facts may call for two processes and raise two sets of questions: (1) the admissibility of the original fact from the proponent; (2) the admissibility of explanatory facts from the opponent. (1) The first is subjected to the test whether the claimed conclusion is a probable or a more probable one, having regard to conceivable interpretations of the fact; the rulings vary more or less upon different evidentiary facts, according to various considera-

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

tions of experience; and occasionally specific subordinate tests are applied. (2) The second process consists in explaining away the original fact's force by showing the existence and probability of other hypotheses; for this purpose other facts affording such explanations are receivable from the opponent; and here also, occasionally, occur specific subordinate processes and tests. The detailed rules for the various sorts of evidence are of course more or less concrete and dogmatic; this or that evidence is or is not held to be relevant. But the principles underlying these rulings are the principles of applied logic that have just been outlined.

TITLE I

CIRCUMSTANTIAL EVIDENCE

INTRODUCTORY:

GENERAL THEORY OF CIRCUMSTANTIAL EVIDENCE

CHAPTER IV.

§ 38. **Degree of Probative Value required.** It has just been seen (§ 31) that the general and broad requirement for Relevancy is that the claimed conclusion from the offered fact must be a probable or a more probable hypothesis, with reference to the possibility of other hypotheses. This is not only the general principle that best describes the attitude of the Courts, but is also the expressed form of the test for specific kinds of facts.

Nevertheless, there is naturally more or less variation of language in the phrasings put forth from time to time by the Courts. The following typical passages will serve as a guide to the general spirit in which the Courts apply the test of relevancy:

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

1806, PETERSON, J., in *Smith & Ogden's Trial*, Lloyd's Rep. 82: "The evidence which is offered to a Court must be pertinent to the issue or in some proper manner connected with it. It must relate and be applied to a particular fact or charge in controversy, so as to constitute a legal ground to support or a legal ground to resist the prosecution. For it would be an endless task and create inextricable confusion if parties were suffered to give in evidence to the jury whatever self-love or prejudice or whim or a wild imagination might suggest. This is an idea too extravagant to be entertained by candid and reflecting men;

as it would, if carried into practice, quickly prostrate property, civil liberty, and good government. Law would become a labyrinth, a bottomless pit, and courts would be perverted from their original design and turned into instruments of injustice and oppression. A line must be drawn, — a line has been drawn on such occasions, which it becomes the duty of judges to pursue. If there be no line, anything and everything may be given in evidence. Where shall we stop? What is the rule which we find to be laid down for our guidance? The evidence must be pertinent to the issues; the witnesses must be material. If the evidence be not pertinent, nor the witnesses material, the Court ought not to receive either."

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

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

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

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

1875, AGNEW, C. J., in *Brown* v. *Schock*, 77 Pa. 479: "In a question of circumstantial evidence, the proof derived from the circumstances is a question of natural presumption and is to be found by the jury; the strength of this proof depends on the probability resulting from the facts. . . . It is the right of the party to have this submitted to the

jury, unless it is so weak and inconclusive that as a matter of law no probability of fact can be drawn from the combined circumstances."

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

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

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

1920, TRIEBER, J., in *Smith* v. *U. S.*, 8th C. C. A., 267 Fed. 665, 668 (on a charge of devising a scheme to defraud by false pretenses): "In prosecutions of this nature, great latitude in the introduction of testimony is allowed, as in most instances the offense can only be established by circumstantial evidence." In *Williamson* v. *United States*, 207 U. S. 425,

451, 28 Sup. 163, the court quoted with approval from *Holmes* v. *Goldsmith*, 147 U. S. 150, 164, 13 Sup. 288, 292:

"'As has been frequently said, great latitude is allowed in the reception of circumstantial evidence, the aid of which is constantly required, and therefore, where direct evidence of the fact is wanting, the more the jury can see of the surrounding facts and circumstances, the more correct their judgment is likely to be. "The competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded in truth." . . . The modern tendency, both of legislation and of the decision of courts, is to give as wide a scope as possible to the investigation of facts. Courts of error are especially unwilling to reverse cases, because unimportant and possibly irrelevant testimony may have crept in, unless there is reason to think that practical injustice has been thereby caused.'"

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

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

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

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

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

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

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

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

The practical difference between these two senses was that in the former sense the fact was always and clearly inadmissible, while in the latter sense it might become admissible under some circumstances. A fact might thus deserve different fates, according as it was "collateral" in one or the other sense. This careless confusion of usage spread, until a kind of stigma began often to be intended in the epithet "collateral." It was appealed to in one sense in order to gain an argument involving its other sense. If an opposing counsel could stigmatize an offered fact as "collateral", he felt that he had struck a blow at its admissibility; and in this effort he had useful weapons, in the older passages in which a "collateral" fact, meaning an immaterial fact, was treated as necessarily inadmissible.[2]

What is needed, therefore, is simply a mutual understanding of the sense in which the term is being used on a particular occasion. When it is used in the second sense to express remoteness of probative value, the fact in question may or may not be admissible, according to the standard judicially declared in § 38, *ante;* there is nothing decisive in its "collateralness."

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

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

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

1824, GIBSON, J., in *Weidler* v. *Bank*, 11 S. & R. 139: "The evidence, therefore, as it was offered, presented facts which, isolated as they stand in the bill of exceptions were entirely irrelevant. . . . But the plaintiff contends that this may have been only a part of the chain of his evidence, and that what was deficient might afterwards have been sup-

§ 39. [1] So also: 1873, Brooke *v.* Winters, 39 Md. 508 ("The rule that excludes facts because they are collateral does not apply to facts wherever existing, if they may afford any reasonable presumption as to the matter in dispute"); *Cal.* C. C. P. 1872, § 1868 ("Evidence must correspond with the substance of the material allegations, and be relevant to the question in dispute. Collateral questions must therefore be avoided. It is, however, within the discretion of the court to permit inquiry into collateral fact, when such fact is directly connected with the question in dispute, and is essential to its proper determination, or when it affects the credibility of a witness"); *Or.* Laws 1920, § 725 (like Cal. C. C. P. § 1868).

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

plied. . . . If it would be relevant, when taken in connexion with other facts, it ought to be proposed in connexion with those facts, and an offer to follow the evidence proposed with proof of those facts at the proper times. But the Court is not bound to spend its time in an inquiry which from the [present] showing of the party can produce no results. Dislocated circumstances may doubtless be given in evidence; particularly if there be no objection to the order of time; but the proposal of the evidence must contain in itself, by reference to something that has preceded it or that is to follow, information of the manner in which the evidence is to be legitimately operative."

1833, BUCHANAN, C. J., in *Davis* v. *Calvert*, 5 G. & J. 304: "It is sometimes difficult to ascertain whether a particular fact offered in evidence is connected with the issue, and will or will not become material in the progress of the investigation. In such cases, the Court not clearly seeing that it is wholly foreign and irrelevant to the issue and cannot be connected with it by evidence of other facts and circumstances, it is proper and usual in practice to admit the proof, on the assurance of the counsel who tenders it that it will turn out to be pertinent and material; otherwise, material and important testimony might frequently and injuriously be excluded, which it is the province of the Court to guard against when it may be done. . . . And when it does not clearly appear 'a priori' that a fact offered to be proved is collateral and irrelevant, there is generally less mischief to be done or apprehended by admitting it, though it should afterwards turn out to be collateral, than by the rejection of the proof of a fact only because, standing alone, it does not plainly appear to be connected with the issue, but may, when connected with other facts and circumstances, become material and important."

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

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

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

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

§ 41. **Circumstantial Evidence may be proved by the same Kind.** It was once suggested that an "inference upon an inference" will not be permitted, *i.e.* that a fact desired to be used circumstantially must itself be established by testimonial evidence;[1] and this suggestion has been repeated by a few Courts, and sometimes actually enforced.[2] There is no such rule; nor can

§ 41. [1] 1824, Starkie, Evidence, I. 57.

[2] *Federal:* 1875, U. S. v. Ross, 92 U. S. 281 ("Whenever circumstantial evidence is relied upon to prove a fact, the circumstances themselves must be proved [by testimonial evidence], and not presumed [*i.e.* inferred from

be. If there were, hardly a single trial could be adequately prosecuted.[3]

circumstantial evidence]"); 1879, Manning *v.* Ins. Co., 100 U. S. 693; 1903, Cunard S. S. Co. *v.* Kelley, 126 Fed. 610, 614, C. C. A. (U. S. *v.* Ross followed; here, as to an inference of knowledge of marks on goods); *Connecticut:* 1904, State *v.* Kelly, 77 Conn. 266, 58 Atl. 705 (murder; deceased's despondency, as evidence of a plan of suicide, excluded); *Delaware:* 1911, Roberts *v.* State, 2 Boyce Del. 385, 79 Atl. 396 (not decided); *Illinois:* 1896, Globe Accident Ins. Co. *v.* Gerisch, 163 Ill. 625, 45 N. E. 563) (1) that G. lifted a box of ashes was shown by the facts that he was seen filling the box with ashes, that afterwards it was seen filled on the street, and that G. usually carried it there; (2) that G. was shortly afterwards found badly strained in the abdomen was otherwise shown; but (3) the fact that he lifted the box of ashes was not allowed to be used to infer that the lift caused the strain, because of the above supposed rule); 1906, Kevern *v.* People, 224 Ill. 170, 79 N. E. 574 (rape); 1917, Ohio Building S. V. Co. *v.* Industrial Board, 277 Ill. 96, 115 N. E. 149 (death of a night watchman; principle discussed); *Indiana:* 1879, Biddle, J., in Binns *v.* State, 66 Ind. 428, 430 ("Inferences can not be drawn from inferences, . . . but inferences may be drawn from facts previously proved [*i.e.* by direct testimony]"); 1913, Dowell *v.* State, 181 Ind. 68, 101 N. E. 815 (an absurd instance of applying this doctrine to a case in which the only real doubt was whether the witness told the truth; bottles of whiskey alleged to have been sold illegally by the defendant to A, who delivered them to B, who produced them on the trial); 1915, Morgan Construction Co. *v.* Dulin, 184 Ind. 652, 109 N. E. 960 (defective beam); *Missouri:* 1909, Swearingen *v.* Wabash R. Co., 221 Mo. 644, 120 S. W. 773; 1921, Philips *v.* Travelers' Ins. Co., 288 Mo. 175, 231 S. W. 947 (accident insurance; held inadmissible to infer from a bruise to an accidental fall and thence to the fall as cause of death; the evidence in the cases shows the nonsensicality of courts continuing to promulgate this scientific and practical untruth; indeed, the very next time that the judge who wrote the opinion is ill and sends for a physician, the physician will build inference on inference on inference from symptoms, and will then prescribe belladonna or strychnia or any other potent drug on the faith of such inferences, and the judge will rise up cured and return to his bench muttering, "No inference upon an inference, mind!"); *New York:* 1912, People *v.* Razezicz, 206 N. Y. 249, 99 N. E. 557 (murder by a bomb; the present theory applied to an inference from the prior explosion of another bomb to the defendant's use of explosives; but the Court also states its attitude in the correct form that "it is unsafe to rely upon that fact as the controlling fact to establish the defendant's guilt"); 1916, People *v.* Van Aken, 217 N. Y. 532, 112 N. E. 380 (wife-murder; the alleged motive involved the defendant's extravagance; he had given a note for $250 and had paid it off and destroyed it before maturity; the note bore an indorsement in his wife's name, and the prosecution argued that he had forged the indorsement and that the premature payment was evidence of this, because it evidenced a desire to conceal the transaction from his wife; this and an analogous inference were held "too uncertain to be permissible"; the opinion avoids expressly sanctioning the fallacy here under consideration; but it might well enough have been repudiated; the result is sound enough in the case in hand); *Oregon:* 1910, State *v.* Lem Woon, 57 Or. 482, 112 Pac. 427, per King, J., diss.; *Pennsylvania:* 1860, Douglass *v.* Mitchell, 35 Pa. 440; 1868, McAleer *v.* McMurray, 58 Pa. 126, 135; 1880, Philadelphia C. P. R. Co. *v.* Henrice, 92 Pa. 431; 1904, Taylor *v.* General Acc. Ins. Co., 208 Pa. 439, 57 Atl. 830; *Tennessee:* 1903, East Tennessee & W. N. C. R. Co. *v.* Lindamood, 111 Tenn. 457, 78 S. W. 99; *Vermont:* 1914, Fadden *v.* McKinney, 87 Vt. 316, 89 Atl. 351 (trespass); *Washington:* 1909, Wilkie *v.* Chehalis Co. L. & T. Co., 55 Wash. 324, 104 Pac. 616 (an instance of another horse's fright at a pile of raw meat, excluded, by some fancied connection with the present principle); 1911, State *v.* Brache, 63 Wash. 396, 115 Pac. 853, *semble*.

Another variety of the fallacy is the following: *Or.* Laws 1920, § 796 ("An inference must be founded on a fact legally proved"); 1909, State *v.* Hembree, 54 Or. 463, 103 Pac. 1008 (wife-murder; the wife's discovery of the defendant's incest with the daughter being alleged as the motive, and the testimony to the incest not being "proved" to the Court's satisfaction, the motive-inference was held improper and hence the incest-testimony; unsound, (1) because the Court concedes that motive-proof is not indispensable, (2) because the Code provision merely means that the inference must be based on an evidenced fact as distinguished from a fact merely guessed at).

[3] 1920, Abbott, C. J., in R. *v.* Burdett, 4 B. & Ald. 95, 161 ("If no fact could be thus ascertained by inference in a court of law, very few offenders could be brought to punishment"); 1917, Ohio B. V. Co. *v.* Ind. Board, 277 Ill. 96, 115 N. E. 149 (whether an employee killed by an assault was injured in the course of employment; "it is true that Courts have frequently stated that a presumption cannot be based on a presumption . . . ; whatever the rule is or ought to be, no authority called to our attention has ever enforced it in the way" here contended for).

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

§ 42. **Irrelevancy and Practical Policy, distinguished.** A circumstantial fact may be logically relevant, and thus far admissible, and yet may be excluded because it is obnoxious to some consideration of Auxiliary Probative Policy, — in particular, those of Confusion of Issues, or Unfair Surprise, or Undue Prejudice. The importance of discriminating between these principles, in rulings on circumstantial evidence, has already been pointed out for evidence in general (*ante*, § 29 *a*).

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

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

[4] The fallacy has been repudiated in the following case: 1897, Hinshaw *v.* State, 147 Ind. 334, 47 N. E. 158; 1913, State *v.* Fiore, 85 N. J. L. 311, 88 Atl. 1039 (citing the text above).

Compare also Gibson, C. J., quoted *ante* § 26, where the relative value of circumstantial and testimonial evidence is considered.

For an acute analysis of this fallacy, and a demonstration of its unsoundness, with citations of additional rulings involving it, see an article "Presumptions built on Presumptions", by Professor Wm. Trickett, of the Dickinson School of Law, in "The Forum", X, 123, March, 1906 (Carlisle, Pa.).

relevant to show, we should find that many distinct facts are available to evidence a single proposition, and thus an intelligent comparison of them would be difficult and much confusing repetition would be necessary. For these reasons, the basis of the classification should be the different kinds of propositions (' facta probanda '), so analyzed as to separate those which are essentially different in their requirements.

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

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

I. A Human Act;

II. A Human Quality, Condition, or State;

III. A Fact or Condition of External Nature.

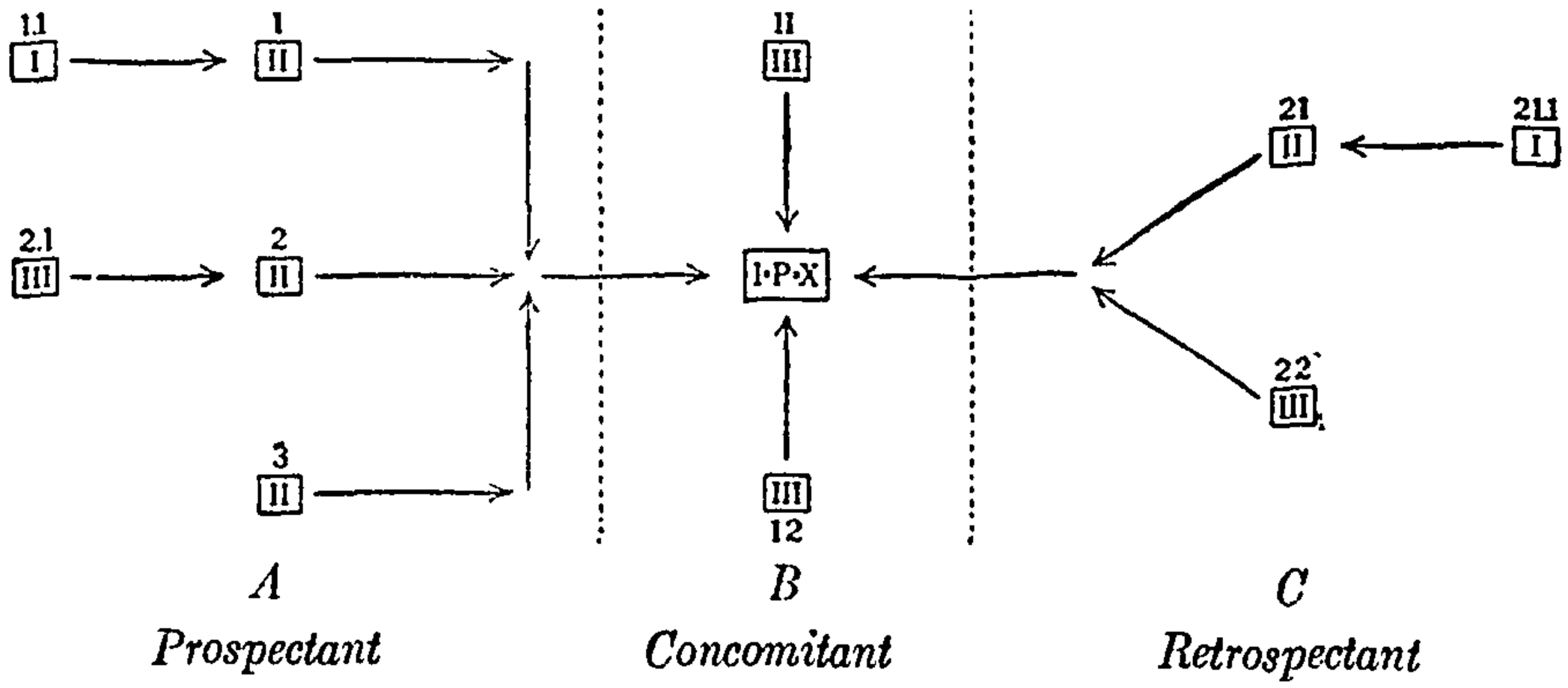
These three groups fall naturally apart, in our system, because in the first group the dominant and indirectly influential rule is the rule forbidding the admission of moral character to evidence an act, in certain classes of cases; and, in the second group, the rule excluding extrinsic testimony to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

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

A. Prospectant;
B. Concomitant; or
C. Retrospectant.[1]

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

Of course, Group I (Human Act) is the commonest 'factum probandum' in judicial proof; in criminal cases always, and in civil cases often, it is the main issue. Taking it therefore as presenting a typical situation, the possible relations of the above classes of evidentiary facts and 'probanda' may be illustrated by the following diagram:



§ 43. [1] It is perhaps worth noting that this analysis was long ago hinted at by Burke, in his disquisition on evidence in the Report on Warren Hastings' Trial, in 1794 (31 Parl. Hist. 342); "every circumstance", he remarks, "precedent, concomitant, and subsequent, become parts of circumstantial evidence."

Suppose *P*, the main 'probandum' to be a *killing by poison*, *i.e.* the doing of a human act = Act *X*, *i.e.* Group I (Doing of a Human Act).

Prospectant Evidence:

1 = a plan or design to do Act *X*. This 1 is a Human Condition of Mind. In turn, 1 becomes a *P*, *i.e.* in Group II; and is evidenced by 1.1 = purchase of the poison, *i.e.* Group I (Human Act).

2 = a motive or emotion, as evidence of the Act *X*. This emotion is in Group II (Human Condition of Mind). In turn, 2 becomes a *P*, and is evidenced by 2.1, the existence of a large sum of cash in the deceased's possession, *i.e.* in Group III (Condition of External Nature).

3 = a disposition to kill (assuming it to be admissible); this is again a Human Condition of Mind, *i.e.* Group II.

Concomitant Evidence:

11 = distance between accused's and deceased's house or room, the doors being open, at the time of Act *X*. This is in Group III (Condition of External Nature).

12 = accused's physical capacity to force deceased to take the poison, again in Group III (or perhaps II).

Retrospectant Evidence:

21 = consciousness of guilt, *i.e.* in Group II (Human Condition of Mind) which in turn becomes a *P*, and is evidenced by 21. 1.

21.1 = hiding or running away after the event, *i.e.* in Group I (Human Act).

22 = money of deceased found hidden in accused's house, *i.e.* in Group III (Fact of External Nature).

This plotting of a typical case will serve to show

(1) that all the various kinds of evidentiary facts can be accounted for and located in the above classification; and

(2) that as each evidentiary fact in turn becomes a 'probandum', the rules appropriate to that variety of evidence can be found and their bearing ascertained.[2]

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

[2] In the present author's "Principles of Judicial Proof" (1913), the analysis of a mass of evidence, under the above classification, is treated in full detail, from the point of view of analyzing and weighing the probative effect in argument to a jury.

SUB-TITLE I: EVIDENCE TO PROVE A HUMAN ACT

TOPIC I: PROSPECTANT EVIDENCE

CHAPTER V.

§ 51. **Classification of Prospectant Evidence.** It is convenient (as pointed out *ante*, § 38) to arrange the order of evidentiary facts, when offered to prove the doing of a human act, according as the indication of the evidence is Prospectant, Concomitant, or Retrospectant. Evidence of the first of these

three classes is much the most voluminous, so far as it raises questions of admissibility, though it is probably not the most frequent in point of actual use in trials.

Evidentiary facts having Prospectant indications are of several sorts, which may be roughly grouped as follows:

Character or Disposition;
Habit or Custom;
Emotion or Motive;
Design or Plan;
Physical Capacity (including Strength and Skill).

The nature of the argument or inference in each instance is this: Because A had a Disposition, Habit, Emotion, Design, or Capacity to do (or not to do), an act x, therefore he probably did (or did not do) the act x alleged. Observe that the party alleging the act argues that the disposition indicates a *doing* of the act, while the party denying the act argues that the (opposite) disposition indicates a *not-doing;* the nature of the argument or inference being precisely the same in both cases, the difference being in the proposition to be proved.

Of these different kinds of evidentiary facts, the tenor of our law suggests that the treatment of Character or Disposition should come first; for the practical reason that special and positive limitations are conceded to affect it, and that these limitations have sometimes mistakenly been supposed to apply to the other sorts of evidence. Indeed, the Character-rule is the dominant one for this branch of the subject.

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

1. Preliminary Discriminations

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

The first question is essentially one of Relevancy, though auxiliary policies often come in to exclude relevant character. The second question, however, is raised in an entirely different quarter; it has nothing to do with character as an evidentiary fact, but with the mode of proving character, assuming it to be properly provable either as an evidentiary fact or as an issue.

Two special problems which the second question raises are concerned with the Hearsay Rule and with the Opinion Rule. The Hearsay Rule concerns

the question whether Reputation-Hearsay, when offered to show Character, forms an exception to that rule, and on what conditions the exception is allowed, — what constitutes a reputation, from how many people must it arise, in what place and at what time, and so on (*post*, §§ 1608–1621). The Opinion Rule raises the question whether individual testimonial opinion or estimate of character is obnoxious to that rule, and operates (if so applied) to exclude the testimony of individuals based on personal observation of another's character (*post*, §§ 1980–1987).

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

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

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

But this notion is certainly unfounded. The law itself clearly demonstrates this, because there is in fact more than one way of evidencing actual Character. Reputation is not the sole way. Individual estimate was formerly always available, and still is in some jurisdictions (*post*, § 1980). Specific acts of conduct are also available for some purposes, especially to show a

witness' character (*post*, § 977). If reputation were the essential and relevant fact, these other modes of proving character would be impossible; for the thing they are used to prove would be unrecognized in the law of evidence. The truth is that reputation is merely one of three possible modes of proving actual Character. Even if it were the exclusive mode, by reason of considerations excluding other modes, it would be as reasonable to identify it with actual character as to identify the Red Line railroad with the town Millville simply because the other railroads to Millville have been abandoned or blockaded. Character, then, is to be considered, for the purposes of relevancy, as the actual moral or psychical disposition, or sum of traits, and is to be distinguished from reputation or any other source of evidencing Character.[1]

This the Courts have frequently emphasized:

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

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

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

§ 53. **Conduct to evidence Character, distinguished from the Relevancy of Character itself.** There is also to be distinguished the use of specific *conduct to evidence* Character from the admissibility of Character itself to evidence something else. Thus, the prosecution in a criminal case may sometimes use the defendant's bad character as relevant; but it is not allowed to evidence that character (as a proposition to be proved) by specific acts of misconduct (*post*, § 194). The reasons affecting the admissibility of this kind of evidence to show Character must be kept separate from the reasons affect-

§ 52. [1] For passages further illustrating the distinction, see *post*, § 1608.

ing the use of Character itself as evidential. The latter may be allowable, yet the other not. In civil cases the separation is equally important. Much will always depend on whether the fact of Character is being offered as an evidentiary fact, or whether it is itself a proposition to be evidenced by conduct exhibiting the Character.

§ 54. **Character as Evidentiary, distinguished from Character as an Issue on the Pleadings.** (1) The present question is, whether a person's Character is admissible to show *the doing or not-doing of an act by him*. But there are two other ways in which character may be involved, — one an evidential question, the other not. (2) Whether a person's Character is *evidentiary for any other purpose, e.g.* a wife's character to show that the husband's alienation of affection was a natural consequence, or a deceased's character to show that the defendant was reasonably afraid of an attack by the deceased. This use is less usual, but must be distinguished as not being offered to evidence the doing of an act by the person having the character. (3) Whether a person's Character is under the legal principles and the pleadings of the case *one of the issues* in it; *e.g.* the character of a plaintiff in defamation, either as expressly brought in issue by a plea of truth, or as issuable in the assessment of damages; the character of an employee as involving the employer's liability to a fellow-servant for the selection of incompetent employees; the character of a house charged with being used for immoral traffic; and so on. Here no evidentiary use is made of the character; it merely plays a part in the legal issues of the case, and the nature of the litigation must be looked to in determining whether character is so involved. This aspect of Character as an issue in the case has constantly to be distinguished; it is fully treated *post*, §§ 69–79.

2. Character as evidentiary of an Act

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

A defendant's character, then, as indicating the probability of his doing or not doing the act charged, *is essentially relevant*.

In point of human nature in daily experience, this is not to be doubted. The character or disposition — *i.e.* a fixed trait or the sum of traits — of the persons we deal with is in daily life always more or less considered by us in estimating the probability of his future conduct. In point of legal theory and practice, the case is no different. A defendant is allowed to invoke his own good character to aid in the demonstration of his innocence; and the prosecution is allowed to use the opposite fact for the opposite purpose. The Courts have made it clear that a defendant's character is regarded as constantly having probative value on that question:

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

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

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

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

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

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

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

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

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

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

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

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

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

1808, Lord ELLENBOROUGH, C. J., to the jury in *Davison's Trial*, 31 How. St. Tr. 217: "If you do not know which way to decide, character should have an effect. But it is otherwise in cases which are clear. If it could be permitted to operate where a crime is clearly proved, it would always be brought forward; because there is hardly any one who has not at some time maintained a good character. . . . If the evidence were in even

§ 56. [1] *Ia.* 1874, State *v.* Kabrich, 39 Ia. 277 (in any "public offence"); 1878, State *v.* Northrup, 48 Ia. 584 ("all criminal cases where the object of the prosecution is to punish the offender for the crime"); 1900, State *v.* Wolf, 112 Ia. 458, 84 N. W. 536; 1903, State *v.* Cather, 121 Ia. 106, 96 N. W. 722; *Mass.* 1850, Com. *v.* Webster, 5 Cush. 295, 324; *Miss.* 1904, Maston *v.* State, 83 Miss. 647, 36 So. 70; *N. Car.* 1857, State *v.* Henry, 5 Jones L. 65, 67; 1895, State *v.* Hice, 117 N. C. 782, 23 S. E. 357 (in this case it had been ruled below that the defendant's good character was not admissible unless he went on the stand, — a ruling exhibiting such an ignorance of fundamental notions as would seem scarcely credible, even in a time when ignorance is allowed so freely to thrust itself to the front); *Or.* 1897, State *v.* Porter, 32 Or. 135, 49 Pac. 964 ("in a criminal action"); *Tenn.* 1906, Powers *v.* State, 117 Tenn. 393, 97 S. W. 815 (and upon all parts of the defendant's conduct).

balance, character should make it preponderate in favor of a defendant; but in order to let character have its operation, the case must be reduced to that situation."

But it is now understood to be admissible without any such limitations.[2] The broad statements by some Courts that a defendant's character in criminal cases is "always admissible"[3] negative impliedly both the foregoing limitations.

Whether, when admitted, it should be *given weight* except in a doubtful case, or whether it may suffice *of itself to create a doubt*, is a mere question of the weight of evidence, with which the rules of admissibility have no concern.[4]

(3) Where the doing of the act charged is *not in dispute*, because conceded, it has been said that character no longer has any probative function, and should not be received, since it certainly cannot be set up merely in excuse.[5]

[2] 1899, Rowe *v.* U. S., 38 C. C. A. 496, 97 Fed. 779; 1873, Kee *v.* State, 28 Ark. 155, 164; 1865, People *v.* Stewart, 28 Cal. 395 (overruling People *v.* Josephs, 7 Cal. 129, 1857); 1864, Jupitz *v.* People, 34 Ill. 516, 521; 1867, Steele *v.* People, 45 Ill. 157; 1876, State *v.* Kinley, 43 Ia. 296; 1895, People *v.* Van Dam, 107 Mich. 425, 65 N. W. 277; 1904, Maston *v.* State, 83 Miss. 647, 36 So. 70; 1899, State *v.* Sloan, 22 Mont. 293, 56 Pac. 364; 1790, State *v.* Wells, 1 N. J. L. 424, 429; 1857, State *v.* Henry, 5 Jones L. N. C. 65, 67; 1877, State *v.* Laxton, 76 N. C. 216, 218; 1898, State *v.* Blue, 17 Utah 175, 53 Pac. 978.

[3] 1874, Hamilton *v.* People, 29 Mich. 198; 1883, People *v.* Mead, 50 Mich. 233, 15 N. W. 95; 1859, Wesley *v.* State, 37 Miss. 327, 352; 1883, State *v.* King, 78 Mo. 556; 1909, Dickenson *v.* State, 3 Okl. Cr. 151, 104 Pac. 923.

[4] This is a profitless question, which does not aid the jury. A discussion of the question may be found in the following cases: *Federal:* 1910, Searway *v.* U. S., 8th C. C. A., 184 Fed. 716; 1918, LeMore *v.* U. S., 5th C. C. A., 253 Fed. 887; 1918, Linn *v.* U. S., 2d C. C. A., 251 Fed. 476; 1918, Warren *v.* U. S., 8th C. C. A., 250 Fed. 89; *Conn.* 1910, State *v.* Alderman, 83 Conn. 597, 78 Atl. 331; 1911, State *v.* Brauneis, 84 Conn. 222, 79 Atl. 70; *Fla.* 1921, Capello *v.* State, 82 Fla. 313, 90 So. 191 (larceny); *Ga.* Brazil *v.* State, 117 Ga. 32, 43 S. E. 460; 1905, Nelms *v.* State, 123 Ga. 575, 51 S. E. 588; 1913, Taylor *v.* State, 13 Ga. App. 715, 79 S. E. 924; *Ill.* 1907, Miller *v.* People, 229 Ill. 376, 82 N. E. 391; 1920, People *v.* Fisher, 295 Ill. 250, 129 N. E. 196 (assault with intent to kill; trial Court's instruction as to probative effect of accused's character held erroneous; the opinion is hopelessly confused in its own theory of proof); *Ind.* 1910, Hundley *v.* State, 173 Ind. 684, 91 N. E. 225 (here also to be considered in mitigation); 1922, Kellar *v.* State, — Ind. —, 134 N. E. 881 (rape); *Iowa:* 1878, State *v.* Northrup, 48 Ia. 584; 1915, State *v.* Bosworth, 170 Ia. 329, 152 N. W. 581, 588; *Mich.* 1868, People *v.* Garbutt, 17 Mich. 27; 1916, People *v.* Humphrey, 194 Mich. 10, 160 N. W. 445; 1922, People *v.* Best, — Mich. —, 187 N. W. 393 (murder); *Minn.* 1921, State *v.* Dolliver, 150 Minn. 155, 184 N. W. 848; *N. M.* 1915, State *v.* McKnight, 21 N. M. 14, 153 Pac. 76 (murder); *N. J.* 1921, State *v.* Randall, 95 N. J. L. 452, 113 Atl. 231; *N. Y.* 1904, People *v.* Bonier, 179 N. Y. 315, 72 N. E. 226; 1911, People *v.* Conrow, 200 N. Y. 356, 93 N. E. 943 (word-juggling); *Oh.* 1913, State *v.* Hare, 87 Oh. 204, 100 N. E. 825; *Pa.* 1908, Com. *v.* Cate, 220 Pa. 138, 69 Atl. 322; 1910, Com. *v.* Aston, 227 Pa. 106, 75 Atl. 1017; 1919, Com. *v.* Stoner, 265 Pa. 139, 108 Atl. 624; 1919, Com. *v.* Tenbroeck, 265 Pa. 251, 108 Atl. 635; 1916, Com. *v.* Ronello, 251 Pa. 329, 96 Atl. 826 (murder); *Utah:* 1911, State *v.* Brown, 39 Utah 140, 115 Pac. 994 (collecting cases; three separate opinions filed; the impression is that, as said above, the discussion of this subject, however learned and interesting as a logical pursuit, is profitless; for the subtleties of the instruction are lost on the Jury); 1921, State *v.* Harris, — Utah —, 199 Pac. 145; *Wis.* 1905, Schutz *v.* State, 125 Wis. 452, 104 N. W. 90.

The following shrewd observation comes down to us from yore: 1664, Turner's Trial, 6 How. St. Tr. 565, 613: L. C. J. Hyde: "The witnesses he called in point of reputation, — that I must leave to you [the jury]. I have been here many a fair time. Few men that come to be questioned but shall have some come and say, 'He is a very honest man, I never knew any hurt by him.' But is this anything against the evidence of the fact?"

[5] 1807, Draper's Trial, 30 How. St. Tr. 1018 (criminal libel; "Do you think the defendant capable or incapable of publishing any statement of facts of the truth of which he was not perfectly convinced?" A. "Perfectly incapable." Lord Ellenborough: "I cannot suppose you mean it for any other purpose than as going in mitigation of punishment.

But, after all, so far as in criminal cases the criminal intent remains in issue, the good character of the defendant may be regarded as always relevant to disprove it; and the better way seems to admit it.[6]

§ 57. **Same: Defendant's Bad Character may not be offered against him.** There is just as much probative value in the argument, "A is quarrelsome, therefore he probably committed this assault", as in the argument, "A is peaceable, therefore he probably did not commit the assault"; and this is acknowledged in judicial opinion (*ante*, § 55). Here, however, a doctrine of Auxiliary Policy (*ante*, § 29*a*) operates to exclude what is relevant, — the policy of avoiding the uncontrollable and undue prejudice, and possible unjust condemnation, which such evidence might induce:[1]

1865, WILLES, J., *R.* v. *Rowton*, Leigh & C. 520, 540: "[Character evidence] is strictly relevant to the issue; but it is not admissible upon the part of the prosecution because (as my brother Martin says) if the prosecution were allowed to go into such evidence, we should have the whole life of the prisoner ripped up, and, as has been witnessed elsewhere, upon a trial for murder you might begin by showing that when a boy at school the prisoner had robbed an orchard, and so on through the whole of his life; and the result would be that the man on his trial might be overwhelmed by prejudice, instead of being convicted by that affirmative evidence which the law of this country requires. The evidence is relevant to the issue, but is excluded for reasons of policy and humanity; because although by admitting it you might arrive at justice in one case out of a hundred, you would probably do injustice to the other ninety-nine." MARTIN, B.: "There would be great danger that the prisoner would be tried on the evidence of character, instead of on that bearing more directly upon the offence charged."

1840, VERPLANCK, Sen., in *People* v. *White*, 24 Wend. 574: "The rule and practice of our law in relation to evidence of character rests on the deepest principles of truth and justice. The protection of the law is due alike to be righteous and unrighteous. The sun of justice shines alike for the evil and the good, the just and the unjust. Crime must be proved, not presumed; on the contrary, the most vicious is presumed innocent until proved guilty. The admission of a contrary rule, even in any degree, would open a door not only to direct oppression of those who are vicious because they are ignorant and weak, but even to the operation of prejudices as to religion, politics, character, professions, manners, upon the minds of honest and well-intentioned jurors."

. . . It cannot be offered in the shape of a defence. Good God! because one man says a thing and because I may believe what he says, am I at liberty to disseminate it all over the world? There is no color for it. I receive this for the purpose of mitigation of punishment. If the fact of publication were doubtful, and if it were referred to a man [as defendant] who had such a character given to him, this would be evidence to go to the jury in answer to the charge, and in that way it would be most material. But here you do not dispute that fact").

[6] 1873, Kee *v.* State, 28 Ark. 155, 164 (here, to disprove malice in murder); 1851, Davis *v.* State, 10 Ga. 103, 105 (murder); 1904, Maston *v.* State, 83 Miss. 647, 36 So. 70 (even where insanity is the defence); 1913, Gilbert *v.* State, 8 Okl. Cr. 543, 128 Pac. 1100 (manslaughter; held erroneous to reject defendant's good character until defendant had testified or had offered some evidence of self-defence).

Whether the accused's good character should be *presumed* is noticed *post*, § 290.

In *Texas*, a statute of 1919 (c. 78, "Dean Law") provides for a suspended sentence, but only on proof of no prior conviction; under this statute, the accused's *good character*, though admissible after *proof* of no prior conviction, is not admissible until then, being immaterial: 1921, Hadnot *v.* State, — Tex. Cr. —, 233 S. W. 1102.

§ 57. [1] The reasons for the rule were well and concisely put in a letter from the celebrated Dr. Parr to Sir S. Romilly, in 1811 (Life of Romilly, 3d ed., II, 180). Compare also the passages quoted § 194, *post*.

1872, DOE, J., in *Darling* v. *Westmoreland*, 52 N. H. 401, 406: "[There is] an exception (which is a peculiarity of precedents of English origin) excluding relevant evidence of a defendant's general and notorious disposition to commit such crimes or torts as that with which he is charged. . . . That such evidence is relevant, the law acknowledges by receiving, in criminal cases and in some civil cases, evidence of a defendant's good character in his favor, and allowing such evidence to be rebutted; and by receiving evidence of the character of witnesses and of other persons. The exclusion of such evidence is a plain departure from the general principle which admits relevant and material evidence. There is reason to believe that this exception originated in a usurpation of legislative power by English judges, led by a merciful impulse to mitigate the cruelty of a bloody criminal code by throwing obstacles in the way of its operation."

1895, PECKHAM, J., in *People* v. *Shea*, 147 N. Y. 78, 41 N. E. 505: "Two antagonistic methods for the judicial investigation of crime and the conduct of criminal trials have existed for many years. One of these methods favors this kind of evidence, in order that the tribunal which is engaged in the trial of the accused may have the benefit of the light to be derived from a record of the whole past life of the accused, his tendencies, his nature, his associates, his practices, and, in fine, all the facts which go to make up the life of a human being. This is the method which is pursued in France, and it is claimed that entire justice is more apt to be done where such course is pursued than where it is omitted. The common law of England, however, has adopted another, and, so far as the party accused is concerned, a much more merciful doctrine. . . . In order to prove his guilt, it is not permitted to show his former character, or to prove his guilt of other crimes, merely for the purpose of raising a presumption that he who would commit them would be more apt to commit the crime in question."

1884, *Anon.*, Ten Years a Police Court Judge, by Judge Wiglittle, p. 166: "Take, for instance, an illustration of the uncasable crimes, the following: A man has had his horse stolen out of the barn. No matter whether a good horse or poor, here is something that law is bound to take notice of — that is to say, law is bound to open its ears and hearken to all that may be said on the subject. The fact that the horse is stolen is indisputable, because the owner avers it. So far so good. Here is a foundation for a case, and nothing is lacking but the superstructure. For the rearing of that the grave inquiry arises, Who stole the beast? The owner has not the slightest doubt in his mind that Ned Hubbard is the thief, and against Ned Hubbard he wants a warrant. 'What, Mr. Johnson, is the basis of your belief in Ned Hubbard's culpability?' 'Why, it is just like him.' 'Anything more?' 'Yes; he was seen 'round my barn.' 'Has he since departed the vicinage, or does he continue at his usual place of abode?' 'Oh! he's round the same as ever, and that's just like him too. He's throwing dust, but he dusted off with the horse all the same.' 'Do you trace him to any act of taking or having the animal in his possession?' 'Well, no; as to that I can't say I do; but just put a warrant on him, and he'll show the white feather fast enough. I know him.' 'But no warrant should issue against a fellow-citizen unless for probable cause, as shown by evidence more or less specific, tending to incriminate him.' 'Fellow-citizen! The place for such fellow-citizens as Ned Hubbard is State prison.' 'Granted, if he have done aught to send him thither.' 'Well, I've told you what I know about it.' 'True; but have you told me aught that is specific or even specious?' 'You're the judge, I suppose.' 'Exactly.' Exit Mr. Johnson, who goes abroad to disseminate prejudice against the court. He wants to know what a police court is for if not to do justice. . . . The effect of all this wanting to know is to Johnsonize a fraction of the community. . . . No judge is so imperturbable as not to be ruffled a little by teapot tempests.

"Accordingly, it may as well be confessed that sometimes, not often, but *once in a while*, judges have been known, when in a very peace-loving mind, to issue warrants upon the application of cave-wind Johnsons to avoid the sputtering of the familiar kitchen utensil,

though the evidence was manifestly insufficient to warrant the warrant. This is not as it should be, because it makes unwarranted expense for the State, and tends to lessen in public esteem the Ned Hubbards who, in legal eye at least, are entirely crimeless."

This policy of the Anglo-American law is more or less due to the inborn sporting instinct of Anglo-Normandom — the instinct of giving the game fair play even at the expense of efficiency of procedure. This instinct asserts itself in other departments of our trial-law to much less advantage. But, as a pure question of policy, the doctrine is and can be supported as one better calculated than the opposite to lead to just verdicts. The deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury, in or out of Court. There are also indirect and more subtle disadvantages.[2] Our rule, then, firmly and universally established in policy and tradition, is that the prosecution may not initially attack the defendant's character.[3]

§ 58. **Same: Prosecution may Rebut.** After a defendant has attempted to show his good character in his own aid, *prosecution may in rebuttal* offer

[2] As suggested by Sir J. F. Stephen, quoted *post*, § 2251.

The contrasting system in Continental procedure is noticed *post*, § 194.

[3] *California:* 1872, People *v.* Fair, 43 Cal. 137, 149 (murder by a mistress; here the defendant had offered evidence that the acts of the deceased had ruined her prospects in life, and the prosecution's rebuttal evidence that her character for chastity was already bad was held improperly received; this is clearly wrong, for it tended to show that an alleged fact relied on by the defendant was false and there was no other way of showing its falsity); *Georgia:* 1916, Smoot *v.* State, 146 Ga. 76, 90 S. E. 715 (murder); *Indiana:* 1915, Stewart *v.* State, 184 Ind. 337, 111 N. E. 307 (nor is the status of the prosecution's introduction of this evidence changed by the defendant's subsequent use of evidence of good character); *Iowa:* 1874, State *v.* Kabrich, 39 Ia. 277; *Kansas:* 1900 State *v.* Beaty, 62 Kan. 266, 62 Pac. 658 (larceny; the bad character of the defendant's associates, excluded); *Kentucky:* 1915, Romes *v.* Com., 164 Ky. 334, 175 S. W. 669 (receipt of bribe at an election; reputation "as a man that would accept a bribe for his vote", excluded; how the prosecuting attorney of Pike County in this day and generation could contemplate offering such testimony, or the circuit judge could receive it, is a question which suggests interesting possibilities); 1920, Owens *v.* Com., 188 Ky. 498, 222 S. W. 524 (possession of intoxicating liquor with intent to sell; "reputation as a bootlegger", excluded); *Maine:* 1862, State *v.* Tozier, 49 Me. 404; *Massachusetts:* 1763, R. *v.* Donks, 1 Quincy 90; 1850, Com. *v.* Webster, 5 Cush. 295, 325; *Missouri:* 1866, State *v.* Creson, 38 Mo. 372; *New York:* 1835, People *v.* White, 14 Wend. 113; 1840, People *v.* White, 24 Wend. 524, and *passim;* 1887, People *v.* Sharp, 107 N. Y. 427, 457, 14 N. E. 319; *North Carolina:* 1829, State *v.* Merrill, 2 Dev. 269, 277; 1847, State *v.* O'Neal, 7 Ired. 251; 1850, Fain *v.* Edwards, 11 Ired. 307; *Oklahoma:* Cantrell *v.* State, 12 Okl. Cr. 534, 159 Pac. 1092 (illegal conveyance of liquor; defendant's reputation as a bootlegger, excluded).

Note however that under some of the modern statutes (*post*, § 1620), admitting the defendant's reputation on a charge of *keeping a house of prostitution*, the prosecution may offer it in chief. Compare also § 78, *post* (keeping a house of prostitution).

Sometimes a case falls near the line of other principles: 1897, Downey *v.* State, 115 Ala. 108, 22 So. 479 (gaming; question to the defendant, whether he followed gambling for a livelihood, excluded; compare §§ 92, 300, *post*); 1880, State *v.* Moelchen, 53 Ia. 310, 313, 5 N. W. 186 (the defendant's previous occupation in Europe as a soldier, admitted; that it should be argued that he was "trained to scenes of blood and carnage", would be improper; but this was not necessarily involved in the evidence).

For the question whether the defendant's *failure to produce evidence of good character* is to be understood as an admission that his character is bad, see *post*, § 290.

For the use of *bad character* and of *conviction of specific offences* to affect the *sentence imposed*, after a finding of guilty, see *post*, § 196.

as evidence his bad character.[1] The true reason for this seems to be, not any relaxation of the principle just mentioned, *i.e.* not a permission to show the defendant's bad character, but a liberty to refute his claim that he has a good one. Otherwise a defendant, secure from refutation, would have too clear an unscrupulous license to impose a false character upon the tribunal.[2]

§ 59. **Same: Kind of Character.** What limitations on these uses of a defendant's character are imposed by the principle of relevancy? In the first place, the character or disposition offered, whether for or against him, must involve the *specific trait* related to the act charged:[1]

§ 58. [1] 1722, Page, J., cited in Vin. Abr. XII, 48, tit. Evidence ("In criminal cases, when the prisoner calls persons to his reputation, this gives an handle to the Crown to give evidence of the prisoner's reputation"); 1865, R. *v.* Rowton, Leigh & C. 520 (Martin, B., who expressed a contrary opinion, asserted that "in no single recorded instance during the whole of that period [two hundred years] has evidence of general bad character been given in reply to evidence of the prisoner's good character"; but it was pointed out by Cockburn, C. J., and Willes, J., (1) that where good character could be shown, of course evidence of bad character would usually only be available in case these witnesses were false, and in such a case the prosecution's customary warning of rebuttal-testimony would deter the use of the defence's testimony; and (2) that the mention of rebutting evidence of the sort, as allowable, by the great lawyer-writers on Evidence of the early century, showed a practice, and not merely a principle). This case disposes of the contrary ruling in R. *v.* Burt, 5 Cox Cr. 284, 1851, Martin, B., and Erle, J. (giving no reasons, but apparently moved by considerations affecting the right of counsel to reply as based on the order of testimony).

In the United States, the propriety of such evidence has been uniformly conceded: *Federal:* 1858, Clifford, J., in U. S. *v.* Holmes, 1 Cliff. 111, 15 Fed. Cas. 382 ("Such evidence is never admitted until the accused . . . has laid the foundation for its introduction by offering evidence to show that he is of good character, and then the counterproof is properly admitted as rebutting testimony"); *Ga.* 1919, Barnes *v.* State, 24 Ga. App. 372, 100 S. E. 788 (here the defendant in his own unsworn statement alleged his good reputation, without calling other witnesses to the fact); *Mass.* 1807, Parsons, C. J., in Com. *v.* Hardy, 2 Mass. 317 ("Whenever the defendant chooses to call witnesses to prove his general character to be good, the prosecutor may offer witnesses to disprove their testimony); *N. Y.* 1908, People *v.* Hinksman, 192 N. Y. 421, 85 N. E. 676 (defendant voluntarily took the stand, and after stating that he was once convicted of larceny, said, "I have been a good boy ever since"; held that testimony of his bad reputation was not thereby made admissible in rebuttal; this is decidedly over-strict; Gray, J., diss.).

[2] *E.g.* Erle, J., in R. *v.* Rowton, *supra* ("If the prisoner, having a bad character, misleads the Court, . . . the false impression should be removed"); 1851, Alderson, B., and Campbell, C. J., in R. *v.* Shrimpton, 2 Den. Cr. C. 322; Clifford, J., in U. S. *v.* Holmes, *supra.* In Lord Mansfield's phrase (2 Atk. 339), the defendant, by going into his own character, gives "a challenge to the prosecutor."

Under the English Criminal Evidence Act, 1898 (61–2 Vict. c. 36, § 1), the question constantly arises whether the *accused who testifies* has permitted the prosecution to evidence his bad character. But the cases are more conveniently considered *post*, § 194 *a* and § 2276, n. 5.

§ 59. [1] ENGLAND: 1701, Captain Kidd's Trial, 14 How. St. Tr. 146 (murder; Kidd: "My lord, I have witnesses to produce for my reputation; . . . I can prove what service I have done for the king [as a king's officer, before I turned pirate]"; L. C. B. Ward: "What would that help you in this case of murder?)"; 1865, Martin, B., in R. *v.* Rowton, Leigh & C. 520, 537 (it must be "good character with respect to the species of crime charged against him"; Cockburn, C. J., was *contra*, but this is opposed to his remarks quoted *ante*, § 55).

UNITED STATES: *Federal:* 1909, Harper *v.* U. S. 8th C. C. A., 170 Fed. 385, 390 (false entry in a bank report; the defendant's character for "morality and sobriety", excluded). *Alabama:* 1883, Kilgore *v.* State, 74 Ala. 7 (it must be a trait "having reference and analogy to the subject of the prosecution"); 1889, Morgan *v.* State, 88 Ala. 223, 6 So. 761 (assault with intent to kill; character for truth, excluded); 1897, Balkum *v.* State, 115 Ala. 117, 22 So. 532 (battery upon a woman; character for "running after women" admitted); 1905, Smith *v.* State, 142 Ala. 14, 39 So. 329 (homicide; defendant's character for honesty excluded);
Arizona: 1894, Chung Sing *v.* U. S., — Ariz. —, 36 Pac. 205 (selling spirits to Indians; character as a law-abiding citizen, excluded);
Arkansas: 1873, Kee *v.* State, 28 Ark. 155, 164 (the character must be "such as would make it unlikely that the defendant would be

1663, *Dover's Trial*, 6 How. St. Tr. 539, 552; seditious publication; a witness testified that the defendant was a faithful member of the train-band. L. C. J. HYDE: "Do not mistake yourself. The testimony of your civil behavior, going to church, appearing in the trained bands, going to Paul's, being there at common service, — this is well. But you are not charged for this. A man may do all this, and yet be a naughty man in printing abusive books, to the misleading of the king's subjects."

guilty of the particular crime with which he is charged");
California: 1857, People *v.* Josephs, 7 Cal. 129 (attempt to rape; character for "morality and good behavior", and "general character", excluded, because the character ought to "bear some analogy and reference to the nature of the charge"); 1865, People *v.* Stewart, 28 Cal. 395 (murder; character for peace and quiet admitted); 1872, People *v.* Fair, 43 Cal. 137, 147 (murder by a mistress; the defendant's character for unchastity not relevant to the act; "It is incorrect to say that the general character of the prisoner is received even in his own behalf"; it must be "general character as to the trait involved in the offence charged"); 1879, People *v.* Casey, 53 Cal. 360 (it must be "in respect to the particular trait involved in the inquiry"); 1882, People *v.* Doggett, 62 Cal. 27, 29 ("traits involved in the charge"); 1901, People *v.* Chrisman, 135 Cal. 282, 67 Pac. 136 (larceny; defendant's habits "as to steadiness, drinking, or anything of that sort", excluded);
Georgia: 1899, Dorsey *v.* State, 108 Ga. 477, 34 S. E. 135 (on a charge of rape, the defendant, a negro, was shown to have followed the woman, a white, for some distance; held that "under the conditions surrounding the two races in this State", the negro race of the defendant and the white race of the woman could be considered as tending to rebut the explanation that he might be following merely to solicit consent to intercourse without force; this ruling will no doubt pass, in some communities; but all such race generalizations are dangerous: it would be equally logical, on a prosecution for lynching a negro, to hold that the white race of the defendant was some evidence that he was a member of the lynching mob); 1914, Frank *v.* State, 141 Ga. 243, 80 S. E. 1016 (murder while attempting rape; the defendant having put in his general good character, his bad character for lasciviousness was then shown by the prosecution);
Idaho: 1913, State *v.* Allen, 23 Ida. 772, 131 Pac. 1112 (but deprecating theoretical strictness in applying the principle);
Illinois: 1884, Tedens *v.* Schumers, 112 Ill. 263, 267; 1905, Wistrand *v.* People, 218 Ill. 323, 75 N. E. 891 (rape; character as a "peaceable and quiet citizen", excluded); 1921, People *v.* Redola, 300 Ill. 392, 133 N. E. 292 (larceny; defendant's good reputation as a "peaceable and law-abiding citizen", held inadmissible, peaceableness being irrelevant; prior rulings explained);
Indiana: 1874, Fletcher *v.* State, 49 Ind. 124, 131; 1879, State *v.* Bloom, 68 Ind. 54 (larceny; the defendant's evidence of good character limited to "honesty and integrity"); 1893, Carr *v.* State, 135 Ind. 1, 34 N. E. 533 (murder by poisoning; character for peace and quietude admissible);
Indian Terr.: 1907, Harper *v.* U. S., 7 Ind. Terr. 437, 104 S. W. 673 (false entries; reputation for "morality and sobriety", held properly excluded);
Iowa: 1856, Gordon *v.* State, 3 Ia. 410, 415; 1876, State *v.* Kinley, 43 Ia. 295 (veracity, admitted on a perjury charge); 1879, State *v.* Curran, 51 Ia. 112, 117 (seduction; character for virtue admitted, but not general good moral character); 1898, State *v.* Heacock, 106 Ia. 191, 76 N. W. 654;
Kentucky: 1920, Denton *v.* Com., 188 Ky. 30, 221 S. W. 202 (murder; "his good moral character as well as his character for peace and quietude", allowed);
Louisiana: 1852, State *v.* Parker, 7 La. An. 83, 88 (murder; character not restricted to peace and quietness, but may include kindness as a husband and father, honesty and integrity and purity of morals; yet the character admissible is defined by the majority of the Court merely as "such particular moral qualities as have pertinence to the charges"); 1905, State *v.* Bessa, 115 La. 239, 38 So. 985 (assault with intent; character for honesty and industry, excluded); 1906, State *v.* Griggsby, 117 La. 1046, 42 So. 497 (murder; defendant's character for honesty and trustworthiness, excluded);
Michigan: 1868, People *v.* Garbutt, 17 Mich. 9, 16 (murder; defence, insanity; the defendant's reputation in the civil war as "a good and valiant soldier", excluded);
Mississippi: 1899, Westbrooks *v.* State, 76 Miss. 710, 25 So. 491 (illegal sale of liquor; defendant's general good character excluded); 1904, Maston *v.* State, 83 Miss. 647, 36 So. 70 (murder; character for "peace or violence", and a "peaceable and law-abiding citizen", admitted); 1905, Horton *v.* State, 84 Miss. 473, 36 So. 1033 (rape; character for peace or violence, admissible);
Missouri: 1858, State *v.* Dalton, 27 Mo. 15 (assault with intent to kill; character for peace, but not for industry, admitted); 1883, State *v.* King, 83 Mo. 556; 1903, State *v.* Auslinger, 171 Mo. 600, 71 S. W. 1041 (illegal voting; defendant's character for industry, held irrelevant; the Court is not bound to instruct upon irrelevant evidence of character, under Rev. St. 1899, § 2627, as amended by Laws 1901,

1794, Mr. ERSKINE, arguing in *Hardy's Trial* and *Horne Tooke's Trial*, 24 How. St. Tr. 1076, 25 id. 348: "The meaning of witnesses to character is this; for instance, put the case of a man who is charged with a crime of a particular description, — suppose a man charged with an unnatural crime; would it be any evidence at all to that man's character that he paid his bills regularly, and that he was not a dishonest man, or anything of that sort? No; your examination to character must always be analogous to the nature of the charge; and you would there inquire whether he was a man of chastity; you would in-

p. 140, relating to written instructions); 1903, State *v.* Thornhill, 174 Mo. 364, 74 S. W. 832 (defendants' repute as gamblers, admitted in rebuttal of their repute for honesty and integrity);
Nebraska: 1895, Basye *v.* State, 45 Nebr. 261, 63 N. W. 811 (character for honesty and integrity, on a charge of murder excluded);
Montana: 1919, State *v.* Popa, 56 Mont. 587, 185 Pac. 1114 (murder; reputation for honesty and integrity, excluded);
Nevada: 1880, State *v.* Pearce, 15 Nev. 188, 190 ("the particular trait of character at issue" is the kind admissible);
New Jersey: 1899, State *v.* Snover, 63 N. J. L. 382, 43 Atl. 1059 (carnal knowledge of one under age of consent; character for "morality, virtue, and honesty in living", admitted); 1904, State *v.* Brady, 71 N. J. L. 360, 59 Atl. 6 (rape; defendant's general reputation, excluded);
New Mexico: 1911, Terr. *v.* Pierce, 16 N. M. 10, 113 Pac. 591 (assault; character for truth and veracity, excluded); 1915, State *v.* McKnight, 21 N. M. 14, 153 Pac. 76 (murder by husband and wife; defence, the deceased's attempt to rape the wife; the wife's good character for chastity and conjugal fidelity, excluded);
New York: 1907, People *v.* Van Gaasbeck, 189 N. Y. 408, 82 N. E. 718 (homicide);
North Carolina: 1918, State *v.* McKinney, 175 N. C. 784, 95 S. E. 162 (bad reputation for selling liquor, admitted, on a charge of having liquor in his possession); 1920, State *v.* McMillan, 180 N. C. 741, 105 S. E. 403 (illegal making of liquor; defendants having introduced character, the State was allowed to show that "their characters were bad for making whisky"); 1922, State *v.* Saleeby, — N. C. —, 110 S. E. 844 (possession of liquor; defendant's bad character for selling liquor, admitted);
Pennsylvania: 1860, Cathcart *v.* Com., 37 Pa. 108, 111 (wife-murder; character as a "kind-hearted man" excluded, but character for "peaceableness and regularity of conduct" admitted; this is finical);
Texas: 1898, Poyner *v.* State, 40 Tex. Cr. 640, 48 S. W. 516 (incest; character as to "gentlemanly deportment and good moral character, allowed"); 1907, Saye *v.* State, 50 Tex. Cr. 569, 99 S. W. 551 (negligent homicide by a deputy sheriff; defendant's character as a cautious and prudent officer, admitted); 1913, Bishop *v.* State, 72 Tex. Cr. 1, 160 S. W. 705 (seduction; defendant's general character as a peaceable, law-abiding citizen, not merely as a moral and chaste person, admissible); 1921, Freddy *v.* State, 89 Tex. Cr. 53, 229 S. W. 533 (murder; general repute as a "peaceable, law-abiding citizen", admitted);
Utah: 1921, State *v.* Thompson, — Utah —, 199 Pac. 161 (indecent assault: defendant's reputation as to personal morality, not admitted unless limited to sexual morality);
Washington: 1900, State *v.* Surry, 23 Wash. 655, 63 Pac. 557 (assault and battery while making an arrest; defendant's character as a conservative and conscientious peace officer, excluded; this is unsound); 1915, State *v.* Schuman, 89 Wash. 9, 153 Pac. 1084 (policeman levying tribute on prostitutes; defendant's character as faithful police officer, excluded; unsound);
West Virginia: 1905, State *v.* Moyer, 58 W. Va. 146, 52 S. E. 30 (embezzlement; character for honesty, admissible).

Contra, but inconsistent with other rulings *supra* in the same jurisdictions: 1894, Funderberg *v.* State, 100 Ala. 36, 14 So. 877 (general good character, admitted); 1863, Hopps *v.* People, 31 Ill. 385 (murder; the defence being insanity, the defendant's character "as a man and a citizen" was admitted); 1863, State *v.* Knapp, 45 N. H. 157 (rape; general good character of the defendant for morality having been received, the State was allowed to show his bad reputation as an illegal liquor seller).

The prosecution's *rebutting* repute may be of the specific trait, even though the defendant's evidence was of general character: 1910, Com. *v.* Maddocks, 207 Mass. 152, 93 N. E. 253 (illegal sale of liquor; after the defendant's evidence of general reputation, held proper for the prosecution to introduce "his reputation as to being a law-abiding person in relation to the liquor law", but only to rebut the defendant's reputation-evidence; citing the text above); 1898, State *v.* Hairston, 121 N. C. 582, 28 S. E. 493 (only general character may be offered; but the opponent on cross-examination may ask as to the specific trait; a peculiar little quirk, which must add interest to the game of law as here played); 1912, State *v.* Wilson, 158 N. C. 599, 73 S. E. 812 (State *v.* Hairston approved); 1907, Schulz *v.* State, 133 Wis. 215, 113 N. W. 428 (whether on a charge of bribery the character inquired into may be, not merely the general trait of integrity, but also the specific one of being a corruptionist, not decided; careful opinion by Winslow, J.).

quire into his regard for women, into his morals, and into his conversation, so as it might rebuff any such horrible and detestable idea having passed in his mind, that he was a man capable in the ordinary course of his life of entertaining such opinions and making use of such expressions. So if a man is indicted for any other offence, if a man is indicted for a robbery, I say I will show you that he was not a necessitous man, that he possessed a large fortune at that time, that he was a man whose ideas were moral and totally contrary to any such practice. That is the nature of character. . . . I speak to a most honorable person upon the bench, who lately tried Mr. Purefoy for the murder of Colonel Roper in a duel. What were the questions asked as to his character? Were they whether he was a good officer? Drilled his company well? Was a well-bred man? Whether he paid his debts? No; but whether he was a man of humanity. A gentleman came from a great distance to testify that humanity was the paramount characteristic of his disposition."

1817, *Turner's Trial*, 32 How. St. Tr. 1007; high treason. Mr. *Cross* (for the defence): "What has been his general character as far as you have known him?" Mr. *Gurney* (opposing): "I submit to your lordships that the proper question is as to loyalty." Mr. *Denman* (for the defence): "If he is generally a respectable man, an inference arises that he is a loyal man." Mr. *Gurney:* "If a man is indicted for felony, evidence is produced to his honesty; if for rape, to his chastity; and so on." Mr. Justice ABBOTT: "As far as my experience goes, the inquiry into character is always adapted to the charge". Mr. *Denman:* " . . . A man who had conducted himself peaceably and respectably was not likely to enter into wild schemes." Mr. Justice ABBOTT: "The question was objected to as too general and therefore not applicable; it was not whether he was a peaceable man, but as to his general character."

1889, MCCLELLAN, J., in *Morgan* v. *State*, 88 Ala. 224, 6 So. 761: "The object and effect of such evidence is to disprove guilt by furnishing a presumption that the defendant would not have committed the offence; and hence the character sought to be proved must be such as would make it unlikely that the party would do the controverted act."

In the orthodox common-law practice, this principle was carried so far that the inquiry could be specifically directed to the defendant's *capacity* for committing the *particular crime*, and not merely to the abstract trait involved;[2] but this practice seems to have fallen into disuse.[3]

A *certificate of honorable discharge* from the United States Army or Navy, assuming it to be admissible by exception to the hearsay rule (*post*, § 1675 *a*), should be liberally construed, *i.e.* as importing not merely general good character, or the specific traits mentioned, but any other of the fundamental moral traits that may be relevant in criminal cases. The soldier is in an environment where all weaknesses or excesses have an opportunity to betray themselves. He is carefully observed by his superiors, — more carefully than falls to the lot of any member of the ordinary civil community; and all his delinquencies and merits are recorded systematically from time to time on his "service record", which follows him throughout his army career and serves as the basis for the terms of his final discharge.[4] The certificate of discharge, therefore, is virtually a summary of his entire service conduct.

[2] *E.g.:* 1803, Hedge's Trial, 28 How. St. Tr. 1403 ff. ("Do you believe, from what you know of their character, that the defendants are capable of committing a gross fraud upon their employers?"); and other earlier trials cited *supra*, and the cases cited *post*, § 1981, n. 3.

[3] 1905, State v. Bessa, 115 La. 259, 38 So. 985 ("Do you believe that a man like him would commit, etc.?" excluded).

[4] U. S. Army Regulations, ed. 1917, §§ 104, 105, 139–150.

When it is "honorable" in its import, it implies a career successfully negativing all of the more common traits involved in criminal charges. In this respect it is therefore more comprehensive than the ordinary community-repute (*post*, § 1608) to general good character, and is entitled to be used on behalf of an accused on virtually any specific charge of serious crime. In view of the high moral value attached to an honorable discharge in the military community, and of the vast numbers of men who saw service in the World-War, it is fitting that the evidential import of such certificates should be liberally recognized.[5]

§ 60. **Same: Time and Place of Character.** This, as a question of Relevancy, is simple enough. (1) Character in one *place* stands on precisely the same footing as character in another place. The person is the same wherever he is, and it is with the person that the trait is concerned. (2) Character at an earlier or later *time* than that of the deed in question is relevant only on the assumption that it was substantially unchanged in the meantime; *i.e.* the offer is really of character at one period to prove character at another, and the real question is of relevancy of this evidence to prove character, not of the character to prove the act; it therefore more properly involves the principle of § 191, *post*.

Most of the doubts, however, raised by a variation of time or of place have no concern with relevancy, but with the hearsay use of Reputation to evidence Character. Thus, a reputation 'post litem motam' may be untrustworthy; a reputation in a community other than the defendant's home may be ill-founded. These problems are therefore all discussed in connection with the Reputation-exception to the Hearsay Rule (*post*, §§ 1615–1618).

§ 61. **Same: Defendant as a Witness.** When a defendant in a criminal case takes the stand in his own behalf, he occupies a double position. As a defendant, his character cannot be attacked by the prosecution; *as a witness*, it can be. The question is whether the former position should be so strictly guarded as to require the exclusion of evidence properly admissible against him in the latter capacity; this question can be better examined in connection with the impeachment of witnesses; and it is therefore dealt with *post*, §§ 890, 2277. How far the defendant, by taking the stand, *waives the privilege against self-crimination* is a still different question, dealt with *post*, § 2276.

§ 62. (2) **Character of Complainant in Rape and similar Crimes.** The reasons of Auxiliary Policy which affect the use of a defendant's character by the prosecution are peculiar to that use, and do not affect the use of character *as against other persons* in a criminal case wherever it may be relevant.

One of these relevant uses is that of the character of a *rape-complainant* for chastity. The non-consent of the complainant is here a material element; and the character of the woman as to chastity is of considerable probative value in judging of the likelihood of that consent:

[5] The cases are placed *post*, § 1675 *a*; the opinions seldom distinguish whether they are ruling upon the present principle or of that of the hearsay exception.

1846, PLATT, B., in *R.* v. *Ryan*, 2 Cox Cr. 115 (admitting testimony to the "decency and propriety" of the general conduct of the prosecutrix, an idiot): "It is important to consider whether a young person in such a state of incapacity was likely to consent to the embraces of this man; because if her habits, however irresponsible she might be, were loose and indecent, there might be a probability of consent being given and a jury might not think it safe to conclude that she was not a willing party."

1856, ISHAM, J., in *State* v. *Johnson*, 28 Vt. 514: "In all cases of this character, the assent of the witness to the act is the material matter in issue, and on that question the defence generally rests on circumstantial testimony. In determining that question, which is purely a mental act, it is important to ascertain whether her consent would from her previous habits be the natural result of her mind, or whether it would be inconsistent with her previous life and repugnant to all her moral feelings. Such habits as are imputed to the witness by this inquiry have a tendency to show such consent as the natural operation of her propensities, and rebut the inference or necessity of actual violence."

1895, GAROUTTE, J., in *People* v. *Johnson*, 106 Cal. 289, 39 Pac. 622: "This class of evidence is admissible for the purpose of tending to show the non-probability of resistance upon the part of the prosecutrix; for it is certainly more probable that a woman who has done these things voluntarily in the past would be much more likely to consent than one whose past reputation was without blemish, and whose personal conduct could not truthfully be assailed. In other words, this class of evidence goes to the question of consent only."

The admissibility, on a *rape* charge, of the complainant's *character for chastity or unchastity* is generally conceded;[1] and her *habits as a pros-*

§ 62. [1] *Accord:* ENGLAND: 1843, R. *v.* Tissington, 1 Cox Cr. 48, Abinger, C. B. ("general want of decency"); 1851, R. *v.* Clay, 5 Cox Cr. 146, Patteson, J.; 1847, Camp *v.* State, 3 Kelly 417, 420.

UNITED STATES: *Alabama:* 1887, McQuirk *v.* State, 84 Ala. 435, 438, 4 So. 775;
Arkansas: 1855, Pleasant *v.* State, 15 Ark. 624, 643, 653;
California: 1856, People *v.* Benson, 6 Cal. 221, 223; 1899, People *v.* Shea, 125 Cal. 151, 57 Pac. 885 (following People *v.* Benson; McFarland, J., diss.);
Florida: 1895, Rice *v.* State, 35 Fla. 236, 17 So. 286;
Georgia: P. C. 1910, § 1019 (quoted *post*, § 64); 1902, Seals *v.* State, 114 Ga. 518, 40 S. E. 731;
Illinois: 1873, Shirwin *v.* People, 69 Ill. 56, 59; 1876, Dimick *v.* Downs, 82 Ga. 573;
Indiana: 1861, Wilson *v.* State, 16 Ind. 393, *semble;* 1884, South Bend *v.* Hardy, 98 Ind. 582; 1885, Anderson *v.* State, 104 Ind. 471, 4 N. E. 63, 5 N. E. 711;
Iowa: 1848, Carter *v.* Cavenaugh, 1 Greene Ia. 171, 175, *semble;*
Kentucky: 1907, Lake *v.* Com., — Ky. —, 104 S. W. 1003;
Massachusetts: 1880, Com. *v.* Harris, 131 Mass. 336;
Michigan: 1888, People *v.* McLean, 71 Mich. 310, 38 N. W. 917; 1907, People *v.* Ryno, 148 Mich. 137, 111 N. W. 740;
Mississippi: 1895, Brown *v.* State, 72 Miss. 95, 16 So. 202;
Missouri: State *v.* Duffey, 128 Mo. 549, 31 S. W. 98;
New Hampshire: 1861, State *v.* Forschner, 43 N. H. 89;
New Jersey: 1885, O'Blenis *v.* State, 47 N. J. L. 279;
New York: 1857, People *v.* Jackson, 3 Park. Cr. 398; 1838, People *v.* Abbot, 19 Wend. 197; 1874, Woods *v.* People, 55 N. Y. 515;
North Carolina: 1846, State *v.* Jefferson, 6 Ired. 305; 1868, State *v.* Cherry, 63 N. C. 32; 1897, State *v.* Hairston, 121 N. C. 579, 28 S. E. 492 (general character allowed, but not character for virtue, on the singular ground that the offering party may only ask for general character, though the witness, "of his own motion, may say in what respect it is good or bad"; a novel and groundless quibble);
Ohio: 1858, McCombs *v.* State, 8 Oh. St. 643, 646; 1862, McDermott *v.* State, 13 Oh. St. 331, 335;
Tennessee: 1874, Titus *v.* State, 7 Baxt. 132, 135;
Utah: 1898, State *v.* McCune, 16 Utah 170, 51 Pac. 818 (character for chastity);
Vermont: 1856, State *v.* Johnson, 28 Vt. 512 (Bennett, J., dissenting on another point); 1867, State *v.* Reed, 39 Vt. 417;
West Virginia: 1906, State *v.* Detwiler, 60 W. Va. 583, 55 S. E. 654; 1922, State *v.* Golden, — W. Va. —, 111 S. E. 320;
Wisconsin: 1864, Watry *v.* Ferber, 18 Wis. 500, 502 (civil action for rape; the woman's character held admissible, and equally in criminal cases).

titute are usually regarded as equivalent to a general trait of character.[2]

The same doctrine should apply to a *charge of enticement for prostitution*, because the question is whether the woman went of her own impulses or yielded to persuasion.[3] But it should not apply in rape where the woman is below the *age of consent*;[4] and perhaps not in a charge of mere *assault with intent* to commit rape, or of *indecent assault*, or the like.[5]

Contra, excluding *bad character:* 1877, State *v.* Morse, 67 Me. 429.

Occasionally, too, a Court has been misled by the doctrine about *presuming a witness' character to be good*, and has therefore erroneously excluded the complainant's *good character* unless her character has first been impeached by the defendant: 1918, Patrick *v.* State, 135 Ark. 173, 204 S. W. 852 (seduction); 1918, Lockett *v.* State, 136 Ark. 473, 207 S. W. 55 (assault to rape; explaining Patrick *v.* State); 1921, Smith *v.* State, 150 Ark. 193, 233 S. W. 1081; 1898, People *v.* Kuches, 120 Cal. 566, 52 Pac. 1002 (admitting good character in rebuttal of alleged lewd conduct); 1900, People *v.* O'Brien, 130 Cal. 1, 62 Pac. 297 (where the Court inconsistently held that there was no such strict presumption in a criminal case, and yet that evidence of good character was inadmissible; the opinion is confused in its notion of presumptions); 1920, Allen *v.* State, 150 Ga. 706, 105 S. E. 369; 1921, Loyd *v.* State, 150 Ga. 803, 105 S. E. 465 (rape; prosecutrix' general good moral character admitted because impeached in defendant's testimony); 1903, Baker *v.* State, 82 Miss. 84, 33 So. 716 (excluded, except after impeachment by the defendant).

[2] *England:* 1829, R. *v.* Barker, 3 C. & P. 589, Park and Parke, JJ. (that the prosecutrix had on one occasion acted the prostitute, admitted, after hesitation arising from R. *v.* Hodgson, *post*, § 200; perhaps in effect only a ruling as to testimonial discredit); 1871, R. *v.* Holmes, 12 Cox Cr. 143, per Kelly, C. B. ("the associate of common prostitutes, and such evidence of general loose character"); 1887, Stephen, J., in R. *v.* Riley, 16 Cox Cr. 195.

United States: 1855, Pleasant *v.* State, 16 Ark. 624, 643, 653, *supra*, *semble;* 1877, State *v.* Shields, 45 Conn. 256, 257, 260, 263 (former prostitution admitted, but the purpose not made clear); 1895, Rice *v.* State, 35 Fla. 236, 17 So. 286 (admitting "promiscuous intercourse with men, or common prostitution"); 1888, People *v.* McLean, Mich., *supra;* 1895, Brown *v.* State, Miss., *supra;* 1838, People *v.* Abbot, N. Y., *supra;* 1874, Woods *v.* People, N. Y., *supra;* 1846, State *v.* Jefferson, N. C., *supra;* 1913, State *v.* Apley, 25 N. D. 298, 141 N. W. 740 (general unchastity, and resort to houses of prostitution, admitted); 1874, Titus *v.* State, Tenn., *supra;* 1856, State *v.* Johnson, Vt., *supra*.

Here the general habit must be distinguished from *particular acts of unchastity*, the admissibility of which has been much controverted (*post*, § 200).

The complainant's *association with unchaste persons* is near the line, but ought to fall under the present principle: 1871, R. *v.* Holmes, cited above, *contra;* 1862, Eddy *v.* Gray, 4 All. Mass. 435, 439 (bastardy; bad character of the young men she associated with, excluded); 1900, State *v.* Taylor, 57 S. C. 483, 35 S. E. 729 (reputation of the house of complainant's abode, excluded).

[3] 1899, Gore *v.* Curtis, 81 Me. 403, 405, 17 Atl. 314 (indecent assault and battery, and solicitation to commit adultery; the plaintiff's character for unchastity admitted); 1890, Brown *v.* State, 72 Md. 468, 475, 20 Atl. 140, 180 (applying the rule to the case of female minor charged to have been enticed for purposes of prostitution; but confusing the question with that of discrediting a witness); Brown *v.* State, 72 Md. 477 (admitting the minor's previous recent residence in a house of prostitution).

It should apply also in a *civil action for rape: Contra:* 1908, Harris *v.* Neal, 153 Mich. 57, 116 N. W. 535 (civil action for rape; the plaintiff's bad reputation for chastity, excluded, following the general rule for civil cases; yet the unsoundness of that rule as an inflexible one is here illustrated, for nobody has doubted that in a criminal prosecution the same evidence would be regarded as useful).

[4] 1895, People *v.* Johnson, 106 Cal. 289, 39 Pac. 622; 1903, People *v.* Wilmot, Cal. 72 Pac. 838; 1911, People *v.* Gray, 251 Ill. 431, 96 N. E. 268; 1907, State *v.* Blackburn, — Ia. —, 110 N. W. 275, *semble;* 1893, People *v.* Abbott, 97 Mich. 484, 485, 56 N. W. 862; 1898, State *v.* Whitesell, 142 Mo. 467, 44 S. W. 332; 1900, State *v.* Hilberg, 22 Utah 27, 61 Pac. 215. *Contra: Tenn.:* Shannon's Code 1916, § 6456 (rape under age: "the female's reputation for the want of chastity, at and before the time of the commission", admissible when the female is over 14);

Here the girl's *good* character is inadmissible also, except as supporting her testimonial character: 1908, Leedom *v.* State, 81 Nebr. 585, 116 N. W. 496.

[5] *Admitted: England:* 1817, R. *v.* Clarke, 2 Stark. 243; *Canada:* 1897, Gross *v.* Brodrecht, 24 Ont. App. 687 (indecent assault); *United States:* 1912, State *v.* Dipley, 242 Mo.

The only difficulty in applying the principle is to distinguish between the use of Character, as bearing on consent, and the use of *specific acts of unchastity* as a means of evidencing the character itself. The latter kind of evidence being in many jurisdictions excluded (*post*, § 200), the woman's character as evidenced by reputation is alone admissible in those jurisdictions; and it thus becomes necessary therein to discriminate between the general character or trait of unchastity and the specific acts of unchastity.[6]

§ 63. (3) **Uncommunicated Character of Deceased in Homicide.** When the issue of self-defence is made in a trial for homicide, and thus a controversy arises *whether the deceased was the aggressor*, one's persuasion will be more or less affected by the character of the deceased; it may throw much light on the probabilities of the deceased's action: [1]

461, 147 S. W. 111 (assault with intent to rape; admitted, on the principle of § 1106, and strangely ignoring the present principle); 1893, Shields *v.* State, 32 Tex. Cr. 498, 502, 23 S. W. 893; 1903, Barton *v.* Bruley, 119 Wis. 326, 96 N. W. 815 (indecent assault).

Excluded: 1811, Davenport *v.* Russell, 5 Day 145, 148. Here though it is not admissible to evidence the woman's consent, which is not in issue, yet it might be relevant to show the defendant's natural expectation of her consent, on the principle of § 402, *post*.

For the question whether the *complainant in rape or bastardy* can be *impeached as a witness* by general bad character, see *post*, § 923.

The following case is peculiar: 1906, State *v.* Romero, 117 La. 1003, 42 So. 482 (carnal intercourse with consent; the prosecutrix' unchaste character, not admitted for defendant).

[6] See the citations in note 2, *supra*.

§ 63. [1] It may be noted that the doctrine is of course equally applicable in *civil cases* where a similar controversy arises (as in Williams *v.* Fambro, *infra*); it is also to be noted that the trait of character must be that of *quarrelsomeness, turbulence*, or *violence: Alabama:* 1839, Findlay *v.* Pruitt, 9 Port. 195, 199 (assault and battery; the plaintiff's reputation for a theft, held improperly admitted as a justification); 1872, Fields *v.* State, 47 Ala. 603 (the deceased's character as a "violent, turbulent, revengeful, bloodthirsty, dangerous man", held admissible for "determining the turpitude of the crime and what should be the measure of the punishment to be inflicted"; no authorities cited); 1875, Eiland *v.* State, 52 Ala. 333 (character from the present point of view ignored); 1880, Roberts *v.* State, 68 Ala. 165 (same, *semble*); 1888, Hussey *v.* State, 87 Ala. 134, 6 So. 420 (question stated, but not decided); 1921, Lambert *v.* State, 205 Ala. 547, 88 So. 347 (repute, not personal knowledge, is the essential thing; unsound); *Arkansas:* 1874, Palmore *v.* State, 29 Ark. 248, 262, 263 (admitted as tending to explain "the conduct of the deceased at the time"); 1921, Trotter *v.* State, 148 Ark. 466, 231 S. W. 177 (murder; deceased's reputed character only, admissible to show knowledge: here the witness' opinion of deceased's character was excluded); 1921, Fisher *v.* State, 149 Ark. 48, 231 S. W. 181 (deceased's peaceable character, not admissible, except to rebut defendant's evidence of deceased's violent character; here, evidence as to carrying a pistol, held not sufficient);
California: 1858, People *v.* Murray, 10 Cal. 309 (admissible "when the circumstances of the contest are equivocal" as to self-defence; but whether the present principle is intended by the Court is not clear);
Florida: 1899, Copeland *v.* State, 41 Fla. 320, 26 So. 319 (admissible only as significant of conduct of deceased at the time of the killing; character for "general cussedness", or for immorality, excluded);
Georgia: 1860, Williams *v.* Fambro, 30 Ga. 233 (admitting the turbulent character of a slave, to show that he was probably killed, as claimed by the defendant, in an act of insubordination; see quotation *supra*); 1903, Dannenberg *v.* Berkner, 118 Ga. 885, 45 S. E. 682 (the plaintiff having made no attack, his character not known to the defendant was held inadmissible); 1920, Brooks *v.* State, 150 Ga. 732, 105 S. E. 362 (excluded, where there was no evidence of deceased's aggression);
Idaho: 1907, State *v.* Barber, 13 Ida. 65, 88 Pac. 418 (not admitted where there was "no question as to who was the aggressor");
Indiana: 1905, Osburn *v.* State, 164 Ind. 262, 73 N. E. 601 (excluded, where the defendant was the aggressor on uncontradicted evidence);
Iowa: 1907, State *v.* Rutledge, 135 Ia. 581, 113 N. W. 461;
Kansas: 1870, State *v.* Spendlove, 44 Kan. 1, 24 Pac. 67 (admissible, under the limitation, apparently, that the question as to the aggressor must be in doubt);
Kentucky: 1896, Com. *v.* Hoskins, — Ky. —, 35 S. W. 284 (violent character admitted, but not mere bad moral character);

1860, STEPHENS, J., in *Williams* v. *Fambro*, 30 Ga. 233, 235 (admitting the turbulent character of a slave, as indicating that he was killed in an act of insubordination, as claimed by the defendant W.): "To prove a proneness to insubordination, to be sure, does not prove an act of insubordination, but it does increase the probability of the story where there is, as there was in this case, other evidence suggestive of such an act. Such a story of the rebellion [as the defendant's], if told by a witness or indicated by circumstances ought to be more easily believed concerning a violent, turbulent negro, than concerning a meek, humble one. I think that any mind in search of truth in such a case, or finding itself in doubt, would want to know the character of the negro. . . . [The defendant]

Louisiana: 1878, State *v.* Burns, 30 La. An. 679 (the character of the deceased is said to be excluded as a general rule, with a possible exception for communicated character; the early cases under § 246, *post*, are assumed as authorities); State *v.* Johnson, 30 La. An. 921 (intimating admissibility in a doubtful case, to show that the deceased had probably quarrelled with and been killed by some one else); 1883, State *v.* Garic, 35 La. An. 970, 971 (a charge that it "tended to indicate that he [the deceased] was the assailant, and that the assault was felonious", apparently approved); 1893, State *v.* Nash, 45 La. An. 1137, 1141, 13 So. 732, 734 (uncommunicated character, excluded); 1900, State *v.* Robinson, 52 La. An. 616, 27 So. 124 (admissible; no precedents cited); 1919, State *v.* Vaughn, 145 La. 31, 81 So. 745 (excluded, no issue of self-defence being raised);

Maryland: 1877, Costley *v.* State, 48 Md. 175 (peculiar facts; the jealous character of the deceased, not admitted to show that the killing was the result of a quarrel arising from the deceased's jealousy of the defendant's intimacy with his wife);

Michigan: 1868, People *v.* Garbutt, 17 Mich. 9, 15 (excluded; obscure);

Minnesota: 1860, State *v.* Dumphey, 4 Minn. 438, 445 (admissible where there is a doubt as to the premeditation of the defendant; but no distinction is made as to the deceased's knowledge of the character, and the opinion is not clear);

Mississippi: 1849, Jolly *v.* State, 13 Sm. & M. 223 (general dangerous character admissible "when the manner of the homicide is not fully known"); 1859, Wesley *v.* State, 37 Miss. 327, 346 (declared inadmissible, but with intimations that in a case of doubt it might be received; Jolly *v.* State not cited);

Missouri: 1853, State *v.* Jackson, 17 Mo. 544 (obscure); 1886, State *v.* Rider, 90 Mo. 61, 1 S. W. 825, *semble* ("in determining the question as to who was the assailant", character admissible); 1906, State *v.* Feeley, 194 Mo. 300, 92 S. W. 663 (deceased's reputed character, admissible on the present principle; repudiating State *v.* Kennade, 121 Mo. 405, 26 S. W. 347); 1912, State *v.* Barrett, 240 Mo. 161, 144 S. W. 485 (State *v.* Kennade reinstated, and the present doctrine repudiated; it is strange that the Court is unable to see the point);

Montana: 1914, State *v.* Jones, 48 Mont. 505, 139 Pac. 441;

New Jersey: 1790, State *v.* Wells, 1 N. J. L. 424, 429 (admitted);

New York: 1876, Thomas *v.* People, 67 N. Y. 224, *semble* (admitted); 1886, People *v.* Druse, 103 N. Y. 655, 8 N. E. 733 (same); 1904, People *v.* Rodawald, 177 N. Y. 408, 70 N. E. 1 (excluded);

North Carolina: 1820, State *v.* Tackett, 1 Hawks 210, 213, 216 (murder of a slave; the deceased's disposition as a turbulent and insolent man, admitted); 1827, Pierce *v.* Myrick, 1 Dev. 345 (trespass for killing the plaintiff's negro; to rebut evidence of the killing being done in defence, evidence was received of the "peaceable and submissive character", "general good character and orderly deportment" of the slave); 1843, State *v.* Tilly, 3 Ired. 424 (murder of his employer by an overseer; because (1) no case of self-defence was made out, (2) it would show only arrogant language, (3) it was not properly proved, evidence was excluded of the deceased being "high-tempered, oppressive, and overbearing towards his overseers"; no precedents cited); 1848, State *v.* Barfield, 8 Ired. 344, 349 (murder; the character of the deceased as "violent, overbearing, and quarrelsome", excluded, because it would be admissible, if at all, only where the evidence was purely circumstantial; State *v.* Tackett distinguished); 1855, Bottoms *v.* Kent, 3 Jones L. 154 (the preceding cases, except Pierce *v.* Myrick, noticed, and the rule stated *obiter* as absolute, that "evidence of the general character of the deceased as to temper and violence is inadmissible"); 1859, State *v.* Hogue, 6 Jones L. 381, 384 (the character of the deceased, who had attacked the defendant, excluded; "there may be exceptions to the rule; State *v.* Tackett is admitted to be one"); 1859, State *v.* Floyd, 6 Jones L. 392, 395, 398 (the temper and disposition of the deceased for violence, excluded, the parties having voluntarily engaged in a fight; no precedents cited); 1877, State *v.* Turpin, 77 N. C. 473, 480 (the general character of the deceased for violence admitted, apparently on the conditions that self-defence be in issue and that the evidence be circumstantial; the precedents examined and summed up); 1880, State *v.* Chavis, 80 N. C. 357 (self-defence in issue; the deceased's general charac-

Williams' knowledge or ignorance [of the character] has nothing to do with that bearing of the character which I have pointed out. The sole purpose for which character was admissible in this case on the question of justification was, from the negro's general readiness for rebellion, to render more probable the evidence which tended to show an act of rebellion at the time he was killed; and this probability is evidently not affected in the slightest degree by Williams' previous knowledge. The light comes from the fact that the negro was one who was apt or likely to do such an act as the one imputed to him, and not from Williams' knowledge of the fact."

There ought, of course, to be some other appreciable evidence of the deceased's aggression, for the character-evidence can hardly be of value unless there is otherwise a fair possibility of doubt on the point; moreover, otherwise the deceased's bad character is likely to be put forward to serve improperly as a mere excuse for the killing, under the pretext of evidencing his aggression, and it is often feasible to obtain untrustworthy character-testimony for that purpose. In short, the same reasons for caution apply as in the case of uncommunicated threats when offered as involving a design of aggression, and thus evidencing a probable aggression, on the part of the deceased (*post*, § 110).

The reason for the hesitation, once observable in many Courts, in recognizing this sort of evidence, and the source of much confusion upon the subject, was the frequent failure to distinguish this use of the deceased's character from another use, perfectly well-settled, but subject to a peculiar limitation not here necessary, — the use of *communicated character* for violence to show the *reasonableness of the defendant's apprehension* of violence (*post*, § 246). As the purpose there is to show the defendant's state of mind, it is obvious that the deceased's character, as affecting the defendant's apprehensions, must have become known to him; *i.e.* proof of the character must

ter for violence excluded, on the authority of Hogue's and Barfield's cases; Turpin's case recognized, but treated as dealing with some different question); 1897, State *v.* Byrd, 121 N. C. 684, 28 S. E. 353 (admissible only where the evidence of the killing is wholly circumstantial; opinion obscure); 1899, State *v.* McIver, 125 N. C. 645, 34 S. E. 439 (vicious temper and violence in anger, admitted); 1905, State *v.* Exum, 138 N. C. 599, 50 S. E. 283 (rule of State *v.* Turpin applied); 1913, State *v.* Blackwell, 162 N. C. 672, 78 S. E. 316 (admissible "when the evidence is wholly circumstantial and the character of the encounter is in doubt"; former cases summed up; query whether the opinion means "or" for "and"; Hoke, J., concurring, in repudiation of the first limitation);
Ohio: 1860, Gandolfo *v.* State, 11 Oh. St. 114, 118 (generally inadmissible); 1875, Marts *v.* State, 26 Oh. St. 162, 168 (declared inadmissible, without discussion);
Oklahoma: 1905, Sovereign Camp *v.* Welch, 16 Okl. 188, 83 Pac. 547 (see the citation *post*, § 64, n. 3);
Oregon: 1907, State *v.* Thompson, 49 Or. 46, 88 Pac. 583 (admissible);
Pennsylvania: 1863, Com. *v.* Ferrigan, 44 Pa. 388 (general deportment for violence, rejected, there being no evidence as to a necessity for self-defence);
South Dakota: 1909, State *v.* Raice, 24 S. D. 111, 123 N. W. 708 (excluded, where self-defence was not in issue);
Tennessee: 1846, Copeland *v.* State, 7 Humph. 479, 495 ("the character of the deceased" treated as throwing light on the question whether she was the agressor; no objection of law had been raised); 1872, Williams *v.* State, 3 Heisk. 376, 396 (the deceased's violent character treated in the same way; no objection of law had been raised);
Texas: 1854, Henderson *v.* State, 12 Tex. 525, 530 (not admissible "as affording presumptive evidence that the party injured was the aggressor"; for it would be "very remote and merely possible conjecture"; but here there was no evidence of aggression by the deceased);
West Virginia: 1918, State *v.* McCausland, 82 W. Va. 525, 96 S. E. 938 (deceased's violent character for many years past, admissible).

indispensably be accompanied by proof of its *communication to the defendant;* else it is irrelevant. In the present use, this additional element of communication is unnecessary; for the question is what the deceased probably did, not what the defendant probably thought the deceased was going to do. The inquiry is one of objective occurrence, not of subjective belief. This distinction, however, was in early rulings not always appreciated by the Courts, nor clearly laid before them by counsel. Hence, an early ruling excluding the present use of the evidence cannot always be taken as a repudiation of the present principle, but is often merely a ruling that the offer does not satisfy the doctrine of communicated character; and such a Court may in future recognize the present doctrine if the distinction is pressed upon it. Apart from a few such precedents, the principle is now generally accepted.

The State also can of course offer the *deceased's peaceable character*, when the issue of self-defence has been raised, even though the defendant has not first introduced the deceased's violent character;[2] though most Courts thus far are singularly loath to accept this dictate of logic and fairness. — The same question may arise where the homicide is said to have been provoked by some *other immoral act* of the deceased.[3]

[2] *Accord: Indiana:* 1858, Dukes *v.* State, 11 Ind. 557, 565; 1892, Fields *v.* State, 134 Ind. 46, 56, 32 N. E. 780; 1899, Thrawley *v.* State, 153 Ind. 375, 55 N. E. 95 (the defendant's issue as to deceased's aggression sufficing to raise the question); *Oregon:* 1914, State *v.* Wilkins, 72 Or. 77, 142 Pac. 589; 1920, State *v.* Holbrook, 98 Or. 43, 192 Pac. 640; *W. Virginia:* 1921, State *v.* Arrington, 88 W. Va. 152, 106 S. E. 445 (murder; deceased's good character, admitted after evidence of his threats against defendant);

Contra: Arizona: 1920, De Woody *v.* State, 21 Ariz. 613, 193 Pac. 299 (murder; evidence of aggression alone, and a plea of self-defence, not sufficient for admitting deceased's peaceable character); *Arkansas:* 1905, Bloomer *v.* State, 75 Ark. 297, 87 S. W. 438; *Illinois:* 1885, Davis *v.* People, 114 Ill. 86, 29 N. E. 192; 1907, Kelly *v.* People, 229 Ill. 81, 82 N. E. 198 (Hand, C. J., diss. on the facts); *Kansas:* 1874, State *v.* Potter, 13 Kan. 414; 1911, State *v.* Truskett, 85 Kan. 804, 118 Pac. 1047; *Kentucky:* 1914, Childers *v.* Com., 161 Ky. 440, 171 S. W. 149 (an astounding ruling on the facts); *Mississippi:* 1920, Richardson *v.* State, 123 Miss. 232, 85 So. 186 (deceased's peaceful character, excluded, though defendant had testified to an act of aggression by deceased; this case in its circumstances again exhibits the shockingly unfair nature of this rule; why do Courts feel themselves bound by the shackles of a senseless chain which they themselves locked and can unlock?); *Missouri:* 1906, State *v.* Feeley, 194 Mo. 300, 92 S. W. 663 (but the State may use character for peaceableness in general, in rebuttal, even though the defendant has offered only the deceased's character for quarrelsomeness when in liquor); 1913, State *v.* Reed, 250 Mo. 379, 157 S. W. 316 (murder; the defendant testified that the deceased was trying to rob him; the State then offered the good repute of the deceased for peace and quietness; excluded; State *v.* Feeley, *supra*, distinguished; the opinion clearly perceives the relevancy of the evidence, but weakly invokes a dread of "making a precedent which would open up a Pandora's box of collateral issues"; "there are always many collateral issues that resourceful attorneys could inject into all kind of suits"; is it not a pity that these resourceful attorneys are not matched by resourceful judges? And is it the law's fault that the resourceful judge is not permitted to checkmate the chicanery of the resourceful attorney?); 1915, State *v.* Ross, — Mo. —, 178 S. W. 475; *Texas:* The rule in Texas on this point rests on the statute, P. C. 1895, § 713, quoted *post*, § 246, and its singular interpretation is noticed in the citations ib., Rev. P. C. 1911, § 1143; *Utah:* 1911, State *v.* Vacos, 40 Utah 169, 120 Pac. 497; *Washington:* 1894, State *v.* Eddon, 8 Wash. 292, 294, 36 Pac. 139, Hoyt, J., diss.

[3] *Texas:* 1904, Melton *v.* State, 47 Tex. Cr. 451, 83 S. W. 822 (defendant killed deceased for insulting his wife; the prosecution was not allowed to introduce the deceased's character for courtesy to ladies); 1904, Orange *v.* State, 47 Tex. Cr. 337, 83 S. W. 385 (defendant killed deceased for incest with his daughter the wife of defendant; deceased's character for unchastity, admitted to show the probability of the incest); 1906, Gregory *v.* State, 50 Tex. Cr. 73, 94 S. W. 1041 (murder;

The use of *particular acts of violence* by the deceased rests on a different principle (*post*, §§ 198, 248); as also the use of the deceased's *physical strength* (*post*, § 84).

§ 64. (4) **Parties in Civil Causes; Character generally excluded.** It is to-day generally said that (subject to specific exceptions, some of them doubtful) the *character of a party in a civil cause is inadmissible; i.e.* that it cannot be used, as it is for or against a defendant in a criminal case, to indicate the likelihood that the act in issue was or was not done. This is laid down as a general rule, to which a specific exception, if any, must be clearly made out. This result, to be sure, was not always so clearly an accepted one.[1] But

the State alleged that the motive was a quarrel over rents; the defendant alleged that it was his discovery of the deceased in intended adultery with his wife; after evidence of the latter fact, the State was not allowed to show the deceased's good reputed character for chastity and virtue, such evidence being admissible only if the defendant had offered the deceased's reputed bad character for chastity; of such a rule, all that can be said is that it would be regarded as abominable, in any other community; apparently, the innocent dead are to receive no right to defend themselves in this court).

Compare the interesting point, raised in the Thaw Case, as to contradicting the *truth of the provocation* in such an issue (*post*, § 262).

§ 64. [1] The notion that character might be resorted to is often advanced by counsel in the early 1800s; but the mainstay of this claim seems always to have been Ruan *v.* Perry, whose subsequent repudiation in its own court is seen in the line of New York cases following: 1805, Ruan *v.* Perry, 3 Caines 120 (the defendant, a naval officer, had ordered the plaintiff's vessel, a neutral, to lie to, and had taken her out of her course, by reason of which she was captured by a belligerent; the plaintiff charged fraudulent collusion with the belligerent captain; and the defendant's good character was received because the evidence was purely circumstantial; Tompkins, J.: "In actions of tort, and especially charging a defendant with gross depravity and fraud, upon circumstances merely, as was the case here, evidence of uniform integrity and good character is oftentimes the only testimony which a defendant can oppose to suspicious circumstances"); 1827, Fowler *v.* Ins. Co., 6 Cow. 673 (defence of fraud, in an action on an insurance-policy; the plaintiff's good character was excluded; Savage, C. J.: "A specific fraud is charged, that must be met on its own merits, unless supported only by circumstances, as in the case of Ruan *v.* Perry. . . . Every man must be answerable for every improper act; and the character of every transaction must be ascertained by its own circumstances, and not by the character of the parties"); 1832, Townsend *v.* Graves, 3 Paige Ch. 453, 455, Walworth, Ch. (character admissible in cases of "a crime, or any other act involving moral turpitude", if evidenced only "by circumstantial evidence or by the testimony of witnesses of doubtful credit"); 1837, Gough *v.* St. John, 16 Wend. 645 (action for false representations as to a third person's solvency; the defendant's good character for honesty and fairness in dealing was excluded; Cowan, J.: "Such evidence [for character] is, in general, confined to criminal prosecutions involving the question of moral turpitude. . . . The case of Ruan *v.* Perry is to the contrary; but that is virtually exploded. . . . I mean to be understood as speaking of the general distinction; I know there are exceptions; they lie in that class of actions, or rather of issues, where the general character is drawn in question by the pleadings or the points involved in a cause", naming slander, criminal conversation, and breach of marriage-promise, as some of the instances"); 1851, Pratt *v.* Andrews, 4 N. Y. 496 (inadmissible; general statement).

A generation later finds an uncertainty of utterance in this State: 1894, Bowerman *v.* Bowerman, 76 Hun N. Y. 46, 50 (copartnership accounting; the case turned on an account stated by the deceased partner W. D. B. in 1882, said by the surviving partner to have been wilfully false; other evidence was incomplete; held that the reputation of W. D. B. for honesty and integrity was admissible; "it is not usually the case that men with a reputation for honesty and integrity embark in a scheme of persistent fraud"; no authority cited; opinion approved on appeal in 145 N. Y. 598, 40 N. E. 163); 1911, McKane *v.* Howard, 202 N. Y. 181, 95 N. E. 642 (breach of promise of marriage; plea, fornication before promise; the plaintiff's good reputation for chastity not admitted to show the improbability of her doing such acts; but the opinion carelessly makes the broad but incorrect statement that this "has been the law from the earliest period"); 1912, Noonan *v.* Luther, 206 N. Y. 105, 99 N. E. 178 (assault and battery; defendant pleaded that plaintiff was disorderly while on his premises; her prior good habits, not admitted for plaintiff).

it is to-day almost everywhere accepted, subject to one or two occasional exceptions.

The reasons for this exclusion differ wholly from the reasons forbidding the prosecution's use of the character of an accused person; the two rules have nothing in common. The reasons advanced for the present rule are of two chief sorts:

(1) A party's character is *usually of no probative value.* Where the issue is whether a contract was made or broken, whether money was paid or property improved by mistake, whether goods were illegally converted or a libel published, there no moral quality in the act alleged, or at any rate any moral quality that may have been present is ignored by the law; and moral character can therefore throw no light on the probability of doing or not doing. In torts involving violence or actual fraud, such a moral quality may appear; but, apart from these, it is (almost without exception) either nonexistent or immaterial:

1854, MARTIN, B., in *Attorney-General* v. *Radloff*, 10 Exch. 97: "In criminal cases evidence of the good character of the accused is most properly and with good reason admissible in evidence, because there is a fair and just presumption that a person of good character would not commit a crime. But in civil cases such evidence is with equal good reason not admitted, because no presumption would fairly arise, in the very great proportion of such cases, from the good character of the defendant, that he did not commit the breach of contract or of civil duty, alleged against him.

1791, *Thompson* v. *Church*, 1 Root 312: 'qui tam' for an assault; the defendant's character as a malicious, quarrelsome man was rejected. *Per* CURIAM: "The general character is not in issue. The business of the court is to try the case, and not the man; and a very bad man may have a very righteous cause."

1826, MARSHALL, C. J., in *Etting* v. *Bank*, 11 Wheat. 59, 73 (action on an indorsement of a note as surety, against which the indorser set up a fraudulent concealment of material facts): "If this case depended on the deservedly high character of the individuals who were engaged on the part of the Bank in the transactions in which the suit originated, — if elevation above the possibility of suspicion that they could have meditated anything believed by themselves to be legally or morally wrong could decide it, this cause would not have required the great efforts that have been bestowed upon it. The names which appear on this record[2] can never be connected with actual fraud; nor would any difficulty be found in protecting them from the imputation, were it possible that it could be made. But judicial inquiries are into the rights of the parties; and although high and honorable character has and ought to have great influence in weighing testimony in which that character is in any manner involved, yet, when the inferences from that testimony are drawn by others, and a Court is required to pronounce the law arising upon them, character is excluded from the view of the judge, and legal principles alone can be acknowledged as his guide."

The meat of this reason is found in the expression of the Connecticut Court, that "a very bad man may have a very righteous cause."

[2] The counsel in the case were Daniel Webster, Roger B. Taney, William Wirt, and Thomas Addis Emmet.

(2) But there is, additionally, a complex reason of Auxiliary Policy (*ante*, § 29*a*), which has been pointed out by several Courts as equally sufficient for exclusion:

1820, HOSMER, C. J., in *Stow* v. *Converse*, 3 Conn. 345 (the plaintiff's good character not received to rebut a slander): "It is not only in contravention of the fundamental rule that evidence shall be confined to the issue, to admit such testimony; but it would be infinitely dangerous to the administration of justice. Instead of meeting a charge of misconduct by testimony evincive of not having misconducted, general character would become the principal evidence in most cases; and he who could throng the court with witnesses to establish his reputation in general would shelter himself from the wrongs he had perpetrated."

1847, WARDLAW, J., in *Smets* v. *Plunket*, 1 Strobh. 372, 375: "The evidence tendered towards this purpose [of showing the plaintiff incapable of fraud charged in a set off], if it could have laid bare the heart of the plaintiff, and ascertained really the strength of his moral principles, would have been highly influential. But examinations in court into general character, according to reputation, usually distinguish only between two classes, the good and the bad, without wise discriminations between the infinite degrees and varieties which exist of either class. Of most persons there is really no general reputation as to character, and of some the general reputation is widely different from the truth, which a full knowledge of their motives, principles, and habits would disclose. Sometimes upon trials the good are overthrown by unexpected assault, and often the bad are burnished and strengthened by the ready testimony which their influence procures in their favor; whilst many of their neighbors, who think ill of them, shrink from being examined, or being examined, cannot say that the suspicions which they entertain, and which they feel rather than know that others entertain also, have been uttered so as to constitute a bad reputation. In investigations concerning character, feeling and prejudice are more frequently exhibited than in inquiries upon any other subject. The number of witnesses is often extended far beyond the limit which upon other topics the Court would indulge; and if there be contrariety of opinion, the matter is usually left at last in great uncertainty. If in every case where an act of dishonesty is imputed, the imputation may be met by such evidence, then there are few cases into which such evidence might not be introduced; trials would be insupportably tedious; and the result of a trial would as often depend upon the popularity of a party as upon the merits of his case. These considerations suggest the propriety of adhering closely to the rules which have been established to regulate the admission of evidence of reputation concerning general character."

1864, ALDIS, J., in *Wright* v. *McKee*, 37 Vt. 163: "Many considerations concur in rejecting such evidence in civil cases. Evidence of this character has but a remote bearing as proof to show that wrongful acts have or have not been committed; and the mind resorts to it for aid only when the other evidence is doubtful and nicely balanced; it may then perhaps suffice to turn the wavering scales; very rarely can it be of substantial use in getting at the truth. It is uncertain in its nature, both because the true character of a large portion of mankind is ascertained with difficulty; and because those who are called to testify are reluctant to disparage their neighbors, — especially if they are wealthy, influential, popular, or even only pleasant and obliging. It is mere matter of opinion, and in matters of opinion men are apt to be greatly influenced by prejudice, partisanship, or other bias, of which they are unconscious; and in cases which are not quite clear they are apt to agree with the first one who speaks to them on the subject or to form their opinion upon the opinions of others. The introduction of such evidence in civil causes wherever character is assailed would make trials intolerably long and tedious and greatly increase the expense and delay of litigation. It is a kind of evidence that is easily manufactured, is liable to abuse, and if in common use in the courts, as likely to mislead as to guide aright."

These two reasons combined seem to justify the fixed policy of our law in excluding the character of the parties to a civil cause when offered to prove or disprove the doing of an act.[3]

[3] In the following cases the evidence was excluded, except where otherwise stated; the cases involving *negligence*, *defamation*, *malpractice*, and the *complainant's* character in *bastardy*, are dealt with *post*, §§ 65–68; certain rulings for *homicide in self-defence*, involving the *plaintiff's character*, have been noted in § 63, *ante*;

Federal: 1804, Ketland *v.* Bisselt, 1 Wash. C. C. 144, *semble* (evidence of good character excluded, because character had not been impeached); 1902, Morgan *v.* Barnhill, 55 C. C. A. 1, 118 Fed. 24 (civil action for homicide);
Alabama: 1837, Ward *v.* Herndon, 5 Port. 382, 385 (false representations); 1917, Parker *v.* Newman, 200 Ala. 103, 75 So. 479 (alienation of husband's affections; defendant's "general character", admitted for her);
Alaska: Comp. L. 1913, § 1503 (like Cal. C. C. P. § 2053);
Arkansas: 1896, Powers *v.* Armstrong, 62 Ark. 267, 35 S. W. 228 (good character to rebut a charge of fraudulent purchase);
California: C. C. P. 1872, § 2053 ("evidence of the good character of a party is not admissible in a civil action . . . unless the issue involves his character"); 1894, Anthony *v.* Grand, 101 Cal. 235, 237, 35 Pac. 859 (battery; defendant's peaceable character excluded); 1907, Van Horn *v.* Van Horn, 5 Cal. App. 719, 91 Pac. 250 (divorce for adultery; respondent's good character not admitted, under C. C. P. § 2053);
Colorado: 1916, DeWeese *v.* People, 61 Colo. 140, 156 Pac. 594 (violation of a city ordinance by fraudulently selling spoiled meat; defendant's character for honesty and fair dealing, admitted; the opinion erroneously treats the issue as a civil one, and also reveals misinformation as to the modern New York doctrine);
Connecticut: 1786, Woodruff *v.* Whittlesey, Kirby 60, 62 (fraudulent transfer of property); 1820, Stow *v.* Converse, 3 Conn. 345 (quoted *supra*); 1828, Humphrey *v.* Humphrey, 7 Conn. 117 (divorce for adultery); Gen. St. 1918, § 6014 (in bastardy proceedings, "evidence of the good character of the accused for morality and decency prior to the alleged commission of the offence", is admissible, subject to rebuttal); § 5467 (in proceedings for disbarment, etc., of an attorney-at-law, "evidence tending to show the general character, reputation and professional standing" is admissible);
Georgia: Code 1910, § 5745, P. C. 1910, § 1019 ("The general character of the parties" is inadmissible, "unless the nature of the action involves such character and renders necessary or proper the investigation of such conduct"); 1861, Boatright *v.* Porter, 32 Ga. 130, 140 (bad character of intermediate party in chain of title, excluded); 1890, Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 751, 766, 12 S. E. 18 (character of plaintiff in insurance claim, the defendant alleging her husband to be still alive); 1909, McClure *v.* State Banking Co., 6 Ga. App. 303, 65 S. E. 33 (plea of 'non est factum' to a note; payee's reputation for bad character as a forger, admitted; good opinion);
Idaho: Comp. St. 1919, § 8040 (like Cal. C. C. P. § 2053);
Illinois: 1869, Sprague *v.* Craig, 51 Ill. 288, 294 (breach of promise of marriage; defence, acts of unchastity; the plaintiff allowed to show her good character, "for the purpose of rendering it improbable that the charge is well-founded"); 1876, Crose *v.* Rutledge, 81 Ill. 266 (crim. con.; defendant's bad character for chastity, excluded);
Indiana: 1832, Rogers *v.* Lamb, 3 Blackf. 155 (malicious prosecution); 1841, Walker *v.* State ex rel. Corbin, 6 Blackf. 4 (bastardy); 1855, Church *v.* Drummond, 7 Blackf. 19 (fraudulent transfer); 1865, Cox *v.* Pruitt, 25 Ind. 92, 94 (seduction); 1877, Gebhart *v.* Burket, 57 Ind. 379, 385 (civil arson); 1882, Haymond *v.* Saucer, 84 Ind. 3, 14 (similar to Sprague *v.* Craig, Ill., *supra*); 1883, Houser *v.* State, 93 Ind. 231 (bastardy); 1898, Vansickle *v.* Shenk, 150 Ind. 413, 50 N. E. 381 (action to set aside fraudulent transfer; the grantor's reputation for honesty, excluded); 1899, Hilker *v.* Hilker, 153 Ind. 425, 55 N. E. 81 (divorce, alleging wife's adultery; wife's character for chastity admissible on her behalf "to disprove the acts charged");
Iowa: 1881, Barton *v.* Thompson, 56 Ia. 571 (admitted only "where intention is the point in issue, and the proof consists of slight circumstances"; here excluded in an action for malicious burning); 1886, Stone *v.* Ins. Co., 68 Ia. 737, 742, 28 N. W. 47 (defence of wilful burning, to an action for insurance-money; the plaintiff's good character excluded); 1913, Phelps *v.* Chicago R. I. & P. R. Co., 162 Ia. 123, 143 N. W. 853 (battery by a railroad conductor on a passenger, the conductor being deceased at the time of the trial; the conductor's character for peaceableness held not admissible);
Kansas: 1882, Simpson *v.* Westenberger, 28 Kan. 756 (transferee in fraud of creditors); 1917, Colvin *v.* Wilson, 100 Kan. 247, 164 Pac. 284 (indecent assault; defendant's reputation as a "moral, chaste, and law-abiding citizen", excluded; unsound);
Kentucky: 1892, Evans *v.* Evans, 93 Ky. 510, 20 S. W. 605 (divorce; "in civil actions, evidence of general reputation is not admissible,

It is possible, however, to maintain that the reasons of policy should be yielded to in ordinary civil cases only; and that where a moral intent is marked

except when directly in issue"); 1905, Mattingly *v.* Shortell, 120 Ky. 52, 85 S. W. 215 (plea of payment; the party's character for honesty, not admitted); 1915, Lenihan *v.* Com., — Ky. —, 176 S. W. 948 (disbarment; "where the nature of the accusation puts in issue the honesty, probity, and good moral character of the accused", he may offer his good character in evidence);

Louisiana: 1914, Gould *v.* Bebee, 134 La. 123, 63 So. 848 (destruction of timber; defendant's character for honesty and honor, excluded);

Maine: 1829, Potter *v.* Webb, 6 Me. 14, 16, 18 (good character to disprove fraud in procuring a decree); 1841, Low *v.* Mitchell, 18 Me. 372, 374 (bastardy proceedings); 1849, Thayer *v.* Boyle, 30 Me. 475, 480 (trespass); 1877, Soule *v.* Bruce, 67 Me. 584 (trespass for battery);

Massachusetts: 1855, Heywood *v.* Reed, 4 Gray 574, 576, 581 (assignee in fraud of creditors); 1891, Day *v.* Ross, 154 Mass. 14, 27 N. E. 676 (good character for peaceableness, in an action for battery); 1897, Geary *v.* Stevenson, 169 Mass. 23, 47 N. E. 508 (the plaintiff's character, in an action for imprisonment, inadmissible, even though the offence set up in justification involves a crime);

Michigan: 1886, Fahey *v.* Crotty, 63 Mich. 383, 29 N. W. 876 (battery; the defendant's good character, excluded; but where "wrong intention or moral turpitude" is in issue and is evidenced only circumstantially, character is admissible); 1897, Munroe *v.* Godkin, 111 Mich. 183, 69 N. W. 244 (assumpsit for labor); 1897, Kingston *v.* R. Co., 112 Mich. 40, 70 N. W. 315 (personal injury); 1902, Adams *v.* Elseffer, 132 Mich. 100, 92 N. W. 772 (assumpsit by an employer against his clerk for misappropriating moneys; defendant's good character excluded); 1908, Harris *v.* Neal, 153 Mich. 57, 116 N. W. 535 (civil action for rape; the plaintiff's bad repute for chastity, excluded);

Minnesota: 1877, Schnek *v.* Hagar, 24 Minn. 339, 344 (action by a female minor for indecent assault; the defendant's character for chastity and morality, admitted in his favor); 1900, Hein *v.* Holdridge, 78 Minn. 468, 81 N. W. 522 (father's action for daughter's seduction; defendant's character for chastity admitted, because the charge "involved the commission of a crime by him": see quotation *supra*); 1919, Nickolay *v.* Orr, 142 Minn. 346, 172 N. W. 222 (indecent assault; defendant's good moral character is admissible, but not his bad character except in rebuttal);

Mississippi: 1884, Leinkauf *v.* Brinker, 62 Miss. 255 (sale in fraud of creditors; the vendee's good character for honesty and fair dealing);

Missouri: 1875, McKern *v.* Calvert, 59 Mo. 242 (seduction); 1877, Dudley *v.* McCluer, 65 id. 241 (equitable proceeding to set aside a settlement obtained by fraud); 1892, Vawter *v.* Hultz, 112 Mo. 633, 639, 20 S. W. 689 (action for death of plaintiff's husband; defendant's peaceable character excluded); 1915, Davenport *v.* Silvery, — Mo. —, 178 S. W. 168 (assault and battery; plea, self-defence; defendant allowed to introduce plaintiff's bad character for turbulence);

Montana: Rev. C. 1921, § 10670 (like Cal. C. C. P. § 2053);

Nebraska: 1895, Stoppert *v.* Nierle, 45 Nebr. 105, 63 N. W. 382 (civil action for filiation of a bastard); 1909, Collister *v.* Ritzhaupt, 83 Nebr. 794, 120 N. W. 489 (bastardy; defendant's character for chastity, excluded);

New Hampshire: 1830, Washburn *v.* Washburn, 5 N. H. 195 (divorce on the ground of the wife's adultery; the wife's character for unchastity); 1838, Matthews *v.* Huntly, 9 N. H. 146, 148; 1866, Boardman *v.* Woodman, 47 N. H. 120 (the sanity of a testatrix was impeached by showing that she had charged one S. with fraud in a transaction and the character of S. for honesty was offered; excluded, as not allowable in a civil case to rebut a charge of fraud); 1897, Warner *v.* Warner, 69 N. H. 137, 44 Atl. 908 (divorce for adultery; respondent's character as to virtue and chastity, admissible in trial Court's discretion);

New Jersey: 1912, Rittenhofer *v.* Cutter, 83 N. J. L. 613, 83 Atl. 873 (battery in an arrest for a trespass; the defendant's peaceful and law-abiding disposition, excluded, no immoral or malicious motive being in issue);

New York: (see the citations *supra*, note 1);

North Carolina: 1840, McRea *v.* Lilly; Ired. 118 (seduction; the defendant's general character as a "modest and retiring man", excluded); 1848, Beal *v.* Robeson, 8 Ired. 276 (malicious prosecution; the defendant had prosecuted for robbery; the plaintiff offered evidence that the defendant had merely fallen while drunk; the defendant's general character for sobriety, excluded); 1855, Bottoms *v.* Kent, 3 Jones L. 154 (the propounder of a will, alleged by the caveator to have procured it by threats, not allowed to show his "easy, quiet temper and facile disposition"); 1898, Marcom *v.* Adams, 122 N. C. 222, 29 S. E. 333 (land sold; defendant's bad character, excluded); 1922, McKay's Will, — N. C. —, 111 S. E. 5 (contest of will, on the ground of undue influence; good character of caveators excluded); 1922, Merrill *v.* Tew, — N. C. —, 110 S. E. 850 (breach of contract of sale of potatoes; party's reputation as to dealings in potatoes, excluded);

North Dakota: 1899, Kinneberg *v.* Kinneberg, 8 N. D. 311, 79 N. W. 337 (assault with intent to rape; defendant's character for chastity,

and prominent in the nature of the issue, the defendant's good moral character should be received as in criminal cases. This view has in more modern opin-

excluded); 1914, State *v.* Brunette, 28 N. D. 539, 150 N. W. 271 (bastardy proceedings; the defendant's character for "chastity and virtue", excluded);
Oklahoma: 1905, Sovereign Camp *v.* Welch, 16 Okl. 188, 83 Pac. 547 (whether the deceased insured, killed by E., was killed while "in violation of the law" under the policy; the deceased's character as a peaceful law-abiding citizen admitted; following Scott *v.* Fletcher, Tenn., *infra*); 1914, Hammett *v.* State, 42 Okl. 384, 141 Pac. 419 (civil action for penalty for violation of liquor law; defendant's good character excluded);
Oregon: Laws 1920, § 865 (like Cal. C. C. P. § 2053); 1896, Munkers *v.* Ins. Co., 30 Or. 211, 46 Pac. 850 (defence alleging a wilful firing by the plaintiff in an action on a policy; the plaintiff's character excluded);
Pennsylvania: 1819, Nash *v.* Gilkeson, 5 S. & R. 352 (assumpsit for money had and received; the defendant's good character excluded); 1819, Dietrick *v.* Dietrick, 5 S. & R. 208 (good character to rebut a charge of fraud, not admissible, because "a man having a good character may commit a fraud"; but here, a will being attacked on the ground of fraudulent and undue influence by the devisee, in misrepresenting to the testator the moral character of the disinherited son's wife, her real character was allowed to be shown, as in issue upon the falsity of the representations); 1823, Anderson *v.* Long, 10 S. & R. 55, 60 (debt on bond; defence, fraud; the defendant's good character excluded, because not put in issue); 1825, Nussear *v.* Arnold, 13 S. & R. 323, 328 (same point, where the devisees had falsely represented their own characters); 1854, Porter *v.* Seiler, 23 Pa. 424, 429 (trespass for stabbing; the injury had been given while the plaintiff was attempting by force to get possession of a carriage in which the defendant was; the defendant's character for peaceableness, the plea being self-defence, was rejected; the doctrine that it was receivable where the evidence was conflicting, expressly denied); 1855, Leckey *v.* Bloser, 24 Pa. 401, 406 (breach of marriage-promise; plaintiff's good character not admitted to rebut evidence of her improper conduct); 1877, Battles *v.* Laudenslager, 84 Pa. 446, 452 (a sharer in the fraud, not a party to the case); 1885, American Fire Ins. Co. *v.* Hazen, 110 Pa. 530, 537 (wilful burning by the insured as a defence by the insurer; the insured's reputation for honesty, peace, and good order, excluded);
Philippine Isl.: C. C. P. 1901, § 344 (like Cal. C. C. P. § 2053, improving the last three words to read "involved is character");
Porto Rico: Rev. St. & C. 1911, § 1528 (like Cal. C. C. P. § 2053);
Rhode Island: 1901, Markey *v.* Angell, 22 R. I. 343, 47 Atl. 882 (assault and battery);
South Carolina: 1825, Rhodes *v.* Bunch, 3 McC. 66, *semble* (trespass, with justification); 1847, Smets *v.* Plunket, 1 Strobh. Eq. 372 (assumpsit; the defendant, in set-off, claimed a balance due from sales by the plaintiff, as commission-agent, which he had falsely suppressed; the plaintiff's good character was excluded; "in civil cases . . . evidence as to that character [of a party] cannot be offered to contradict an imputation of dishonesty or even of fraud"; quoted *supra*); 1901, Marshall *v.* Mitchell, 59 S. C. 523, 38 S. E. 158 (services to deceased; reputation of deceased for prompt payment, not admitted to show payment);
Tennessee: 1809, Scott *v.* Fletcher, 1 Overton 488 ("in questions of tort, or quasi tort, where the injury is doubtful, character may be given in evidence"; Powel, J., doubted); 1870, Henry *v.* Brown, 2 Heisk. 213 (trespass for killing a heifer; defendant's good character for honesty, admitted; since "the charge is one involving moral turpitude"; Ruan *v.* Perry followed); 1872, Spears *v.* Ins. Co., 1 Baxt. 370 (insurance action; defence, the plaintiff's arson; the plaintiff's good character for honesty, admitted); 1889, Rogers *v.* Stokes, 87 Tenn. 215, 11 S. W. 215 (payee's fraud in the renewal of notes; the payee's good character for honesty, admitted); 1890, McBee *v.* Bowman, 89 Tenn. 140, 14 S. W. 481 (alleged forgery of a later will by a claimant; the claimant's good character admitted); 1902, Continental Bank *v.* First Nat'l Bank, 108 Tenn. 374, 68 S. W. 497 (false representations; "the rule in Tennessee is that in cases where a party is charged with a great moral wrong, he may introduce evidence of good character");
Vermont: 1859, Lander *v.* Seaver, 32 Vt. 114 (trespass for a beating by the defendant as schoolmaster; the trial court having made the issue to turn on the presence of malice, the defendant's character as a "mild and moderate master" was held properly admitted for this purpose; but not upon the question whether a beating was given); 1864, Wright *v.* McKee, 37 Vt. 161 (trover against a carrier for negligently losing a package of money; the facts were such that if the plaintiff's version were true, the defendant had been guilty of embezzlement; the defendant's good character was rejected as not admissible in civil cases; quoted *supra*); 1905, Coruth *v.* Jones, 77 Vt. 441, 60 Atl. 814 (assault and battery; defendant's character as a peaceable man, excluded); 1916, Russ *v.* Good, 90 Vt. 236, 97 Atl. 987 (assault and battery; plea, self-defence; defendant's character as a quarrelsome man, not admitted); 1917, Sanders *v.* Burnham, 91 Vt. 480, 100 Atl. 905 (aliena-

ions seemed to gain ground, and if only it can be phrased in a definite rule it is worth recognizing:[4]

1900, START, C. J., in *Hein* v. *Holdridge*, 78 Minn. 468, 81 N. W. 522. "There would seem to be no logical reason why the same rule should not apply to civil actions in which the defendant is charged with a crime. . . . The rule seems to be one of practical convenience, for the purpose of avoiding the confusion of issues. On principle, however, it would seem that there ought to be exceptions to this general rule. . . . Inasmuch as the general rule is not based upon any philosophical reason, but is merely one of convenience, it ought not to be applied to cases where justice to the defendant requires that the inconvenience arising from a confusion of the issues should be disregarded, and he be permitted to give evidence of his previous good character, or, in other words, that such evidence ought to be received in a civil action when it is of a character to bring it within all of the reasons for admitting such evidence in criminal cases. Civil actions for an indecent assault, for seduction and kindred cases, are of this character; for such cases are not infrequently mere speculative and blackmailing schemes. The consequences to the defendant of a verdict against him in such a case are most serious, for the issue as to him involves his fortune, his honor, his family. From the very nature of the charge, it often happens that an innocent man can only meet the issue by a denial of the charge, and proof of his previous good character. Ought a defendant in such a case to be deprived of the right to lay before the jury evidence of his previous good character, because it will tend to confuse the issue, while a defendant in a case where the State charges him with a simple assault, involving no more serious consequences than the payment, perhaps, of a fine of five dollars, is accorded the absolute right to give such evidence? . . . [But the doctrine] ought not to be extended to civil actions where the issue relates to a simple assault, or to the fraud, deceit, or negligence of the defendant, or to similar actions, for they are not within the reasons we have suggested for the admission of evidence of good character in exceptional civil actions."

1909, *McClure* v. *State Banking Co.*, 6 Ga. App. 303, 65 S. E. 33; the bank sued McClure on a note made payable to one Turner and indorsed by him to the bank; the defendant claimed that the note was a forgery, and that Turner had committed the forgery. He offered to prove, in support of this contention, that the general reputation of Turner was very bad and that he bore the general reputation of having been engaged in the business of committing forgeries. The trial Court declined to allow the proof. POWELL, J., "The rule prevailing in England and in most of the American States, that evidence of character is not usually received when offered for the purpose of throwing light on the probability of the doing of a certain act by the person whose character is in question, is not of force in this state. The contrary doctrine has been recognized in our jurisprudence from a very early date. Frequently this kind of evidence has a distinct relevancy and a high degree of probative value, because it tends to make the question involved in the issue more or less probable in favor of one side of the case or the other. Even those Courts and text-writers who support and lay down the proposition that the evidence is not admissible do not put it on the ground that the evidence lacks relevancy or probative value, but rather rely on the ancient and well-established character of the rule itself. The Courts of this State, out of deference to the policy expressed in the maxim 'Let there be light', have rejected the old rule, which has long outlived the reason from which it sprang.

"In the case at bar the maker of the note claimed that Turner had forged his signature. Now, if Turner were a man of good character, this fact would have made the defendant's

tion of husband's affections; acts of intoxication, etc., by defendant, excluded);
Washington: 1903, Poler *v.* Poler, 32 Wash. 400, 73 Pac. 372 (divorce for sodomy; respondent's character as a "law-abiding and moral man", excluded);
West Virginia: 1918, Hess *v.* Marinari, 81 W. Va. 500, 94 S. E. 968 (assault; defendant's good character for peace and quiet, admitted, approving the text above; leading opinion by Ritz, J.).

[4] The cases are cited *supra*, n. 3.

contention very improbable. . . . On the other hand, proof that Turner was a man of bad character, and especially that he had the general reputation of being a frequent and notorious forger, would tend to make the defendant's contention that the signature to the note was a forgery more probable."

§ 65. **Same: Character of a Defendant or a Plaintiff charged with Negligence.** A few Courts have shown an inclination to admit, exceptionally, the character of a *person charged with a negligent act* (contributory negligence, if a plaintiff), as throwing light on the probability of his having acted carelessly on the occasion in question; provided that the other evidence leaves the matter in great doubt, or that the other evidence is purely circumstantial, or (as sometimes put) that there are no eye-witnesses testifying. The mainstay of this exceptional doctrine seems to have been the 'obiter' suggestion in *Tenney* v. *Tutile*.[1] Such evidence is no doubt likely to be of some probative value in such cases, and under the above limitations is hardly contrary to the ordinary policy of avoiding confusion of issues (*ante*, § 64). As a matter of law, however, the doctrine is maintained in a few jurisdictions only, and has been expressly repudiated in many.[2]

§ 65. [1] 1861, Tenney *v.* Tuttle, 1 All. Mass. 185 (the defendant, in action for injuries caused by a runaway horse, left standing untied, in the street, offered to show "his own character as a careful, prudent, and cautious man", as bearing on the question of whether he used ordinary care on this occasion; Metcalf, J., excluding it: "When the precise act or omission of a defendant is proved, the question whether it is actionable negligence is to be decided by the character of that act or omission, and not by the character for care and caution that the defendant may sustain. If such evidence . . . is ever admissible in a case like this, we incline to the opinion that it is only when the plaintiff attempts to prove the defendant's negligence by merely circumstantial evidence, or, perhaps, by witnesses shown to be of doubtful veracity").

[2] ENGLAND: 1889, Stephen, J., in Brown *v.* R. Co., L. R. 22 Q. B. D. 393 (character for negligence, inadmissible);

UNITED STATES: *Federal:* 1896, Central Vt. R. Co. *v.* Ruggles, 21 C. C. A. 575, 75 Fed. 953 (intemperate habits of a watchman to show a specific failure of duty, excluded); 1898, Harriman *v.* Pullman P. C. Co., 29 C. C. A. 194, 85 Fed. 353 (employee's careful character, excluded); 1913, Arizona & N. M. R. Co. *v.* Clark, 9th C. C. A., 207 Fed. 817, 823 (whether plaintiff was a careful or negligent engineer, excluded; the opinion shows ignorance of the different principles involved);
Arkansas: 1907, St. Louis I. M. & S. R. Co. *v.* Inman, 81 Ark. 591, 99 S. W. 832 (contributory negligence; deceased's character as a "cautious, careful, and prudent man", excluded);
California: 1893, Towle *v.* P. I. Co., 98 Cal. 342, 33 Pac. 207 (careful character of defendant's employee, excluded, distinguishing Ficken *v.* Jones, 28 Cal. 618); 1911, Carr *v.* Stern, 17 Cal. App. 397, 120 Pac. 35 (defendant's driver's character for skill and efficiency, excluded);
Connecticut: 1874, Morris *v.* East Haven, 41 Conn. 252 (contributory negligence; plaintiff's character for prudence, shown from personal opinion, excluded); 1902, Mears *v.* R. Co., 75 Conn. 171, 52 Atl. 610 (whether a piano was carefully moved on a rainy day; "nor did proof of the care he generally took on rainy days legitimately tend to show the care he actually took on any particular rainy day"; it is singular that such language can be put forth from the bench by those who in other relations would by their own actions repudiate it as illogical; this was an offer of habit);
Florida: 1886, Saussy *v.* R. Co., 22 Fla. 327, 329 (reputation of the defendant's servant, who caused the harm, excluded);
Idaho: 1913, Denbeigh *v.* Oregon-Washington R. & Nav. Co., 23 Ida. 663, 132 Pac. 112 (engineer's reputation for care and prudence, excluded);
Illinois: 1883, Chicago, R. I. & P. Co. *v.* Clark, 108 Ill. 113 (a brakeman's character as to being "habitually prudent, cautious, and temperate", held admissible, unless there had been "witnesses who saw the infliction of the injury"); 1893, Toledo, St. L. & K. C. R. Co. *v.* Bailey, 145 Ill. 159, 162, 33 N. E. 1089 (careful character of plaintiff's intestate, admitted, there being no eye-witnesses); 1898, Illinois C. R. Co. *v.* Ashline, 171 Ill. 313, 49 N. E. 521 (that the deceased, killed by a train, "was a man of careful habits", admissible where there are no eye-witnesses, "we are inclined to think"); 1900, Chicago & Alton R. Co. *v.* Pearson, 184 Ill. 386, 56 N. E. 633 (deceased's habits of

The chief difficulty here is (1) to determine whether the fact offered is really character (Disposition) or only a *Habit*, *i.e.* of prudent or negligent methods. The latter should in any case be admitted; and a comparison of the doctrine as to Habit (*post*, §§ 92, 96, 97) will show how many instances fall close to the line.

intemperance, excluded, where eye-witnesses of his conduct about the time of injury were available); 1901, Salem *v.* Webster, 192 Ill. 369, 61 N. E. 323 (plaintiff's habit as to rapid driving, admissible only "where there is no direct testimony as to the conduct at a particular time"); 1904, Illinois C. R. Co. *v.* Prickett, 210 Ill. 140, 71 N. E. 435 (engineer killed by the explosion of his locomotive boiler; there being no eye-witness of his conduct, his character, for carefulness was admitted); 1906, Chicago & A. R. Co. *v.* Wilson, 225 Ill. 50, 80 N. E. 56 (death on a railroad track; no eye-witness of the actual moment of injury having testified, the "careful habits of the deceased" were admitted); 1909, Collison *v.* Illinois Central R. Co., 239 Ill. 532, 88 N. E. 251 (admissible, *semble*); 1914, Newell *v.* Cleveland C. C. & St. L. R. Co., 261 Ill. 505, 104 N. E. 223 (where there are no eye-witnesses, the deceased's habits of care, etc., are admissible); 1915, Casey *v.* Chicago Railways Co., 269 Ill. 386, 109 N. E. 984 ("habits of the deceased as to care", etc., may suffice to prove the exercise of care); 1916, Greene *v.* Fish Furniture Co., 272 Ill. 148, 111 N. E. 725 (rule applied to admit character of an employee in an action for his death caused by lack of a fire-escape, there being no eye-witnesses); 1920, Moore *v.* Bloomington D. *v.* C. R. Co., 295 Ill. 63, 128 N. E. 721 (death at a railroad crossing; deceased's habits of care, admitted, there being no testimony of eye-witnesses); 1921, Petro *v.* Hines, 299 Ill. 236, 132 N. E. 462 (death of a pedestrian at a railroad crossing; in applying the eye-witness rule, the mere argument that a purporting eye-witness may be falsifying as to his presence does not authorize the rule to be applied as though there were no eye-witness; deceased's habits of care, here excluded); 1921, Soucie *v.* Payne, 299 Ill. 552, 132 N. E. 779 (death at a railroad crossing; plaintiff offered the deceased's repute for due care, on the assumption that there was no eye-witness; defendant tendered the train-engineer as being an eye-witness, but plaintiff declined to call him, and the trial Court admitted the character on the theory that there appeared to have been no eye-witness; afterwards the engineer testified on call of defendant: and the trial Court then struck out the evidence as to plaintiff's character: held, correct in both rulings; the question illustrates the barren technicalities to which this form of rule leads);

Indiana: 1871, Pittsburg, F. W. & C. R. Co. *v.* Ruby, 38 Ind. 295, 311, *semble* (of a railroad employee, to show negligence at a particular time, excluded);

Iowa: 1893, Hall *v.* Rankin, 87 Ia. 261, 264, 54 N. W. 217 (action against a druggist for giving poison instead of medicine; defendant's careful character, excluded); 1899, McKay *v.* Johnson, 108 Ia. 610, 79 N. W. 390 (whether an engine's poor working was due to the plaintiff's mismanagement; plaintiff's character as a competent engineer, excluded; this is unsound);

Kansas: 1890, Southern Kans. R. Co. *v.* Robbins, 43 Kan. 145, 148 (the contributory negligence of an injured party; his character for care or the opposite, excluded; yet "exceptions are made in some cases where there are no eye-witnesses of the accident, and better evidence cannot be obtained"; here there were eye-witnesses); 1898, Erb *v.* Popritz, 59 Kan. 264, 52 Pac. 871 (careful character of the injured person, excluded); 1911, Saunders *v.* Atchison T. & S. F. R. Co., 86 Kan. 56, 119 Pac. 255 (defendant's engineer's character for carefulness, not admissible as evidence of being careful on a given occasion); 1913, Fike *v.* Atchison T. & S. F. R. Co., 90 Kan. 409, 133 Pac. 871 (whether the deceased, in using the railroad crossing, "always drove carefully watching for dangers"; there were no eye-witnesses of the deceased's conduct at the time of the injury; point not decided);

Maine: 1852, Lawrence *v.* Mt. Vernon, 35 Me. 100, 104 (competency of the plaintiff's driver, to disprove contributory negligence, excluded); 1880, Dunham *v.* Rackliff, 71 Me. 345, 349 (careless character of the defendant's driver, as showing negligence at the time, excluded); 1885, Chase *v.* Maine Central R. Co., 77 Me. 262 (deceased's general character for carefulness, excluded, though there were no eye-witnesses);

Maryland: 1906, American Straw B. Co. *v.* Smith, 94 Md. 19, 50 Atl. 414 (defendant's driver's competence as a driver, excluded); 1908, Baltimore & O. R. Co. *v.* State, 107 Md. 642, 69 Atl. 439 (deceased's habits as a careful driver, excluded, though there were no eye-witnesses);

Massachusetts: 1824, Com. *v.* Worcester, Thacher Cr. C. 100, 102 (on a charge of violating an ordinance by driving at a trot in a city, the defendant's character as a careful driver was excluded, apparently because the carelessness of his act was immaterial); 1838, Adams *v.* Carlisle, 21 Pick. 146 (Shaw, C. J.: "that the person driving was commonly careful and skilful" is admissible to show care at a particular time); 1855, Baldwin *v.* R. Co., 4

It is necessary also to distinguish two other questions, not always kept separate in discussion: (2) whether in proving a negligent character, *specific former acts of negligence* may be used; this assumes the character to be admissible, and deals only with a mode of getting at it (*post*, § 199); (3) whether an *employee's negligent character* or his *negligent acts* are admissible to charge the employer with the knowing retention of an incompetent employee; this is concerned with character as in issue, not as evidentiary to an act (*post*, §§ 80, 249, 250).

§ 66. **Same: Character of a Plaintiff in Defamation to prove his Innocence.** When A is said by B to have been guilty, *e.g.*, of murder or of forgery, and in a suit for defamation is met by a plea of truth, so that the issue is whether A

Gray 333 (negligent character of the plaintiff's driver, to show actual carelessness; excluded only when proved by reputation, but not when proved by one having personal knowledge); 1856, Robinson *v.* F. & W. R. Co., 7 Gray 92, 95 (admissibility doubted); 1861, Tenney *v.* Tuttle, 1 All. 185 (see citation *supra*); 1861, Gahagan *v.* R. Co., 1 All. 187 (keeping cars improperly across the highway; Tenney *v.* Tuttle followed); 1872, McDonald *v.* Savoy, 110 Mass. 49 (a plaintiff bound to prove due care in driving was not allowed, by a majority of the Court, to show "that he was commonly careful and skilful in driving his team"; following Tenney *v.* Tuttle); see also Whitney *v.* Gross, Hatt *v.* Nay, cited *post*, § 80, not expressly dealing with this question;

Minnesota: 1898, Fonda *v.* R. Co., 71 Minn. 438, 74 N. W. 166 (general incompetency of motorman, excluded);

Missouri: 1896, Culbertson *v.* R. Co., 140 Mo. 35, 36 S. W. 834 (that a switchman was drunk at the time of giving a signal; excluded, because the fact of giving it was undisputed, and the only question was his negligence under the circumstances);

New Hampshire: 1873, State *v.* M. & L. Railroad, 52 H. N. 6549, *semble* (of an employee, to show whether he did or did not act carelessly, excluded); 1913, Greenwood *v.* Boston & M. R. R., 77 N. H. 101, 88 Atl. 217 (deceased's character for carefulness, excluded, though there were no eye-witnesses).

New York: 1871, Warner *v.* R. Co., 44 N. Y. 465, 471 (former intemperate habits of a flagman on duty, held inadmissible to show neglect on the occasion in question; yet here the evidence of his drunkenness at the time and other facts affecting his conduct were fully before the jury; Hunt, C., dissenting);

Pennsylvania: 1874, Hays *v.* Miller, 77 Pa. 238 (counter-claim for injury caused by a collision with the plaintiff's tow-boat, while towing barges for the defendants; after evidence by the defendants tending to show that the plaintiff's servants carelessly caused the collision, the plaintiff offered to rebut by showing that the servants were "competent, skilful, and careful officers"; held, improper; for though the defendants might have rested their case on the plaintiff's selection of incompetent servants and the issue of their incompetence might thus have become legally material, yet here the only argument was from general character to conduct on the particular occasion, and this was held improper; "the jury will not confine the evidence of character to its true bearing upon the fact of negligence in the particular case, but set it up as per se a justification of the master"); 1888, Baltimore & O. R. Co. *v.* Colvin, 118 Pa. 230, 12 Atl. 337 (a flagman's reputation, not received to show him careless at the time in issue);

South Carolina: 1903, Reeves *v.* Southern R. Co., 68 S. C. 89, 46 S. E. 543 (train running past a signal; engineer's testimony that he had never done it, excluded; improperly treated as a question of character); 1904, Bedenbaugh *v.* Southern R. Co., 69 S. C. 1, 48 S. E. 53 (injury of a person on a railroad track; the plaintiff's general intoxicated habits excluded, there being direct testimony of his condition at the time; erroneous);

Texas: 1898, Missouri, K. & T. R. Co. *v.* Johnson, 92 Tex. 380, 48 S. W. 568 (plaintiff engineer's negligent habits, excluded; but certain exceptions are recognized);

Vermont: 1884, Bryant *v.* R. Co., 56 Vt. 710, 712 (fire set by locomotive; the section-man's good character for care and prudence, excluded);

Virginia: 1913, Southern R. Co. *v.* Rice's Adm'x, 115 Va. 235, 78 S. E. 592 (that the engineer was a "fast runner", excluded);

Washington: 1898, Carter *v.* Seattle, 19 Wash. 597, 53 Pac. 1102 (plaintiff's character for sobriety, not admitted to negative the fact of intoxication, treated as a question of negligence); 1919, Chilberg *v.* Parsons, 109 Wash. 90, 186 Pac. 272 (automobile collision; testimony to the "rate of speed at which defendant had been accustomed to drive his car", excluded);

For *habits of intemperance*, see also *post*, §§ 85, 96.

committed the crime of murder or of arson, it is supposed by some Courts that A should be allowed to invoke his *good character* for peaceableness or for honesty, as bearing on the probability of his having committed the crime which B is trying to prove against him. There is much reason for assimilating the situation to that of an accused person and taking it out of the rule applicable ordinarily to parties in civil cases, — not only because the plaintiff is repudiating an accusation of crime, but because an unfavorable outcome affects his character to a degree equivalent to a punishment and carries a significance wholly absent after the loss of an ordinary civil suit:

1824, Mr. *Thomas Starkie*, Evidence, II, 305, 643: "Where, indeed, the defendant justifies the slander which conveys an imputation of dishonesty, the case may admit of a very different consideration, for there the party is charged with a crime, and in such a case character affords just the same presumption of innocence as if the party had been tried for the offence."

1853, NASH, C. J., in *Sample* v. *Wynn*, 1 Busbee 321 (charge of bestiality; plea of truth): "The nature of the crime charged upon the plaintiff is of the most odious character, the preferring of which is calculated to banish the individual charged from the ordinary intercourse of his fellow men, to brand him with an offence more odious than that which drove Cain into the wilderness and made him a wanderer upon the face of the earth. . . . The crime charged is detestable and there is but one witness to the foul deed. In such a case, how can the purest man that lives shield himself from the effects of malice or revenge if not permitted to resort to such evidence?"

The only answer to this argument seems to be that it puts the plaintiff in a position relatively too favorable, as against the defendant, who already has the burden of proving his plea of truth:

1838, PARKER, C. J., in *Matthews* v. *Huntly*, 9 N. H. 146 (charge of perjury; plea of truth; the plaintiff's general good character was rejected; after quoting the remark of Starkie, *supra*): "A party undertaking to justify, in an action of slander, should undoubtedly satisfy a jury of the fact; but he should not be held to make out the charge beyond all reasonable doubt, because the plaintiff is not on trial for the crime, and, whatever the verdict may be, in punishment or disability is incurred by him. And this being so, the plaintiff should not be permitted to avoid the evidence offered, in any other manner than he could be permitted to avoid similar evidence in any other civil suit. There is no hardship in this. A party may in many instances trust to his general character to exonerate him in public estimation from a charge or suspicion of particular misconduct; but if he brings a suit for the injury sustained by such charge, and the adverse party relies for justification upon its truth, the latter ought in justice to have that fact tried in the same way other facts are tried in civil cases."

With such plausible arguments on either side, it is natural that the state of the law in the various jurisdictions should differ.[1]

§ 66. [1] ENGLAND: 1825, Cornwall *v.* Richardson, 1 Ry. & Mo. 305, Abbott, C. J. (stealing money; excluded); 1833, Powell *v.* Harper, 5 C. & P. 589 (libel charging the plaintiff with receiving stolen goods; justification; the plaintiff's "general character for honesty" was admitted on his behalf);

UNITED STATES: *Alabama:* 1900, Hereford *v.* Combs, 126 Ala. 369, 28 So. 582 (perjury admissible); *Connecticut:* 1820, Stow *v.* Converse, 3 Conn. 343, *semble* (to disprove a charge of infidelity, the plaintiff was allowed to give evidence of his "uniform profession, conduct, and conversation"; but to disprove a charge of exacting money illegally as an official, evidence of his character for honesty was rejected, as unavailable in civil cases to disprove an act); *Delaware:* 1841, Parke *v.*

There is, however, no reason why the defendant should be thus exceptionally allowed to use the plaintiff's *bad character* as evidence of his probable guilt; and it is generally agreed that this use is inadmissible.[2]

Distinguish from the present subject the question whether the plaintiff's *reputation* may be considered *in mitigation of damages* (*post*, § 70).

§ 67. **Same: Character of Defendant in Malpractice.** Where the action is for *malpractice of a physician* or other person engaging to use skill, the defendant's possession of due skill is usually *put in issue* under substantive law

Blackiston, 3 Harringt. 373, 375, Layton, J., diss. (excluded); *Indiana:* 1843, McCabe *v.* Platter, 6 Blackf. 405 (unchastity, excluded); 1844, Byrket *v.* Monohon, 7 Ind. 84 (perjury; admitted on the theory that he could show it if criminally prosecuted for perjury); 1861, Miles *v.* Vanhorn, 17 Ind. 249 (unchastity; excluded, following the McCabe case); 1867, Harm *v.* Wilson, 28 Ind. 301 (larceny; excluded, because there was no justification); 1873, Wilson *v.* Barnett, 45 Ind. 163, 168 (merely establishes the doctrine that one justifying a slanderous charge of crime must prove it beyond a reasonable doubt, as in criminal cases); 1876, Downey *v.* Dillon, 52 Ind. 442, 452 (citing the preceding case, admits the plaintiff's good character in a slander suit for a charge of perjury, distinguishing the earlier cases on this principle); 1877, Gebhart *v.* Burket, 57 Ind. 381 (preceding case approved); *Iowa:* 1887, Hanners *v.* McClelland, 74 Ia. 319, 37 N. W. 389 (excluded); *Maryland:* 1915, Bavington *v.* Robinson, 127 Md. 46, 95 Atl. 1067 (slander by charge of stealing, with a justification; plaintiff's good reputation as to honesty and integrity, admitted); *Massachusetts:* 1827, Harding *v.* Brooks, 5 Pick. 244 (slander, charging the plaintiff as "a liar, a knave, and a rascal"; justification; the plaintiff's evidence of good character was received, in order by "proof of the general tenor of his conduct and character to repel such imputations"; and it was apparently used to repel charges of specific misconduct); 1913, Stearns *v.* Long, 215 Mass. 152, 102 N. E. 326 (undecided; here excluded, because no crime was charged, and because the character-trait offered was not Mich. relevant); *Michigan:* 1918, Rowe *v.* Myers, 204 Mich. 374, 169 N. W. 823 (slander of chastity; plea, truth; plaintiff's good repute for chastity, admitted; Kovacs *v.* Mayoras, 175 Mich. 582, distinguished); *New Hampshire:* 1839, Chesley *v.* Chesley, 10 N. H. 327, 330 (excluded); 1851, Severance *v.* Hilton, 24 N. H. 148 (excluded); *New York:* 1848, Houghtaling *v.* Kilderhouse, 1 N. Y. 530 (poisoning the defendant's horses; plea of truth; plaintiff's good character excluded); 1851, Pratt *v.* Andrews, 4 N. Y. 496 (preceding case approved); *North Carolina:* 1859, Burton *v.* March, 6 Jones L. 409, 412 (larceny, excluded).

[2] ENGLAND: 1822, Jones *v.* Stevens, 11 Price 235, *semble;* 1825, Cornwall *v.* Richardson, 1 Ry. & Mo. 305, Abbott, C. J.;

UNITED STATES: *Del.* 1841, Parke *v.* Blackiston, 3 Harringt. 373, 375; *Mass.* 1834, Com. *v.* Snelling, 15 Pick. 337, 343 (criminal libel; bad character of the libellee, not admissible to show the truth of the charge of gaming and drugging a horse, whether in a civil or in a criminal case); 1843, Stone *v.* Barney, 7 Metc. 86, 92 (it is receivable even where the defendant justifies by pleading truth, but is used solely on the question of damages, *i.e.* assuming that the jury find the words to be false, then they use the plaintiff's character in assessing damages, but not till then; "it would be the duty of the Court to advise the jury that it could not be used to sustain the justification, but was properly introduced because both questions were before them, and if the justification failed, upon the evidence applicable thereto, they would consider the evidence of the character of the plaintiff in assessing damages . . . , but for other purposes the evidence would be irrelevant"); *Mich.* 1897, Finley *v.* Widner, 112 Mich. 230, 70 N. W. 433; *Ohio:* 1831, Dewit *v.* Greenfield, 5 Oh., Pt. 1, 226 (perjury; the plaintiff's bad character for veracity, excluded).

Contra: Ga. 1897, Cox *v.* Strickland, 101 Ga. 482, 28 S. E. 655 (frequent arson; plaintiff's bad character admissible on plea of truth); *Mich.* 1892, Sanford *v.* Rowley, 93 Mich. 119, 52 N. W. 1119 (perjury and lying; on a plea of truth, the plaintiff's bad reputation for veracity was admitted).

That the defendant may not here use the plaintiff's bad character to show the probability of his having done the things alleged in the slander, seems implied also in the decisions (*post*, § 73) denying the use of such character on a *plea of justification* when offered in *mitigation of damages;* for as the objection to that course is merely the possible misapplication of the character-evidence to the justification-plea (*i.e.* to prove the truth of the charge), the clear implication is that such an application would be inadmissible. Those, moreover, must be cases where the character would be usable evidentially to prove a specific act, for of course if the charge had touched the general character, it would have come directly in issue under the justification of truth.

and the pleadings, and hence may of course be proved on the principle of §§ 70–79, *post*. But apart from this, and assuming that the question is whether he *did a particular act* involving unskilful or improper methods, it would seem that his habitual qualities, if properly evidenced by repute or otherwise (*post*, §§ 1621, 1987), were admissible as indicating his probable conduct; for it is a habit and training, rather than a moral trait, that is involved, and thus the principle of §§ 83, 92, *post*, should control, and not the Character-rule. There is, however, little useful authority on the point.[1]

§ 68. (5) **Character of Third Persons (Adultery, Illegitimate's Inheritance, Bastard's Filiation, Forged Will, Other Persons' Crimes).** Where the character offered is that of a *third person, not a party* to the cause, the reasons of policy (noted *ante*, § 64) for exclusion seem to disappear or become inconsiderable; hence, if there is any relevancy in the fact of character, *i.e.* if some act is involved upon the probability of which a moral trait can throw light, the character may well be received. On this principle it has been admitted to evidence the *illegitimacy* of one claiming an inheritance,[1] to evidence the adultery of a *co-respondent in divorce* or other third person,[2] and to show a

§ 67. [1] *Cal.* 1902, Baker *v.* Borello, 136 Cal. 160, 68 Pac. 591 (reputed skill of a physician, admitted, as involved in the plaintiff's duty to employ a reputable physician to attend to his injury); *Conn.* 1812, Grannis *v.* Branden, 5 Day 260, 271 (malpractice by a surgeon and midwife; after evidence by the defendant of his professional skill and character, the plaintiff was allowed to show that the defendant was without proper training, having formerly been a dancing-master, etc.; following the analogy of the rule in criminal cases); *N. C.* 1824, Jeffries *v.* Harris, 3 Hawks 105 (assumpsit for services as a physician; the plaintiff's poor character as a physician excluded, because "not put in issue by the nature of this action"; *aliter, semble*, if the plaintiff had represented himself as of a certain grade of skill); *Pa.* 1845, Mertz *v.* Detweiler, 8 W. & S. 376, 378 (action for malpractice; the defendant's evidence as to his skill and character as a surgeon, held "irrelevant"; "it may be said that his general qualifications might serve to shed light on the propriety of his practice in this particular instance, but it is light which would be less likely to lead to a sound conclusion than to lead astray").

Distinguish the use of *particular acts of incompetency* (*post*, §§ 202, 208).

The following statute belongs here: Conn. Gen. St. 1918, § 5467 ("general character, reputation, and professional standing" of an attorney to be admissible in a proceeding for his removal, etc.).

§ 68. [1] 1732, Pendrell *v.* Pendrell, 2 Stra. 925 (issue to try heirship; the defendant was allowed "to prove the mother to be a woman of ill-fame", as tending to show the plaintiff a bastard); 1810, Banbury Peerage Case, in App. to LeMarchant's Gardner Peerage Case, 458; 1856, Legge *v.* Edmonds, 26 L. J. Ch. 125, 135 (legitimacy as affecting title); 1904, Kennington *v.* Catoe, 68 S. C. 370, 47 S. E. 719 (title depending on legitimacy of a son born eleven months after marriage; character of the mother for chastity about the time of gestation, but not otherwise, admitted against the son).

Contra, as to particular acts: 1903, State *v.* Hendrick, 70 N. J. L. 41, 56 Atl. 247 (conspiracy between two men and a woman to obtain an inheritance from B. by fraudulently pretending a marriage between B. and the woman and producing a child as B.'s heir; acts of criminal intimacy between the woman and certain third persons, excluded, as against the two men; erroneous; this was good evidence of her likelihood to defraud in the manner alleged, and was also admissible under the principle of § 133, *post*).

Compare the citations *post*, § 134 (*adultery* as evidence of *illegitimacy*).

[2] *Ala.*: 1860, Blackman *v.* State, 36 Ala. 295, 297 (adultery with a woman M.; the reputation of M. for unchastity, admitted as corroborative evidence); *Ark.* 1918, McDonald *v.* Louthen, 136 Ark. 338, 206 S. W. 674; *Ga.* 1906, Sutton *v.* State, 124 Ga. 815, 53 S. E. 381 (fornication with A.; reputation of A. as a prostitute, and of her house as a bawdy-house, admitted); *Mass.* 1868, Clement *v.* Kimball, 98 Mass. 535 (action for boarding the defendant's wife; defence, separation and adultery; the bad reputation of chastity of men who visited the wife while so separated, excluded, because no other evidence of adultery was offered as a foundation; but "such testimony often becomes competent when there is other evidence in the case to show relations

different parentage for a *bastard* in filiation proceedings;[3] and the principle may equally apply (subject to the limitations of §§ 139–142, *post*) to evidence the commission of any *crime by a third person*, particularly the *forging* or coercing *of a will or deed*,[4] and in sundry other situations.[5]

of an equivocal character"); 1880, Com. *v.* Gray, 129 Mass. 476 (on a charge of adultery against a husband, after showing suspicious association with a woman, the character of the woman as a prostitute or the contrary may be shown); *Mich.* 1877, Marble *v.* Marble, 36 Mich. 386 (divorce for adultery; "reputation", of an unspecified sort, admissible as "subsidiary" evidence; Clement *v.* Kimball approved); *Vt.* 1913, State *v.* Nieburg, 86 Vt. 392, 85 Atl. 769 (adultery with X; X's unchaste repute, admitted); 1913, State *v.* Snyder, 96 Vt. 449, 85 Atl. 984 (same).

Contra: 1920, Kelley *v.* State, 146 Ark. 509, 226 S. W. 137 (murder of Q., for having illicit relations with defendant's wife; the prosecution disputing O's misconduct, evidence of O's reputed character for morality was not admitted for the State; "the manifest purpose was to lead the jury to believe that . . . it was not probable that he would have been guilty of adultery"; quite so; the logic of some courts, when they exclude evidence just because it would be probative, is indeed amusing, — or will in some future generation be so esteemed); 1907, Van Horn *v.* Van Horn, 5 Cal. App. 719, 91 Pac. 250 (divorce for adultery; respondent's good character, not admitted under C. C. P. § 2053); 1901, Guinn *v.* State, — Tex. Cr. —, 65 S. W. 376 (adultery; character of the third person, excluded).

Some of the cases cited under § 228, n. 6, *post* (*insanity* evidenced by conduct), belong here also, perhaps.

The following ruling is uniquely astonishing: 1918, Reed *v.* State, 98 Oh. 279, 120 N. E. 701 (attempted burglary; to show other intent, viz. to visit the complaining witness illicitly, the defendant introduced evidence of her implied invitation to him; in rebuttal, the prosecution offered the witness' general reputation for chastity; held improperly admitted, because the evidence "in no wise assailed the community reputation of the prosecuting witness", and judgment reversed solely on this account; alas, for the protection of virtuous women's characters in this State under such a decision!).

[3] 1811, Fall *v.* Overseers, 3 Munf. 495, 497, 502, 505 (complainant in bastardy prosecution; the woman's bad character for virtue admitted, apparently to prove the probability of another's parentage). The following case could have been decided on this principle: 1855, Zitzer *v.* Merkel, 24 Pa. 408 (seduction; the daughter's good character for chastity not admitted to disprove specific unchastities alleged by the defendant). *Contra:* 1904, People *v.* Wilson, 136 Mich. 298, 99 N. W. 6 (bastardy; the woman's repute for unchastity about the time of begetting, excluded).

Compare the citations in § 133, *post* (acts of unchastity, on an issue of bastardy, etc.).

[4] *Accord:* 1916, Hurst *v.* Evans, 1 K. B. 352 (insurance against burglary; whether the robbery of the insured's safe was committed with the complicity of M. his employee; M.'s association "with notorious and highly skilled safe-breakers", admitted); 1906, Ford *v.* Ford, 27 D. C. App. 401, 411 (good repute of a notary certifying to an acknowledgment alleged to be false); 1906, Hannah *v.* Anderson, 125 Ga. 407, 54 S. E. 131 (caveators alleged fraud and threats by the propounder of a will; his good character admitted); 1918, State *v.* Johnson, 24 N. M. 11, 172 Pac. 189 (murder of H.; plea, that H. had insulted defendant's wife; deceased's general reputation for morality and decency, admitted; but the opinion erroneously invokes the rule of § 63 *ante*); 1820, Rowt's Adm'r *v.* Kile's Adm'r, Gilmer, Va. 202 (as part of the evidence to show that a third person had forged the instrument sued on, evidence of the person's "infamous character" held admissible; but this ruling was made before the modern doctrine was settled); 1903, Ward *v.* Brown, 53 W. Va. 227, 44 S. E. 488 (undue influence; good character of deceased attorney preparing the will, admitted, as an exception to the general rule).

Contra: 1905, West *v.* Houston Oil Co., 136 Fed. 343, 348, C. C. A. (alleged forgery of a certificate of acknowledgment; the notary's reputation as a forger, excluded; unsound); 1910, Quinalty *v.* Temple, 5th C. C. A., 176 Fed. 67 (title to land; the plaintiff's title turned on whether Q. died seised; defendant traced title through a deed of 1837 from F., citing a deed to him from Q., but no deed from Q. to F. was found; the recital in F.'s deed being admitted in evidence, the defendant offered to show (1) F.'s character for honesty, and (2) Q.'s character as a spendthrift, to evidence the probable deed from Q. to F., and the correctness of F.'s recital; excluded; reason, the old starched and stilted doctrines about character-evidence; one of them became here particularly ludicrous, viz. that character-evidence "would greatly increase the expense and delay of litigation", for here the Court ordered the whole pack of cards to be dealt over again by ordering a new trial solely for this error, and thus "greatly increased the expense and delay of litigation", by years of time and bags of money, to punish the defendant for wasting one hour at the original trial; the case was one of the really obvious opportunities for breaking through a rule of thumb and letting in the evidence; it

§ 68 *a* (6) **Character of Animals.** The character or disposition of an *animal* is no less relevant than that of a human being, as indicating his probable conduct on a particular occasion, and it is open to none of the objections of auxiliary policy (*ante*, §§ 57, 64) which affect the use of a party's character. It is therefore commonly conceded to be admissible.[1] The hesitation sometimes observed in the rulings has been due to the *time* at which the disposition is predicated in the offer; but here, as with human character (*ante*, § 60), the existence of a trait at a given time is evidence that it existed also for a reasonable time before and afterwards, and within liberal limits should therefore be received.[2]

3. Character as evidentiary for Other Purposes

§ 69. **Character as evidencing a Third Person's Belief, Knowledge, or Motive.** The evidentiary uses of Character just examined have the purpose in each case of indicating the likelihood that the person to whom the character is attributed did or did not do an act alleged. But a person's character may

was precisely the kind where common sense would welcome the evidence); 1903, McElroy *v.* Phink, 97 Tex. 147, 76 S. W. 753; 77 S. W. 1025 (character for integrity of a deceased third person, said to have destroyed improperly a lost will, excluded).

Compare the rule for *impeaching the character* of an *attesting witness* (*post*, § 1514), for *skill of a draftsman* of a document (*post*, § 87), for *corroborating a witness* (*post*, § 1106), for character as a *motive for murder* (*post*, § 390, n. 1); and some of the cases *ante*, § 64, n. 3.

[5] The following rulings seem sound: 1903, Burnett *v.* People, 204 Ill. 208, 68 N. E. 505 (murder by persuading the deceased woman to a joint suicide; the deceased's good character for chastity, held inadmissible); 1902, State *v.* Chanute, 65 Kan. 682, 70 Pac. 870 (illegal sale of liquor; that the buyer, who did not testify, was a "spotter", inducing sales for the purpose of prosecution, excluded). 1905, Toliver *v.* State, 142 Ala. 3, 38 So. 801 (robbery; character of H., with whom defendant was at the time, excluded).

The character of an *accomplice* or *co-conspirator* is hardly to be deemed relevant, except for or against himself when tried jointly: 1907, Schultz *v.* State, 133 Wis. 215, 113 N. W. 428 (bribery; good character of an alleged co-conspirator, excluded).

§ 68 *a*. [1] 1878, Maggi *v.* Cutts, 123 Mass. 535 (viciousness of a horse); 1897, Broderick *v.* Higginson, 169 Mass. 482, 48 N. E. 269 (habit of a dog to attack passing teams, admissible to show that he did it on a particular occasion).

Contra, 1868, East Kingston *v.* Towle, 48 N. H. 57, 65 (the bad character of the defendant's dog as to sheep-killing, not admitted to evidence that he had killed particular sheep; Doe, J., dissenting; this would probably not be followed in the same Court to-day); 1896, Kelly *v.* Alderson, 19 R. I. 544, 37 Atl. 12 (a dog's character for peaceableness not admitted to show that the dog probably did not bite till assaulted; "this would set up the character of the dog against the plaintiff's oath", — an amusing piece of judicial reasoning).

[2] 1900, Walrod *v.* Webster Co., 110 Ia. 349, 81 N. W. 598 (of horses after an accident, admitted); 1861, Chamberlain *v.* Enfield, 43 N. H. 356, 360 (his disposition for skittishness six or eight months after an accident, admitted, since "it may be safely laid down as a general rule (having its exceptions, no doubt) that neither horses nor men entirely change their characters, their habits, or their manners, in that space of time"); 1865, Whittier *v.* Franklin, 46 N. H. 23, 26; 1898, Stone *v.* Langworthy, 20 R. I. 602, 40 Atl. 832 (character of a horse subsequent to an accident, excluded as of "slight practical value"); 1888, Turnpike Co. *v.* Hearn, 87 Tenn. 291, 10 S. W. 510 (whether a horse was unmanageable; his disposition before and after the accident admitted); 1898, Dover *v.* Winchester, 70 Vt. 418, 41 Atl. 445 (sheep-killing; dog's character since the time, admissible).

Distinguish the proof of an animal's character when *in issue:* 1901, Willet *v.* Goetz, 125 Mich. 581, 84 N. W. 1071 (dog; here his good character was excluded, because the 'scienter' had been clearly shown otherwise by vicious acts); 1898, Citizens' R. T. Co. *v.* Dew, 100 Tenn. 317, 45 S. W. 790 (ancestry of a dog, admitted to show his value).

Distinguish also the use of *particular instances of conduct to evidence the animal's character* (*post*, § 201), and also to evidence the *owner's knowledge of that character* (*post*, § 251).

also have other evidentiary uses; and it is worth while here to point out the principles which they involve:

(1) *Character as affecting another Person's Belief or Reasonable Grounds for Belief.* There are several situations of this kind. Usually the character will be relevant only so far as attended with a reputation; for by means of the reputation the other person's belief or knowledge is best shown:

(*a*) Character of a *deceased person*, as indicating a defendant's apprehension of aggression from the deceased (*post*, § 246);

(*b*) Character of an *arrested person*, as indicating another person's reasonable ground for believing a charge of crime and for causing his arrest (*post*, § 258);

(*c*) Character of an *employee*, as indicating his employer's knowledge of his incompetence (*post*, § 249).

(2) *Character as indicating a Motive;* this is an occasional use having various aspects (*post*, § 389).

4. Character as an Issue in the Case

§ 70. (1) **Plaintiff's Reputed Bad Character as mitigating Damages for Defamation.** Where A sues B for defamation, and the issue is as to the proper amount of compensation, the question arises whether it is fair to measure his compensation by the quality of his original actual standing in the community, and, in particular, whether the fact that he had little or no reputation to lose may be considered as good reason for diminishing the damages accordingly. This question, it will be seen, is not one of the law of Evidence, *i.e.* character or reputation for character is not offered as having probative value to evidence the probability of something else. A principle of the law of Damages is involved, *i.e.* whether compensation shall be regulated according to a certain fact, namely, quality of reputation; if yes, reputation becomes material; if no, reputation is immaterial, and will not be considered. It must also be noticed that we are no longer dealing with *actual* character, but with *reputed* character; and, furthermore, that this reputation is not offered evidentially (*ante*, § 52), but as an element brought into issue by the law of the case. The propriety of considering this element in fixing compensation must here be considered (though it is no question of Evidence), for the purpose of distinguishing those precedents which involve it from those which involve genuinely a question of Evidence.

(1) Whether in an action for *defamation* the defendant may use the *plaintiff's poor reputation* (or lack of reputation) *to mitigate the damages* has been one of the most controverted questions in the whole law. The arguments on each side are so strong, and the balance of convenience is so clear, according to the point of view taken, that it is no wonder that Courts have taken radically opposite views. The argument in favor of considering reputation has been thus expressed:

1818, Mr. *Holt*, note in Holt's N. P. 308: "The ground of the action on the case for a libel is the 'quantum' of injurious damage which the person libelled either has or may be presumed to have sustained from the libellous matter. . . . [Thus] the reputation can not be said to be injured where it was before destroyed. The plaintiff has previously extinguished his own character. He has, therefore, no basis for an action to recover compensation for the loss of character and its consequential damage. The law considers him as bringing an action of damage to a thing which does not exist."

1882, CAVE, J., in *Scott* v. *Sampson*, L. R. 8 Q. B. D. 491: "Speaking generally, the law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit, and if such false statements are made without lawful excuse, and damage results to the person of whom they are made, he has a right of action. The damage, however, which he has sustained must depend almost entirely on the estimation in which he was previously held. He complains of an injury to his reputation, and seeks to recover damages for that injury; and it seems most material that the jury who have to award those damages should know, if the fact is so, that he is a man of no reputation. 'To deny this would', as is observed in Starkie on Evidence, 'be to decide that a man of the worst character is entitled to the same measure of damages with one of unsullied and unblemished reputation. A reputed thief would be placed on the same footing with the most honorable merchant, a virtuous woman with the most abandoned prostitute. To enable the jury to estimate the probable quantity of injury sustained, a knowledge of the party's previous character is not only material but seems to be absolutely essential.' It is said that the admission of such evidence will be a hardship upon the plaintiff, who may not be prepared to rebut it; and under the former practice, where the damages could not be pleaded to, and general evidence of bad character was allowed to be given under a plea of not guilty, there was something in this objection, which, however, is removed under the present system of pleading, which requires that all material facts shall be pleaded; and a plaintiff who has notice that general evidence of bad character will be adduced against him, can have no difficulty whatever, if he is a man of good character, in coming prepared with friends who have known him to prove that his reputation has been good."

1818, 1820, NOTT, J., in *Buford* v. *M'Luny*, 1 Nott & M. 269, *Sawyer* v. *Eifert*, 2 id. 515: "In every action at law the object is to recover reparation for some injury sustained. And where the injury is to property, the value of the article is the principal object of inquiry. And I can see no good reason why the value of character may not be investigated as well as that of any other commodity, when the reparation of character is the object of this suit. . . . It is said it would be taking a person by surprise thus to permit an inquiry into his character. But if the character of a witness, who is called upon in Court and compelled to give evidence without any previous notice, is not shielded from such an attack, how much less ought a party who has voluntarily brought his character into Court claim such an exemption? He commences with stating that he is a person of good name, fame, and reputation, and he ought to be always prepared to defend his allegation. A person is presumed to be always prepared to defend his general character, if he has a good one; if he has not, it ought to be exposed. . . . I hold that a woman ought not to be taken from the stews and brothels of a town, to be placed alongside of the most respectable ladies who equally adorn our drawing-rooms and our churches; nor that the high priest of vice and corruption should be ranked with the pious priest of the parish or the respectable bishop of the diocese. Where a person's character is such that he cannot safely trust it to a court and jury, slander can do him but little injury; and a person who is neither ashamed nor afraid to expose his character to the eye of the public ought not to be permitted to shelter it under the forms of law from the eye of a jury."

The meat of this argument is that a person should not be paid for the loss of that which he never had. The opposing argument lays stress on the abuses to which the use of such evidence is open:

1822, *Jones* v. *Stevens*, 11 Price 235, 256, 269, slander, charging the plaintiff with being a disreputable and unprofessional attorney; testimony to his general bad character and reputation as an attorney was held inadmissible under the general issue; GRAHAM, B.: "There is a full concurrence of opinion amongst the whole Court that such general evidence of bad character is not admissible, . . . and that principally on the grounds that a party can not be expected to be prepared to rebut it, and that, if it were to be received, any man might fall a victim to a combination made to ruin his reputation and good name, even by means of the very action which he should bring to free himself from the effects of malicious slander." GARROW, B.: "If ever it should [become the law that such evidence should be admissible], the libeller will become a much more general character than we find him now; for he will derive protection and impunity from the apprehension and dread, with which the object of his malice would naturally be possessed, of resorting for redress to courts of justice to vindicate his name, where it would be permitted to the defendant to bring forward testimony of general bad character which from its nature it would be impossible to disprove; whereby they in effect become the means of putting the libels of which they complain on the records of the courts of giving a wider circulation to the calumnies contained in them."

1806, LIVINGSTON, J., in *Foot* v. *Tracy*, 1 Johns. 46: "I am now satisfied that more mischief will follow from an adoption of such a rule than by excluding the investigation altogether, except when presented as a complete justification in the form of a special plea. . . . It is answered that a person of bad fame has no right to bring a suit, or, if he does, that he cannot expect the same compensation as those who have a character to lose. But no one, however low a man's reputation be, has a right to publish slanders of him, or to charge him with crimes of which he is innocent. If he confines himself to the truth, he can plead it; but if he will deal in general invective, or indulge his wit and venom by travelling out of the record, he must abide by the consequence. Nothing is better settled than that the truth of a libel or of slander cannot be relied on, in justification, unless pleaded. What is not permitted, then directly, ought not to be tolerated in any other way. . . . [This result] will only impose on those who choose to publish their animadversions on the crimes or failings of others, which occupy so great a portion of our public papers, the task of proving by particular facts the truth of what they assert. Nor is there any hardship in this. Those who sport with the feelings of others, under the professions of zeal for the public good, on no other basis than that of common fame, which is not always an infallible guide, cannot complain if courts require from them, on these as on most other occasions, some better proof of their calumnies than general opinion. If every man who does not enjoy an unblemished reputation, or has the misfortune to be disesteemed by his neighbors, were fair game, in a country where the liberty of the press is so much perverted and abused, few indeed would escape."

1818, CHEVES, J., dissenting, in *Buford* v. *M'Luny*, 1 Nott & M. 272: "1. It is alleged that the pleadings put the character of the plaintiff in issue. Now it is not true, in point of law, that the character of the plaintiff is put in issue . . . [since a plea denying the allegation would be demurrable]. 2. But it is said that the foundation of the damages given in actions of slander is the actual injury suffered by the plaintiff in his character. This is not true; it is upon the presumption of loss (little more than a legal fiction), and not upon the actual loss, that actions of slander are principally founded. . . . Are not the heaviest damages given when the slander is uttered against unsullied and impregnable character, — where the malice of the calumniator has been shot 'like a pointless arrow from a broken bow'? To the tottering and questionable character, the shafts of the slanderer are fatal and ruinous, . . . in such cases we know that the damages are usually nominal, though the injury is immeasurable and intolerable. Is it not, then, amusing ourselves with a phantom, when we suppose that the actual loss sustained by the sufferer is the real foundation of damages in actions of slander? There must be other and higher principles

on which they are founded. Is it not obvious that the foundation of these damages is to be discovered in the general sanctity of character, which is considered as a shield, not against irreparable injury only, but against every possible assault upon the hallowed blessing of a good name? Even the wicked and the worthless are allowed this protection, as the infidel was once permitted to enter the Christian sanctuary. . . . Ought [the defendant] not to be subjected to heavier penalties for thus oppressing the fallen, perhaps the broken-hearted and repentant and reforming offender, than if he had, with equal malice but with less meanness, attacked the highest and most irreproachable man in the community? I should say he ought. [3.] But if the admission of this evidence were clear, according to analogy and theory, it ought to be rejected in practice from its immateriality to a fair defence, and from the abuses of which it will be susceptible. It is immaterial, because, as far as such a cause should operate, it has its full influence (and too much) through the knowledge of the jury. . . . It is susceptible to the greatest abuses. The person, not of unblemished reputation, must suffer every calumny that the tongue can utter, in silence; for if he seek redress against any specific slander, he must suffer the defects of his character to be exhibited and proclaimed in a court of justice by as many witnesses as the fears or malice of the defendant may choose to call. A man laboring under a neighborhood calumny, though perfectly innocent, must be the victim of every specific slander that may be uttered against him. He dare not enter the portals of a court of justice, or he will be doomed to eternal infamy by a thousand tongues."

§ 71. **Same: the Question as affected by the Pleadings.** The state of the pleadings may affect the situation radically, by giving opportunity for different issues and policies. There are four conceivable cases:

(*a*) *General issue* pleaded; the amount of damages being customarily herein issuable, the plaintiff's bad repute is offered in mitigation;

(*b*) *Justification* of truth pleaded; the defamatory charge *specific* (*e.g.* "A stole a horse from B"); the plaintiff's bad character offered to show the *probability of the theft;*

(*c*) *Justification* pleaded; the charge *specific;* the plaintiff's bad repute offered in *mitigation* of damages, anticipating a possible finding against the defendant on the plea;

(*d*) *Justification* pleaded; the charge *general* (*e.g.* "A is a thief"); the plaintiff's bad reputed character offered as involved in the plea.

(*a*) This is the ordinary case, raising the general question; the passages quoted in the preceding section deal with this case. It is the most favorable for the defendant, for here his claim is not affected by any possible impropriety of pleading, except the supposed argument of surprise, discussed above by the judges.

(*b*) This is a purely evidentiary use of character, and has been already elsewhere examined (*ante*, § 66).

(*c*) Here the question is (1) whether as a matter of pleading the issue of damages can properly be raised under a plea of justification, and (2), even if it is theoretically possible, whether it is not practically better to exclude the element of repute, because of the probable abuse of the opportunity by those who would make no real attempt to prove truth but would simply abuse the plaintiff's reputed character, and because a mere direction to the jury not to

consider such character except in mitigation of damages would hardly be sufficient to keep them from letting it affect their verdict on the plea of truth.[1]

(*d*) Here, since the defamatory charge is general, and the reputed character is offered as showing the very fact in issue, the defendant seems to be safe; yet it is sometimes argued that, to avoid abuse of the situation and to prevent surprise, he can never even plead in justification the fact of general character, but must affirm specific acts and prove them as such.[2] It will be noticed (*post*, § 73) that the jurisdictions are divided as to case (*a*); that only the Courts which admit in case (*a*) need to discuss case (*c*), and here again there is a division; that only the Courts that exclude in case (*a*) are likely to care to raise the question of case (*d*), and that the result of exclusion therein is rarely reached. It will also be noticed that the effect of excluding in both (*a*) and (*d*) is practically to prevent a defendant from using the plaintiff's bad character at all, either in justification or in mitigation.

§ 72. **Same: Kind of Character, Particular or General.** A further question that arises in those jurisdictions where the plaintiff's bad character is admitted in mitigation is whether *general* bad character can alone be used, or whether bad character for the *particular trait* involved in the defamation can alone be used. Most Courts, instead of allowing the use of either or both, prefer to make the use of one sort exclusive. The argument that *general character alone* should be considered is expounded as follows:

1847, COULTER, J., in *Steinman* v. *McWilliams*, 6 Pa. St. 175: "Can evidence of separate and particular departments of character be lawfully allowed? . . . How is character estimated? Certainly by its general import. It will not do to take up the Decalogue and inquire whether a man is generally reputed as addicted to fornication or adultery, to profane swearing, Sabbath-breaking. . . . If this mode of destroying character was allowed in our courts, the standing of all men would be in peril. We have but few Catos among us; and if we had more, such individuals would hardly seek redress in our courts. But the law is not made for the protection of such men, but for the protection of that middle class all the world over, who have a sense of truth, honor, and virtue, and who are yet not above the infirmities of life; whose sensibility as to the value of character, and whose liability to err, make them more susceptible of wounds from the shaft of slander. The thousand of wagging tongues of this world, sometimes in sport and sometimes in malice, make free with some department or quality of character of good men in the main; and if malice were allowed to seize hold of these reports and embody them in a court of justice to destroy character, few men would be safe. The truth is that it is only in general character that a man finds his true level in society; and that alone ought to mark his value."

§ 71. [1] For the best exposition of this case, see M'Nutt *v.* Young, 8 Leigh 542 (1837).

[2] The reasons are set forth in the following leading case: 1787, J'Anson *v.* Stuart, 1 T. R. 748, 752 (slander by charging the plaintiff as a "notorious swindler and common informer"; Ashurst, J.: "The defendant . . . when he took upon himself generally to justify the charge, must be prepared with the facts which constitute the charge, in order to enable him to maintain the plea. Then he ought to state those facts specifically, to give the plaintiff an opportunity of denying them; for the plaintiff cannot come to the trial prepared to justify his whole life"; Buller, J.: "If the plaintiff has been guilty of any act of swindling, the defendant must be taken to know them. He could not prove the justification, as he has pleaded it, by general evidence; but he has no justification unless he can prove the special instances; and, knowing them, he ought to put them on the record, that the plaintiff might be prepared to answer them"; here the plea was held bad on demurrer).

This argument is answered as follows, by those who claim that a reputation for the *particular trait* involved is *equally* open to examination:

1864, STRONG, J., in *Conroe* v. *Conroe*, 47 Pa. 202: "A man may have many virtues and consequently a good general reputation, and yet be notorious for a single vice. If his virtues be called in question, it is an injury; but if only his vice be asserted, his injury is less. . . . [The plaintiff's] averment is not that her reputation for all the virtues which go to make up good character is fair, but that her reputation for chastity was sound; and it is that, she complains has been taken from her. Its real value was therefore a proper subject of inquiry."

The argument that the reputation for the *particular trait alone* should be considered is thus set forth:

1871, LYON, J., in *Wilson* v. *Noonan*, 27 Wis. 614: "It is said that a person who brings such an action puts his reputation in issue; but it seems to be more accurate to say that he thereby puts it in issue in the particular wherein he claims that it has been assailed. Human reputation is complex in its nature. Because a man has a single vice, or even more than a single vice, it does not follow from that circumstance that he is totally depraved. . . . He may be an incorrigible liar, and yet strictly honest in all his dealings. He may be a great scoundrel in pecuniary matters, and yet perfectly chaste. . . . Where a person's character for truth and veracity is falsely assailed, and he brings his action against the assailant to recover damages therefor, if his reputation for truth and veracity is good, on what sound principle can it be said that if such plaintiff is unchaste, or dishonest in business matters, or covetous, profane, or a sabbath-breaker, the damages to which he would otherwise be entitled shall be reduced to a nominal sum?"

§ 73. **Same: State of the Law in the Various Jurisdictions.**[1] (1) So far as concerns the *question at large*, as affected by the pleadings (*ante*, §§ 70, 71), it will be noticed that to-day, in case (*a*), the repute is in most of the juris-

§ 73. [1] ENGLAND AND CANADA: (1) *Character in mitigation or justification:* (*a*) *England:* The earlier rulings all inclined to admit bad repute, under the *general issue*, in mitigation: 1716, Dennis *v.* Pawling, Vin. Abr. "Evidence", I, b, 16 (XII, 159); 1908, Knobell *v.* Fuller, Peake, Add. Cas. 139, Lord Kenyon, C. J.; 1803, R. *v.* Waring, 5 Esp. 13, Lord Alvanley, C. J.; 1809, Leicester *v.* Walter, 2 Camp. 251, Mansfield, C. J.; 1810, Williams *v.* Callender, Holt N. P. 307, note, Lord Ellenborough, C. J.; 1813, Anon *v.* Moor, 1 M. & S. 284, K. B.; 1811, Snowdon *v.* Smith, 1 M. & S. 286, note, Chambre, J., *semble;* 1817, Newsam *v.* Carr, 2 Stark. 70, Wood B.; 1817, Mills *v.* Spencer, Holt N. P. 533, Gibbs, C. J., *semble;* 1822, Waithman *v.* Weaver, 11 Price 257, note, Abbott, C. J., doubtful; 1824, Ellershaw *v.* Robinson, 2 Stark. Ev. 641, n., Holroyd, J.; and the same opinion was indicated under the next rulings (*c*), refusing to receive it under a justification. Then came a series of rulings excluding it: 1822, Jones *v.* Stevens, 11 Price 235; 1859, Bracegirdle *v.* Bailey, 1 F. & F. 536, Byles and Willes, JJ.; 1863, Myers *v.* Currie, 22 N. C. Q. B. 470; but the more recent opinion looks upon the earlier line as orthodox, and receives the evidence: 1882, Scott *v.* Sampson, L. R. 8 Q. B. D. 491; Rules of Supreme Court, 1883, Order XXXVI, Rule 37 (in defamation, where the truth is not pleaded, the defendant may not in chief offer in mitigation evidence "as to the character of the plaintiff, without the leave of the judge," unless on 7 days' notice of particulars; quoted *post*, § 209);

Canada: Statutory rules now usually admit it, subject to a notice of particulars: *Alberta:* Rules of Court 1914, No. 198 (like Ont. Rule 158); *B. C.* Rules of Court 1912, No. 461 (like Ont. R. 158); *Ont.* Rules of Court 1913, R. 158 (where truth is not pleaded, character is not receivable in mitigation unless on seven days' notice of particulars); *Man.* Rev. St. 1913, c. 46, R. 485 (like Ont. Rule 158); *Newf.* Cons. St. 1916, c. 83, Ord. 32, R. 22 (like Ont. Rule 158, requiring two days' notice); *N. Sc.* Rules 1900, Ord. 34, R. 30 (like Ont. Rule 158).

(*c*) Its use under a *justification* was once thought improper: 1811, Snowden *v.* Smith, M. & S. 286, note, Chambre, J.; but later the rulings were all in the other direction: 18—, Kirkman *v.* Oxley, 2 Stark. Ev. 306, *k*, Heath, J.; 1826, Mawby *v.* Barber, 2 Stark. Ev. 641, *e*, Lord Tenterden, C. J.; 1836, Moore *v.* Oastler, 2 Stark. Ev., Lord Denman, C. J., and Parke,

dictions admitted; that only the Courts which admit in case (*a*) need to discuss case (*c*), and that here again the repute is commonly admitted; that the question in case (*d*) is not likely to be raised except in the few Courts that exclude in case (*a*), — although in England (*a*) is admitted and (*d*) is excluded. It may also be noted that the effect of excluding in both (*a*) and (*d*) is practically to prevent a defendant from using the plaintiff's bad repute at all, either in justification or in mitigation.

B.; 1837, Hardy *v.* Alexander, 2 Stark. Ev., Coltman, J.; 1833, Powell *v.* Harper, 5 C. & P. 590, 592, Parke, B.; Mr. Starkie also approved these rulings, believing it sufficient for the Court to tell the jury to apply the evidence only on the question of damages.

(*d*) The exclusion of character on a justification of a general charge was supposed to have been settled by the following line of cases: 1787, J'Anson *v.* Stuart, 1 T. R. 748 (quoted *supra*, § 71); 1822, Jones *v.* Stevens, 11 Price 235, 273; 1842, Hickinbotham *v.* Leach, 10 M. & W. 361, Parke, B.; 1893, Zierenberg *v.* Labouchere, 2 Q. B. 183, 186 (approving J'Anson *v.* Stuart).

(2) *Kind of Character.* The particular trait, as well as the general character, seems to be admissible: 1833, Powell *v.* Harper, 5 C. & P. 590, 592 (honesty); the exclusion of "particular credit" in Dennis *v.* Pawling, Vin. Abr. "Evidence," I, b, 16 (1716), vol. XII, 159, seems not to refer to the present subject, but to discrediting a witness by particular acts.

UNITED STATES: *Alabama:* (1) (*a*); admitted; the limitation specified is intended to prevent the defendant's abuse of this opportunity by taking advantage of the destruction of a reputation destroyed by himself: 1834, Commons *v.* Walters, 1 Port. 322, 327 (but not after the date of the charge); 1836, Waters *v.* Jones, 3 Port. 442, 450; 1846, Bradley *v.* Gibson, 9 Ala. 408; 1849, Scott *v.* McKinnish, 15 Ala. 665 (but not after the date of the charge).

Arkansas: (1) (*a*): 1918, McDonald *v.* Southen, 136 Ark. 368, 206 S. W. 674 (slander; general issue and justification; admissible, to mitigate damages).

Connecticut: (1) (*a*) admitted: 1792, Brunson *v.* Lynde, 1 Root 354; Seymour *v.* Merrills, Root 459; 1794, Austin *v.* Hanchet, 2 Root 148; 1820, Stow *v.* Converse, 3 Conn. 346; 1822, Treat *v.* Browning, 4 Conn. 414; 1825, Bennett *v.* Hyde, 6 Conn. 24.

Delaware: (1) (*a*) inconsistent rulings: 1838, Waples *v.* Burton, 2 Harringt. 446 (admissible); 1841, Parke *v.* Blackiston, 3 Harringt. 373, 375 (inadmissible, following, Jones *v.* Stevens); (*c*) same condition; Waples *v.* Burton, *supra;* Parke *v.* Blackiston, *supra.*

Illinois: (1) (*a*) and (*c*) admitted: 1842, Young *v.* Bennett, 5 Ill. 43, 47 (even where a plea of justification has been put in); 1858, Sheahan *v.* Collins, 20 Ill. 328, 1905, Dowie *v.* Priddle, 216 Ill. 553, 75 N. E. 243 (excluded).

Indiana: (1) (*a*) and (*c*): 1825, Henson *v.* Veatch, 1 Blackf. 371 (left undecided); 1841, Sanders *v.* Johnson, 6 Blackf. 52 (left undecided at least where the plea is justification); 1842, Burke *v.* Miller, 6 Blackf. 155 (said *obiter* to be admissible on the general issue); 1843, McCabe *v.* Platter, 6 Blackf. 405 (held admissible even under a justification); 1867, Bickenstaff *v.* Perrin, 27 Ind. 528 (admissibility recognized).

Iowa: (1) (*a*): 1887, Hanners *v.* McClelland, 74 Ia. 318, 322, 37 N. W. 389 (admitted); 1921, Sclar *v.* Resnick, 192 Ia. 669, 185 N. W. 273 (slander; plaintiff's bad character admitted in mitigation, regardless of malice).

Kansas: 1912, Wood *v.* Custer, 86 Kan. 387, 121 Pac. 355 (slander charging cattle-stealing; reputation also as to integrity and as to being a cattle-thief, admitted).

Kentucky: (1) (*a*) admitted: 1810, Eastland *v.* Caldwell, 2 Bibb 21, 23; 1880, Campbell *v.* Bannister, 79 Ky. 209; 1896, Ratcliff *v.* Courier-Journal, 99 Ky. 416, 36 S. W. 177; (2) (*b*); particular trait only: Eastland *v.* Caldwell, *supra.*

Louisiana: (1) (*a*) admitted: 1828, Kendrick *v.* Kemp, 6 Mart. N. S. La. 500;

Maine: (1) (*a*) admitted: 1839, Smith *v.* Wyman, 16 Me. 14 (chastity);

Massachusetts: (1) (*a*) admitted: 1810, Wolcott *v.* Hall, 6 Mass. 518 (Parsons, C. J.: "he ought not to obtain large damages, if his character is of little or no estimation in society"); 1817, Ross *v.* Lapham, 14 Me. 279 (but excluding evidence of the plaintiff's being an atheist); 1825, Bodwell *v.* Swan, 3 Pick. 376 (Parker, C. J.: "To a reputation already soiled, the injury is small"); 1834, Com. *v.* Snelling, 15 Pick. 337, 344; 1843, Stone *v.* Varney, 7 Metc. 86; 1863, Chapman *v.* Ordway, 5 All. 595; 1863, Parkhurst *v.* Ketchum, 6 All. 406; 1874, Peterson *v.* Morgan, 116 Mass. 350; 1875, Clark *v.* Brown, 116 Mass. 509; 1881, Hastings *v.* Stetson, 130 Mass. 76, 78; (*c*) admitted: Stone *v.* Varney, *supra* (*quoted supra*, § 66); (2) general character and particular trait admitted: Clark *v.* Brown, *supra.*

Michigan: (1) (*a*) admitted: 1877, Proctor *v.* Houghtaling, 37 Mich. 41, 44; 1883, Bathrick *v.* Detroit Post, 50 Mich. 629, 642 (reputation before publication of the charge); 1897, Finley *v.* Widner, 112 Mich. 230, 70 N. W.

(2) As to the *kind of repute* receivable, the exclusive admissibility of general character is no longer the law anywhere; the exclusive admissibility of the particular trait is maintained in perhaps half of the jurisdictions, and in the others the admissibility of both is recognized.

433; 1897, Fowler *v.* Fowler, 113 Mich. 575, 71 N. W. 1084; 1897, Georgia *v.* Bond, 114 Mich. 196, 72 N. W. 232; (2) inconsistent rulings; 1883, Bathrick *v.* Post, *supra* (particular trait only); 1894, Thibault *v.* Sessions, 101 Mich. 279, 290, 59 N. W. 624 (general character only).

Minnesota: (1) (*a*): 1868, Simmons *v.* Holster, 13 Minn. 249, 257 (not decided); 1921, Nett *v.* Bonfig, — Minn. —, 185 N. W. 956 (slander; denial; plaintiff's bad reputation admissible, but not rumors of his guilt);

Mississippi: (1) (*a*) admitted: 1859, Powers *v.* Presgroves, 38 Miss. 227, 241; *Missouri:* (1) (*a*) admitted: 1822, Anthony *v.* Stephens, 1 Mo. 254; (2) particular trait only: Anthony *v.* Stephens, *supra.*

New Hampshire: (1) (*a*) admitted: 1833, Lamos *v.* Snell, 6 N. H. 413; 1851, Severance *v.* Hilton, 24 N. H. 148; (2) general character and particular trait also: Lamos *v.* Snell, *supra.*

New Jersey: (1) and (2); General bad character is admissible: 1855, Sayre *v.* Sayre, 25 N. J. L. 235 (exhaustive opinion by Green, C. J.);

N. Mexico: Annot. St. 1915, § 4155 ((*c*) "defendant may plead both truth and mitigating circumstances," "and whether he prove the justification or not, he may give mitigating circumstances in evidence").

New York: (1) (*a*) admissible, since the first case: 1806, Foot *v.* Tracy, 1 John. 46 (undecided; Kent, C. J., and Thompson, J., for, and Livingston, J., and Tompkins, J., against receiving it); 1824, Paddock *v.* Salisbury, 2 Cow. 811; 1829, Douglass *v.* Tousey, 2 Wend. 352 (since "defendants might indirectly contribute to the reputation of the plaintiff's bad character for the very purpose of reducing the damages in actions of slander already instituted against them", the reputation offered cannot be of the character after the words were uttered); 1829, King *v.* Root, 4 Wend. 139; 1847, Hamer *v.* McFarlin, 4 Den. 509; (*c*) admitted: King *v.* Root, *supra;* Hamer *v.* McFarlin, *supra* ("[The other view] assumes that the jury could not discriminate between the proof offered to sustain the justification and that which relates to the damages merely; but I think the evil apprehended is more imaginary than real").

North Carolina: (1) (*a*) admitted: 1802, Vick *v.* Whitfield, 2 Hayw. 222; 1853, Sample *v.* Wynn, Busbee 320;

Ohio: (1) (*a*) admitted: 1831, Dewit *v.* Greenfield, 5 Oh. 225; 1846, Fisher *v.* Patterson, 14 Oh. St. 418, 425.

Pennsylvania: (1) (*a*) admitted, but (*b*) doubtful: 1823, Anderson *v.* Long, 10 S. & R. 61, *obiter;* 1833, Smith *v.* Ruckecker, 4 Rawle 295 (undecided); 1835, Henry *v.* Norwood, 4 Watts 347, 350; 1847, Steinman *v.* McWilliams, 6 Pa. 170, 174 (admissible where a plea of not guilty is recorded; on a justification only, no decision given, the case going off on another point); 1864, Conroe *v.* Conroe, 47 Pa. 198 (admissible on the general issue; but apparently not on a justification alone); 1865, Moyer *v.* Moyer, 49 Pa. 210 (admitted; nothing said as to the bearing of pleadings); (2) The rulings have veered entirely around, originally admitting general character only, but now admitting only particular traits: 1833, Smith *v.* Ruckecker, 4 Rawle 295 (charge of whoring; evidence of the plaintiff's reputation for thieving, excluded); 1847, Steinman *v.* McWilliams, 6 Pa. 170, 175 (refusing to confine the plaintiff to reputation for veracity only, in an action for charging perjury; overruled in effect by the following cases, admitting particular traits); 1864, Conroe *v.* Conroe, 47 Pa. 198 (chastity); 1865, Moyer *v.* Moyer, 49 Pa. 210 (general character excluded, and only the particular trait admitted; Steinman *v.* McWilliams and Conroe *v.* Conroe cited but misread).

South Carolina: (1) (*a*) admitted; 1818, Buford *v.* M'Luny, 1 Nott & M. 268; 1820, Sawyer *v.* Eifert, 2 Nott & M. 511; 1833, Anon., 1 Hill S. C. 251, 253; 1836, Randall *v.* Holsenbake, 3 Hill. 177; (2) admitting general character and particular traits also: 1818, Buford *v.* M'Luny, 1 Nott & M. 268, 270 (it is not allowable "for instance, where a person is accused of stealing, to prove by way of mitigation that he had committed murder or that he was a drunkard or a gambler; but the evidence must go to show that his character is so bad that he might well be suspected of the particular offence charged, and could not be injured by the report").

Texas: A peculiar rule here applies to criminal libel for defaming a woman's chastity; by Penal Code 1895, § 751, Rev. P. C. 1911, § 1178, "the general reputation for chastity of the female alleged to have been slandered may be inquired into"; this is held to mean that on proof of the woman's bad repute for chastity the defendant is entitled to acquittal: 1909, Dobbs *v.* State, 55 Tex. Cr. 483, 117 S. W. 799.

Virginia: (1) (*a*) admitted: 1837, M'Nutt *v.* Young, 8 Leigh 542; 1839, Lincoln *v.* Chrisman, 10 Leigh 338, 342 (except, possibly, where the slander charges nothing affecting the moral character); 1867, Adams *v.* Lawson, 17 Gratt. 259, *semble;* (*c*) admitted: 1837, M'Nutt *v.* Young, 8 Leigh 542 (perhaps the best single case on the subject); (2) admitting general

§ 74. **Same: Rumors of the Crime charged, as affecting Reputation.** In thus seeking to mitigate damages by showing the plaintiff's reputation to be susceptible of little or no injury, the defendant will sometimes attempt to attain his purpose by showing less than a total lack of reputation for general character or for the particular trait. If, for instance, the charge was that the plaintiff stole a horse, the defendant will offer to show that there was a prevalent rumor or a common belief that the plaintiff stole the horse; thus, the defendant will assert, his false charge could not have hurt the plaintiff by causing a belief in his guilt, because there was already a common belief in it, or at least a rumor of it. The argument for permitting this has never been better put than in the following passage:

1860, PIGOT, C. B., dissenting, in *Bell* v. *Parke*, 11 Ir. C. L. 413, 425: "It is by putting extreme cases that the application of a principle can often be most clearly tested; let me put the case that I shall now describe. Suppose this to have happened: a gentleman employed in a railway-office is found in the office murdered, and circumstances of the very strongest suspicion attach upon one individual; the case is tried, the facts are fully investigated, the individual is acquitted; but there exists generally, in the community at large, a moral conviction that the party charged is guilty. . . . He is entitled to the benefit of his acquittal, and to the presumption of innocence which the law casts round one whose guilt has not been proved; no man can be justified in calling him a 'murderer', — nay, the general impression may, if the truth were clearly known, be unjust. But, rightly or wrongly, he has lost his good name, and there exists a general reputation that he was guilty of the specific offence which I have described. . . . Is it just or reasonable that a man so covered with the reputation of having been guilty of an atrocious crime should be entitled to as large a measure of damages, for being called a murderer, as a person of unblemished fame, upon whose character the breath of slander had never been blown? . . . Suppose two successive cases presented in succession to the same jury; in one, the alleged murderer is plaintiff, in the other, the plaintiff is a man without a stain upon his character; I do not think it just or reasonable (and I cannot think that it will ultimately be established as the law of England) that the same measure of damages should be applied to each."

character and particular traits also: 1837, M'Nutt *v.* Young, 8 Leigh 542; 1839, Lincoln *v.* Chrisman, 10 Leigh 343.

Vermont: (1) (*a*) and (2): 1802, Smith *v.* Shumway, 2 Tyler 74 (bad general character excluded).

West Virginia: (1) (*a*) admitted: 1869, Shroyer *v.* Miller, 3 W. Va. 158, 161.

Wisconsin: (1) (*a*) admitted, but (*b*) unsettled: 1867, B—— *v.* I——, 22 Wis. 372 (chastity; both general issue and justification pleaded); 1871, Wilson *v.* Noonan, 27 Wis. 599, 612 (official integrity); 1880, Maxwell *v.* Kennedy, 50 Wis. 645, 7 N. W. 657, *semble* (horse-stealing); 1898, Caudrian *v.* Miller, 98 Wis. 164, 73 N. W. 1004; (2) neither rule apparently settled upon: 1860, Haskins *v.* Lumsden, 10 Wis. 359, 369 (admissibility of general character doubted); 1867, B—— *v.* I——, *supra* (admissibility of general bad character assumed, for both general issue and justification); 1871, Wilson *v.* Noonan, *supra* (reserving the question whether general character may be shown; and intimating the negative); 1880, Maxwell *v.* Kennedy, *supra* (obscure); 1882, Campbell *v.* Campbell, 54 Wis. 90, 97, 11 N. W. 456 (poisoning; general character admissible, no distinction being made as to particular traits); 1906, Earley *v.* Winn, 129 Wis. 291, 209 N. W. 633 (slander that plaintiff whipped her mother; reputation as to ill-treating her mother, admitted; the rule being that the reputation is confined to "the fault or trait of character involved in the offence charged", citing some of the above cases as authority for this); 1877, Kimball *v.* Fernandez, 41 Wis. 329 (habit of evil conduct charged; single instances allowed to be proved; whether in justification only or on general issue, not decided).

Distinguish the defendant's offer of his *own bad repute*, as indicating that his utterance was not believed and thus did no harm: 1881, Hastings *v.* Stetson, 130 Mass. 76, 78.

But there are grave objections to permitting such a practice, as the following passages make clear:

1860, FITZGERALD, B., in *Bell* v. *Parke*, 11 Ir. C. L. 413, 420: "A reputation there may be as to general character; and as general character is affected by a slander, it may be natural to show, by rumors or otherwise, what that reputation is. But there cannot, as it appears to me, by reputation as to the guilt of a particular offence, in the sense in which reputation is understood in the law of evidence."

1882, CAVE, J., in *Scott* v. *Sampson*, L. R. 8 Q. B. D. 491: "It would seem that such evidence [rumors and suspicions as to the truth of the charge made by the defendant], is not admissible, as only indirectly tending to affect the plaintiff's reputation. If these rumors and suspicions have in fact affected the plaintiff's reputation, that may be proved by general evidence of reputation. If they have not affected it, they are not relevant to the issue. To admit evidence of rumors and suspicions is to give any one who knows nothing whatever of the plaintiff, or who may even have a grudge against him, an opportunity of spreading, through the means of the publicity attending judicial proceedings, what he may have picked from the most disreputable sources, and what no man of sense who knows the plaintiff's character would for a moment believe in. Unlike evidence of general reputation, it is particularly difficult for the plaintiff to meet and rebut such evidence; for all those who know him best can say is that they have not heard anything of these rumors. Moreover, it may be that it is the defendant himself who has started them"; a question to a witness, whether he had heard anywhere the story which was the libel in question before he saw it in the defendant's journal, was excluded.

1836, GIBSON, C. J., in *Long* v. *Brougher*, 5 Watts 440: "Surely it does not lessen the injury that the plaintiff's character, bleeding from a thousand wounds, has received only the finishing blow from the defendant. Who can say that it would not have weathered the storm had it not sunk at last under the accumulated weight of the defendant's wrongs? I am unable to see the justice of estimating character by fragments, or of treating as matter of extenuation the fact that the injured party had suffered the same prejudice from another. The blow may fall heavier on sensibilities morbid from the repetition of injury. The principle has no analogue in any other part of the law; for in the pursuit of reparation for trespass to my person, I am not to be told that my battered carcass was of little worth to me by reason of a previous beating. . . . In that predicament the condition of the sufferer is an aggravation of the wrong; inasmuch as the residue of a man's soundness, whether of body or character, is the more valuable to him, because it is all that he has to depend on. . . . Now it seems to be irreconcilable to the dictates of justice that previous outrage should be made an invitation to aggression by cheapening the consequences of it to the prepetrator, . . . [or] that a stale and exploded accusation may be made a pretext for its repetition."

The better arguments seem to require the exclusion of such evidence; and this is the result in the great majority of jurisdictions. The difficulty is, however, to draw the line between a mere rumor of the particular act charged and a general loss of reputation as to the particular trait involved in it; for the latter, as already seen (*ante*, § 73) is received in most jurisdictions. Thus in King *v.* Root, *infra*, the libel had charged the plaintiff with being in a state of beastly intoxication, and it was held that mere rumors of the act charged were inadmissible, while a bad reputation for excessive intoxication would be admissible. So far, then, as rumors of the sort have in effect destroyed the plaintiff's reputation to a real extent, it is proper enough to receive them; for this is only saying what all concede, that his reputation may be shown.

But the distinctions drawn and the phrasings used in the various decisions and jurisdictions differ considerably.[1] It may be noticed, however, that

§ 74. [1] ENGLAND: The reception of such evidence goes back to the case of Leicester *v.* Walter, 2 Camp. 251 (1809: libel; general issue; the right to dispute the damages under the general issue, being conceded, Mansfield, C. J., received evidence of "a general suspicion of the plaintiff's character", "general rumor", etc., "to show that he could receive little injury", "provided the reports got into many men's mouths"; follow Eamer *v.* Merle, unreported, by Lord Ellenborough, C. J., in which the damages upon a slander charging insolvency were mitigated by "rumors in circulation" to the effect); the subsequent treatment of the subject is well analyzed by Cave, J., summing up the cases in Scott *v.* Sampson, L. R. 8 Q. B. D. 491 (1882): "While such evidence appears to have been admitted by Lord Ellenborough, C. J., in Eamer *v.* Merle (not reported), and by Cresswell, J., with the approbation of Wightman, J., in Richards *v.* Richards, 2 Moo. & Rob. 557, and while its admissibility was supported by Pigot, C. B., in Bell *v.* Parke, 11 Ir. C. L. R. 413, it, was doubted by Abbott, C. J., in Waithman *v.* Weaver, 11 Price 257 n. and by Coleridge, J., in Nye *v.* Thompson, 16 Q. B. 175, and it was held inadmissible by Fitzgerald and Hughes, B. B., in Bell *v.* Parke, and by the whole Court of Exchequer, in Jones *v.* Stevens, 11 Price 235"; he then mentions Leicester *v.* Walter, 2 Camp. 251, as an early ruling of a peculiar sort; the only case omitted by the learned judge is Anon. *v.* Moor, 1 M. & S. 284, which received "reports in the neighborhood." The rule of exclusion seems settled for England by Scott *v.* Sampson.

CANADA: 1885, McGregor *v.* McArthur, 5 U. C. C. P. 493 (breach of promise; obscure).

UNITED STATES: *Federal:* 1900, Sun Print. & P. Ass'n *v.* Schenck, 40 C. C. A. 163, 98 Fed. 925 (prior rumors of the act, excluded); *Alabama:* 1834, Commons *v.* Walters, 1 Port. 323 (charge of receiving stolen goods; general suspicion in the neighborhood, before the charge, held admissible, as involving, "loss of character"); 1846, Bradley *v.* Gibson, 9 Ala. 406 (charge that the plaintiff was a hog thief and had left Mississippi to avoid a trial for hog-stealing; such reports excluded, except that after showing bad general character, the reports might perhaps have been used to indicate its extent; the preceding case thus explained); Holley *v.* Burgess, 9 Ala. 730 (approving Bradley *v.* Gibson); *California:* 1901, Hearne *v.* De Young, 132 Cal. 357, 64 Pac. 576 (mere rumors of the act in question, excluded); *Colorado:* 1913, Meeker *v.* Post P. & P. Co., 55 Colo. 355, 135 Pac. 457 (rumors, etc., excluded, no issue of mitigation of damages being made under the pleading); *Connecticut:* 1820, Bailey *v.* Hyde, 3 Conn. 463, 466 ("reports in the neighborhood that he had been guilty of practices similar", admissible if they have circulated so far "as to have blemished the plaintiff's character"); 1822, Treat *v.* Browning, 4 Conn. 408, 414 (reports admitted as affecting the damages by amounting to "common fame or reputation"; purporting to follow Leicester *v.* Walter; here the slander was that the plaintiff had a bastard child); *Georgia:* 1897, Cox *v.* Strickland, 101 Ga. 482, 28 S. E. 655 (charge of arson; rumors of various arsons, excluded); *Illinois:* 1858, Sheahan *v.* Collins, 20 Ill. 328 (obscure ruling, but *semble* excluded); 1873, Strader *v.* Snyder, 67 Ill. 404, 410 (general repute as to the fact charged, excluded); *Indiana:* 1825, Henson *v.* Veatch, 1 Blackf. 371 (left undecided); 1841, Sanders *v.* Johnson, 6 Blackf. 54 (the mere existence of reports imputing the crime, without any showing as to their generality or their effect on the reputation, excluded, at least where the plea is justification); 1854, Kelley *v.* Dillon, 5 Ind. 428 (same as next case); 1867, Bickenstaff *v.* Perrin, 27 Ind. 528 (general suspicion or rumor of the acts imputed, but not the mere existence of *a* rumor or suspicion, admissible); *Iowa:* 1887, Hanners *v.* McClelland, 74 Ia. 320, 322, 37 N. W. 389 (rumors excluded, distinguishing Bar *v.* Hack, 46 Ia. 310, and in effect overruling it on this point); 1912, Mills *v.* Flynn, 157 Ia. 477, 137 N. W. 1082 (Hanners *v.* McClelland followed); 1913, Ott *v.* Murphy, 160 Ia. 730, 141 N. W. 463 (rumors excluded); *Kentucky:* 1910, Morgan *v.* Lexington Herald Co., 138 Ky. 637, 128 S. W. 1064 (admitted); *Louisiana:* 1828, Kendrick *v.* Kemp, 6 Mart. N. S. 500 (that "the people of St. H. were in the habit of" abusing the plaintiff, excluded); *Massachusetts:* excluded in the following cases: 1810, Wolcott *v.* Hall, 6 Mass. 518; 1822, Alderman *v.* French, 1 Pick. 1, 17; 1843, Stone *v.* Varney, 7 Metc. 91; 1848, Watson *v.* Moore, 2 Cush. 140; 1874, Peterson *v.* Morgan, 116 Mass. 350; *Michigan:* 1877, Proctor *v.* Houghtaling, 37 Mich. 41, 44 (excluding "particular suspicions"); 1897, Wolff *v.* Smith, 113 Mich. 359, 70 N. W. 1010, *semble* (same); *Minnesota:* 1868, Simmons *v.* Holster, 13 Minn. 249, 257 (not decided); *Mississippi:* 1859, Powers *v.* Presgroves, 38 Miss. 227, 241 (excluded); *Missouri:* 1822, Anthony *v.* Stephens, 1 Mo. 254 (current report as to the fact charged, excluded); 1843, Moberly *v.* Preston, 8 Mo. 462, 466, *semble* (same); *New Hampshire:* 1827, Mason *v.* Mason, 4 N. H. 114, *semble* (common report, excluded); 1852, Dame *v.* Kenney, 25 N. H. 318 (reports excluded, even though they actually affect the reputation); *New York:* 1829, King *v.* Root, 4 Wend. 129, 140 (rumors excluded; but reputation for the class of act admitted, if "of the same quality or degree

some Courts recognize a third sort of thing, a reputation as to the act charged, — lying between a mere rumor as to the act, on one hand, and a reputation as to the particular trait involved, on the other; but this variation seems anomalous and unsound.

This use of such rumors, as negativing the harm done to the plaintiff's reputation, is to be distinguished from two other uses of similar facts, arising chiefly under the substantive law of Defamation, but also forming the subject of much controversy in the past: (1) *Conduct* or rumored conduct of the plaintiff offered as constituting the defendant's *grounds for suspecting* the plaintiff of the offence charged, and thus indicating the absence of malice and going in mitigation of damages; the argument against this is that such matter, so far as it amounts to anything substantial, should be made to support a plea of truth; (2) the fact that the defendant did not originate the charge, but merely *heard it from others*, offered to negative malice and mitigate damages; the argument against this is that a wise policy will not regard it as an extenuation. Both these subjects belong to the law of Defamation; and, as the cases treating them are not likely to be confounded with evidentiary rulings upon character or repute, it is unnecessary to deal with them here. Moreover, the use of *particular acts of misconduct* to evidence the character or reputation usable under the principles of the preceding sections, though it involves an evidentiary question, is governed by wholly different considerations (*post*, §§ 207, 209).

§ 75. (2) **Plaintiff's Reputed Bad Character as mitigating Damages in Other Actions (Seduction, Crim. Con., Indecent Assault, Breach of Marriage Promise, Malicious Prosecution, etc.).** It is obvious that, on the principle so generally accepted for an action of Defamation, the plaintiff's reputed

charged in the libel"; *i.e.* the damages for a charge of beastly intoxication not to be mitigated by reputation for the free use of liquors; but Mather, Sen., argues forcefully to the contrary, in dissenting at 158); 1838, Kennedy *v.* Gifford, 19 Wend. 298, 301 (reputation as to the charge, as well as rumors, excluded); *North Carolina:* 1826, Nelson *v.* Evans, 1 Dev. 9 (charge of theft; "general opinion and belief" of the plaintiff's guilt, admitted); 1861, Luther *v.* Skeen, 8 Jones L. 356 (reports of specific misconduct, excluded); *Ohio:* 1831, Dewit *v.* Greenfield, 5 Oh. 226 (general suspicion as to the plaintiff's guilt of the act charged, admissible); 1846, Fisher *v.* Patterson, 14 Oh. 418, 425 (general reputation of a different analogous act, excluded); 1855, Van Derveer *v.* Sutphin, 5 Oh. St. 293, 298 (reports in general circulation as to the facts charged, excluded); *Pennsylvania:* 1833, Smith *v.* Ruckecker, 4 Rawle 295 (charge to whoring; rumors as to the plaintiff's illicit intercourse, excluded); 1836, Long *v.* Brougher, 5 Watts 439 (reports of the same crime, excluded; quoted *supra*); *South Carolina:* 1831, Freeman *v.* Price, 2 Bail. 115 ("whether he had never heard anything against the reputation of the plaintiff", excluded; distinguishing it from the fact that the plaintiff "was generally suspected of the fact charged"; but the latter is not allowed in the authority cited); 1833, Anon., 1 Hill S. C. 251, 253 (apparently contradictory, in allowing suspicious facts to be shown; but the doctrine of suspicion as an excuse was probably in the court's mind); 1836, Randall *v.* Holsenbake, 3 Hill S. C. 177 (may prove suspicious facts, as in preceding case; also "that the plaintiff was generally reported and suspected to be guilty of the crime imputed to him"); *Wisconsin:* 1860, Haskins *v.* Lumsden, 10 Wis. 359 (mere rumors excluded; "the existence of unfavorable and defamatory rumors and reports [as to the fact charged] is one thing, and a real loss of character and standing in [the] community quite another"); 1906, Earley *v.* Winn, 129 Wis. 290, 109 N. W. 633 (slander that plaintiff whipped her mother; Haskins *v.* Lumsden followed).

character may be considered, in mitigation of damages, in any other action in which the law of Damages recognizes the harm to reputation as one of the elements of recovery.

This has always been conceded for the action of *seduction*, for here the disgrace to the father must naturally be less or lacking if the daughter is already of bad reputation for chastity; her previous bad reputation may therefore be shown.[1] In the same way, in a husband's action for *criminal conversation*, the wife's previous bad reputation may be shown.[2] Here and in the preceding action, the father's or husband's *own reputation* is, as such, apparently immaterial; but a distinction is to be made as to his actual conduct or character, for this, while not necessarily an excuse for the defendant, may well serve in mitigation, inasmuch as the loss of his wife's or daughter's virtue can mean little to a person of his behavior; thus the reputation is here received as evidence of the actual character.[3]

The reputed character of the plaintiff in an action for *breach of promise*

§ 75. [1] ENGLAND: 1808, Bamfield *v.* Massey, 1 Camp. 460, Lord Ellenborough, C. J.: 1814, Dodd *v.* Norris, 3 id. 519, same judge; 1840, Carpenter *v.* Wall, 11 A. & E. 804.

CANADA: 1876, McCreary *v.* Grundy, 39 U. C. Q. B. 316, 325.

UNITED STATES: *Ala.* 1830, Drish *v.* Davenport, 2 Stew. 226, 270; *Conn.* 1811, Davenport *v.* Russell, 5 Day 145, 148; *Del.* 1851, Robinson *v.* Burton, 5 Harringt. 335, 337; *Ill.* 1874, White *v.* Murtland, 71 Ill. 250, 264; *Ind.* 1859, Shattuck *v.* Myers, 13 Ind. 50; 1868, Bell *v.* Rinker, 29 Ind. 269; 1884, South Bend *v.* Hardy, 98 Ind. 580; *Iowa:* 1848, Carter *v.* Cavanaugh, 1 Greene 171, 175, *semble; Mass.* 1807, Boynton *v.* Kellogg, 3 Mass. 189 (excluded so far as the bad character was acquired in consequence of the seduction); *Minn.* 1904, Wyman *v.* Lynde, 93 Minn. 257, 101 N. W. 163 (assault and criminal abuse; the daughter's subsequent character, excluded); *Mo.* 1875, McKern *v.* Calbert, 59 Mo. 242 (excluded; whether as negativing an essential element of the plaintiff's case, viz. his daughter's chastity, or in mitigation of damages, does not appear); *N. Y.* 1805, Akerley *v.* Haines, 2 Caines 292 (*contra*, unchaste character of the daughter immaterial, as the loss of service is the basis of the claim); 1851, Pratt *v.* Andrews, 4 N. Y. 495, Bronson, C. J., *semble* (admissible); *Pa.* 1863, Hoffman *v.* Kemerer, 44 Pa. 452; 1858, *Tenn.* Reed *v.* Williams, 5 Sneed 580, 582; 1858, Thompson *v.* Clendening, 1 Head 287, 296 (but not after the time of seduction); *Wis.* 1864, Watry *v.* Ferber, 18 Wis. 500, 503.

For the woman's character, as a main part of the issue and not merely as mitigating damages, in a *criminal prosecution* or her *own statutory action* by the woman for seduction, see *post*, § 79.

Compare also the rulings on *character as a motive* (*post*, § 390, n. 1).

[2] 1824, Starkie, Evidence, II, 305; 1811, Davenport *v.* Russell, 5 Day Conn. 145, 148; 1876, Crose *v.* Rutledge, 81 Ill. 266; 1906, Hardwick *v.* Hardwick, 130 Ia. 230, 106 N. W. 639 (loss of consortium; plaintiff's bad moral character, admitted); 1851, Pratt *v.* Andrews, 4 N. Y. 495, Bronson, C. J. (approving Bamfield *v.* Massey and Dodd *v.* Norris); 1823, Anderson *v.* Long, 10 S. & R. Pa. 61; 1816, Ligon *v.* Ford, 5 Munf. Va. 10, 16.

Apparently the wife's or daughter's *actual character* would also be material as mitigating the injury to *feelings* (McKern *v.* Calvert, *supra*).

For the use of *particular acts* as showing this actual character of the daughter, see *post*, §§ 210, 211.

Compare also the cases cited *post*, § 390, (character as a *motive*).

[3] *Conn.* 1832, Norton *v.* Warner, 9 Conn. 172 (general moral character excluded; although his character as a husband is to be considered); *Del.* 1851, Robinson *v.* Burton, 5 Harringt. 335, 338 (reputation here not admitted to show the dissolute character of the father to mitigate damages in an action for seduction, because it "can be proved by particulars"); *Tenn.* 1858, Reed *v.* Williams, 5 Sneed 580, 582 (admitted); 1858, Thompson *v.* Clendening, 1 Head 287, 296 (admitted; but not the mother's reputation); 1900, Spellings *v.* Parks, 104 Tenn. 351, 58 S. W. 126 (seduction; bad reputation of plaintiff's mother, inadmissible).

For the use of *particular acts* as showing this actual character of the father, see *post*, §§ 210, 211.

of marriage,[4] or for *indecent assault*,[5] or for *malicious* prosecution,[6] is necessarily involved in the measurement of damages; but not in the *ordinary tort-actions* for violence.[7] Yet where injury to *earning-capacity* is involved, the actual character may be material,[8] and conceivably also the reputed character for skill and the like.

§ 76. (3) **Plaintiff's Reputed Good Character as affecting Damages in Defamation, Seduction, Crim. Con., etc.** That the plaintiff under the foregoing doctrine may refute the imputations cast on his reputed character, by showing his *good* reputed character, is not doubted. But whether he may go into it until it has been attacked has been the subject of much difference of opinion. The better rule seems to be that his reputation is assumed to be good, and that he has therefore no need to sustain it until it has been attacked.[1]

[4] 1855, McGregor *v.* McArthur, 5 U. C. C. P. 493; 1912, Young *v.* Corrigan, U. S. D. C. N. D. Ohio, 208 Fed. 431; 1860, Burnett *v.* Simpkins, 24 Ill. 267; 1873, Williams *v.* Hollingsworth, 6 Baxt. Tenn. 12, 16; 1920, Ganerke *v.* Kiley, 171 Wis. 543, 177 N. W. 889 (loss of reputation by reason of the breach, admissible for the plaintiff; birth of a child, or pregnancy, admissible to evidence loss of reputation).

Distinguish the following use: 1917, D. *v.* B., 38 D. L. R. 243, Ont. (breach of promise of marriage; repute of plaintiff's community as to her unchastity, consequent upon defendant's breach; decision not clear).

Distinguish here the use of the woman's bad character as an *excuse for the breach* (*post*, § 77).

[5] Here both the actual and the reputed character would have a bearing: 1897, Gross *v.* Brodrecht, 24 Ont. App. 687; 1889, Gore *v.* Curtis, 81 Me. 403, 405, 17 Atl. 314 (indecent assault; the plaintiff's character for unchastity, admitted); 1893, Miller *v.* Curtis, 158 Mass. 127, 130, 32 N. E. 1039 (indecent assault; damages to feelings; the plaintiff's virtue or the reverse, as affecting her shocked feelings, *semble*, admissible); 1882, Mitchell *v.* Work, 13 R. I. 645 (same; "the mental sufferings of a vulgar and licentious woman from an indecent assault would be less than that of a modest and virtuous woman"); 1903, Barton *v.* Bruley, 119 Wis. 326, 96 N. W. 815.

For the use of *particular acts* to evidence this character, see *post*, § 212.

[6] 1907, Emory *v.* Eggan, 75 Kan. 82, 88 Pac. 740; 1849, Bacon *v.* Towne, 4 Cush. Mass. 240; 1907, Conklin *v.* Consolidated R. Co., 196 Mass. 302, 82 N. E. 23 (assault, arrest, and malicious prosecution); 1919, Boyers *v.* Lindhorst, 280 Mo. 5, 216 S. W. 536 (malicious prosecution; general bad repute, admissible); 1901, Hiersche *v.* Scott, — Nebr. —, 95 N. W. 494 (reputation of the plaintiff for insanity, admitted in an action for maliciously instituting proceedings to commit); 1920, Schreiner *v.* Hutter, 104 Nebr. 539, 177 N. W. 826 (abuse of process; plaintiff's bad repute, excluded, under the pleadings); 1900, Drummond *v.* Henderson, 62 Oh. 136, 56 N. E. 650 (malicious prosecution, against a magistrate; plaintiff's bad reputation for honesty admitted); 1891, Wolf *v.* Perryman, 82 Tex. 112, 120, 17 S. W. 772.

Distinguish here the use of the plaintiff's bad character as evidencing *reasonable ground of suspicion* (*post*, § 258).

[7] 1921, Meints *v.* Huntington, 8th C. C. A., 276 Fed. 245 (battery and false imprisonment, committed on an alleged disloyalist by alleged loyalists; "reputation or character of the litigants", *i.e.* plaintiff, held inadmissible; unsound, because here the circumstances might have justified exemplary damages, but for the plaintiff's disloyal character); 1851, Corning *v.* Corning, 6 N. Y. 97 (battery; excluded). *Contra:* 1920, Wrabek *v.* Suchomel, 145 Minn. 468, 177 N. W. 764 (assault and battery on a public occasion; plaintiff's bad reputation as a law-abiding citizen, admitted under a general denial).

[8] 1895, Wright *v.* Crawfordsville, 142 Ind. 636, 639, 42 N. E. 227 ("vicious habit of becoming intoxicated", provable as affecting earning capacity of deceased in action for death).

§ 76. [1] DEFAMATION: *Excluded before attack: Fed.* 1918, Buckeye Cotton Oil Co. *v.* Sloan, 6th C. C. A., 250 Fed. 712 (not decided; but here the cross-examination had attacked plaintiff's character); 1917, Washington Post Co. *v.* Chaloner, 47 D. C. App. 66 (charge of murder; plea of truth; admitted); *Del.* 1841, Parke *v.* Blackiston, 3 Harringt. 373, 375 (absolutely, because the defendant is not allowed to attack it); *Ind.* 1843, McCabe *v.* Platter, 6 Blackf. 405; 1861, Miles *v.* Vanhorn, 17 Ind. 249; 1867, Hann *v.* Wilson, 28 Ind. 301; *Mass.* 1827, Harding *v.* Brooks, 5 Pick. 244, *semble*; *Mont.* 1916, Fowlie *v.* Cruse, 52 Mont. 222, 157 Pac. 958 (but here merely instructing the jury under Rev. C. § 8026);

§ 77. (4) **Party's Bad Character as an Excuse, or as otherwise in Issue; Breach of Promise of Marriage.** The character of a plaintiff, reputed or actual, may come *into issue*, under the substantive law and the pleadings, and thus becomes material. No principle of evidence is involved, until the question arises as to the mode of evidencing the character (*post*, §§ 202–208).[1]

In the action for *breach of promise of marriage*, to begin with, the actual bad character of the plaintiff as to chastity may be an excuse for terminating the contract, and is therefore material.[2]

§ 78. **Same: Character of Houses of Ill-fame or of their Inmates; Gambling Houses; Liquor Resorts; etc.** In prosecutions for keeping a bawdy-house or house of ill-fame, or a place of resort for gambling, liquor-selling, or the

N. H. 1851, Severance *v.* Hilton, 24 N. H. 148; 1852, Dame *v.* Kenney, 25 N. H. 324 (improper evidence of rumors is sufficient to constitute an attack); *Oh.* 1893, Blakeslee *v.* Hughes, 50 Oh. 490, 34 N. E. 793; *Or.* 1893, Cooper *v.* Phipps, 24 Or. 357, 362, 33 Pac. 985; *Pa.* 1902, Clark *v.* North American Co., 203 Pa. 346, 53 Atl. 237 (it is immaterial whether the impeachment is made directly or by insinuation on cross-examination); 1906, Burkhart *v.* North American Co., 214 Pa. 39, 63 Atl. 410 (Clark *v.* North American Co. followed).

Admitted: 1803, R. *v.* Waring, 5 Esp. 13, Alvanley, L. C. J.; 1813, Givens *v.* Bradley, 3 Bibb Ky. 192, 195, *semble;* 1835, Williams *v.* Greenwade, 3 Dana 432 (general issue; good character admissible "in aggravation", before attack); 1915, Deitchman *v.* Bowles, 166 Ky. 285, 179 S. W. 249; 1894, Stafford *v.* Journal Ass., 142 N. Y. 598, 37 N. E. 625 (admitted on the facts); 1853, Sample *v.* Wynn, Busbee N. C. 322; 1867, Adams *v.* Lawson, 17 Gratt. Va. 250, 258; 1869, Shroyer *v.* Miller, 3 W. Va. 158, 161.

Not decided: 1913, Stearns *v.* Long, 215 Mass. 152, 102 N. E. 326.

Distinguish the following: 1915, Wilson *v.* Sun Pub. Co., 85 Wash. 503, 148 Pac. 774 (defamation; the plaintiffs were partners and the libel was on their restaurant business; reputation of "one of the partners", excluded, on the issue of damages, only joint reputation being admissible; unsound, because untrue to human nature).

SEDUCTION: *Excluded before attack:* 1808, Bamfield *v.* Massey, 1 Camp. 460, Ellenborough, L. C. J.; 1814, Dodd *v.* Norris, 3 Camp. 520, same judge; 1876, Burke *v.* Scribner, 16 N. Br. 652 (breach of promise; after cross-examination to prior unchastity, the plaintiff's good character was admitted); 1907, Colburn *v.* Marble, 196 Mass. 376, 82 N. E. 28 (particular acts of unchastity do not constitute such an attack); 1851, Pratt *v.* Andrews, 4 N. Y. 493, Bronson, C. J., *semble* (particular acts of misconduct do not constitute such an attack).

CRIMINAL CONVERSATION: 1800, R. *v.* Francis, 3 Esp. 116, Lord Kenyon, C. J. (the defendant pleaded the prosecutor's dissipated character, etc., in mitigation; but as his witnesses denied this, the prosecutor was not allowed to go into it); 1851, Pratt *v.* Andrews, N. Y. *supra*.

MALICIOUS PROSECUTION: 1855, Goldsmith *v.* Picard, 27 Ala. 142, 147, 153 (malicious attachment, whereby the plaintiff's business was injured; his good reputation as a merchant admitted).

SUNDRIES: 1813, Givens *v.* Bradley, 3 Bibb 192, 195 (battery; excluded).

§ 77. [1] The following cases illustrate the variety of issues: 1776, Martyn *v.* Hind, Cowp. 437, 441 (the plaintiff's character and conduct as a justification for the defendant's removal of the plaintiff, suing for dismissal from his curacy); 1893, People *v.* Gates, 46 Cal. 52 (a statute punishing "open and notorious cohabitation"; the notoriety is provable as a fact in issue).

The use of character to evidence *reasonable grounds for belief* (in malicious prosecution and the like) is dealt with *post*, §§ 246–258.

[2] 1801, Foulkes *v.* Sellway, 3 Esp. 236; 1796, Woodard *v.* Bellamy, 2 Root Conn. 354; 1897, Smith *v.* Hall, 69 Conn. 651, 38 Atl. 386 (the bad character of the plaintiff being pleaded in defence, evidence of her good character was admitted in rebuttal); 1907, Colburn *v.* Marble, 196 Mass. 376, 82 N. E. 28 (collecting the cases as to the various excuses of this sort); 1875, Von Storch *v.* Griffin, 77 Pa. 504.

So also for *alienation of affections:* 1920, Justice *v.* Clinard, 142 Tenn. 208, 217 S. W. 663 (alienation of affections).

But if *actual unchastity* is the defence, reputed chastity is not material in rebuttal: 1911, McKane *v.* Howard, 202 N. Y. 181, 95 N. E. 642 (on a plea of the plaintiff's prior fornication, in defence to an action for breach of promise, the plaintiff's good repute for chastity is inadmissible).

For the use of *particular acts* as showing chastity — character, see *post*, § 206.

like, it is often difficult to distinguish whether a question of Evidence or a question of Criminal Law is involved; and much will depend on the elements of the crime as determined by the wording of the statute and by its judicial construction.

(*a*) *Character of the House.* If it distinctly appears in the statute that the *repute* of the house is the essential criminal fact, so that merely to keep a house of that reputation is the offence, then the reputation is a fact in issue, and the reputation may be shown, irrespective of the actual character or use of the house.[1] But if the *actual character* or use of the house is also or alone an element of the crime, then the question of the use of reputation is an evidentiary one, *i.e.* whether reputation, as an exception to the Hearsay rule, may be used to evidence the character; this is dealt with *post*, § 1620.[2]

(*b*) *Character of the Inmates.* A house of ill-fame, or disorderly or bawdy house, signifies a house commonly resorted to or lived in by prostitutes for purposes of prostitution; thus, one element in the offence of keeping it may be the kind of persons resorting to or living in it. Now it is usually understood by Courts that this element of the crime involves, not merely the *actual* but also the *reputed* character of these persons as prostitutes; in which case their reputed character becomes a fact in issue; and this is the general result of the precedents.[3] It is of course conceivable that a Court may hold their

§ 78. [1] 1913, Massee *v.* Williams, 6th C. C. A., 207 Fed. 222 (undecided); 1846, Caldwell *v.* State, 17 Conn. 467, 472; 1873, State *v.* Morgan, 40 Conn. 44 (a statute punishing the keeping of a place "reputed" to sell liquors); State *v.* Buckley, 40 Conn. 246; 1880, State *v.* Thomas, 47 Conn. 546; 1909, State *v.* Anderson, 82 Conn. 111, 72 Atl. 648 (but if the actual character is disputed, then the reputation becomes merely evidential, and the actual character must be found); 1879, King *v.* State, 17 Fla. 183, 190 ("ill-fame"; reputation admitted both of the house and of the individuals who resort to it); 1894, State *v.* West, 46 La. An. 1009, 1015, 15 So. 418 (reputation of the house, with other facts, admitted to show it to be disorderly), 1914, State *v.* Fanning, 97 Nebr. 224, 149 N. W. 413 (opinion somewhat indefinite as to the points decided); 1893, State *v.* Hull, 18 R. I. 207, 26 Atl. 191 (reputation of the house or of its frequenters, admissible, but not of the defendant); 1873, Morris *v.* State, 38 Tex. 603 ("house for the purpose of public prostitution"; reputation admitted as "the subject of the inquiry"); 1875, Sylvester *v.* State, 42 Tex. 496 (same); 1872, State *v.* Brunell, 29 Wis. 435 (not clear whether reputation is treated as evidential or in issue).

Of course the actual character, or use, of the house may also be shown (where the terms of the statute do not exclusively make repute the element).

Whether this actual use may be shown by *particular instances* of prostitution, etc., is discussed *post*, § 204.

Whether *knowledge* may be shown by *reputation*, is noticed *post*, § 254.

Whether the Legislature may *constitutionally* make the fact of *reputation alone a crime*, is considered *post*, § 1354.

[2] There is also a third conceivable situation, viz., that the house must be one of prostitution both actually and by repute; in this case the reputation is in issue on the latter element, but the evidentiary question may arise whether it is also usable to prove the former.

[3] In most of the ensuing cases the distinction is not made, and the inmates' "character" is admitted: 1833, U. S. *v.* Stevens, 4 Cr. C. C. 341 (on a count charging the defendant with suffering persons of ill-fame to come together, the reputation of the visitors of the house was admitted); 1920, Thaler *v.* U. S., 6th C. C. A., 261 Fed. 746 (assisting patronage of a house of ill-fame, under U. S. St. May 18, 1917, § 13; reputation of defendant's house-detective as a panderer, admitted); 1876, Wooster *v.* State, 55 Ala. 221; 1919, Batesville *v.* Smythe, 138 Ark. 276, 211 S. W. 140; 1899, Demartini *v.* Anderson, 127 Cal. 33, 59 Pac. 207; 1866, State *v.* Jerome, 33 Conn. 265, 269; 1900, Howard *v.* People, 27 Colo. 396, 61 Pac. 595 (as well as that of the defendant); 1918, Graul *v.* U. S., 47 D. C. App. 543, 548 (reputa-

actual character to be the essential thing, and then the evidentiary question is again raised, whether the reputation may be used to prove this. Since, however, the propriety of thus using the reputation is plain (*post*, § 1620, under the Hearsay rule), the distinction ought to be practically of little consequence.

§ 79. **Same: Criminal Prosecution or Statutory Action for Seduction.** Where by statute the crime of seduction is established or an action given to the woman, three cases arise. (1) Either the statute (as occasionally) describes the woman as of "chaste repute"; or (2) it describes her as of "chaste character"; or (3) it does not make any limitation of the sort. In the latter case, however, the Courts have almost uniformly (*post*, § 205) implied into the statute the requirement of (2); so that (2) and (3) stand practically on the same footing. Now in (1) the reputation is the thing in issue; the actual character is immaterial. The reputation is therefore provable without doubt; and the only question that can arise is whether particular acts of unchastity are usable (*post*, § 205). In (2) the actual character is the matter in issue. One question is whether particular acts of unchastity are usable to show it; this is dealt with elsewhere (*post*, § 205). Another question is whether reputation may be used to show the actual character; this involves the exception to the Hearsay rule, and is therefore discussed elsewhere (*post*, § 1620). Another question is whether the chastity is *presumed*, *i.e.* whether the burden of producing evidence of unchastity is on the defendant, and whether the prosecution must or may evidence the woman's good character before it has been disputed by the defendant's evidence (*post*, § 2528); or similar question arises where the issue is merely as to damages (*ante*, § 76), but the solution is not necessarily the same.

tion of some inmates three or four years before, admitted as evidencing defendant's knowledge); 1879, King *v.* State, 17 Fla. 183, 190 (see citation *supra*); 1898, Shaffer *v.* State, 87 Md. 124, 39 Atl. 313; 1856, Com. *v.* Kimball, 7 Gray Mass. 328; 1861, Com. *v.* Gannett, 1 All. Mass. 7; 1875, Com. *v.* Cardoze, 119 Mass. 210; 1906, State *v.* Hoyle, 98 Minn. 254, 107 N. W. 1130; 1895, State *v.* Hendricks, 15 Mont. 194, 39 Pac. 94; 1851, Clementine *v.* State, 14 Mo. 113; 1860, State *v.* M'Gregor, 41 N. H. 407, 412; 1915, State *v.* Koettgen, 88 N. J. L. 51, 95 Atl. 747 (Swayze, J.: "Thieves and prostitutes do not gather at a church"); 1920, State *v.* Ingram, 180 N. C. 672, 105 S. E. 3 (drunken character of frequenters of defendant's pool-room, admitted); R. I. Gen. L. 1909, c. 108, § 3 (quoted *post*, § 1620); 1893, State *v.* Hull, 18 R. I. 207 (see citation *supra*); 1838, State *v.* McDowell, Dudley S. C. 345, 349 ("when the facts are proved that the defendants, common prostitutes, occupied particular houses . . . , a strong presumption of the character of the houses was raised").

Whether the character or occupation of such inmate may be shown by *particular instances* of prostitution, etc., is discussed *post*, § 204.

The character of the *defendant himself* may not be used against him as defendant (*ante*, § 57), but his character as an inmate may well be; hence a variance of rulings: 1919, Batesville *v.* Smythe, 138 Ark. 276, 211 S. W. 140 (admitted, when the accused is an inmate); 1901, State *v.* Beebe, 115 Ia. 128, 88 N. W. 358 (whether the defendant's reputation for unchastity is receivable, not decided); 1893, State *v.* Hull, R. I., *supra* (excluded); 1900, Howard *v.* People, Colo., *supra* (admitted); 1900, Dailey *v.* State, — Tex. Cr. —, 55 S. W. 823 (admitted).

Compare the cases cited *post*, § 1620 (reputation).

The same issues might arise on a charge of keeping a house for illegal *gaming*; but usually the statute does not make repute a part of the issue, and the question of *knowledge* (*post*, § 254) or *intent* (*post*, § 367) is the important one.

§ 80. **Same: Character of an Employee, as affecting the Employer's Liability.** By the law of Torts and Agency, an essential fact in the liability of an employer may be the employee's character as an incompetent person (through negligence, intemperance, and the like), and the employer's *knowledge of this incompetence.* Thus the employee's character becomes a fact in issue, and will usually be evidenced through his reputation.[1] There is here no doubt, and no question of Evidence. But the employer's knowledge of this character is also a fact in issue, and the same reputation may serve also to show this knowledge; this is an evidentiary question of the mode of evidencing Knowledge (dealt with *post*, § 249). Besides these aspects, however, there are also occasional instances in which an employee's character may in other ways become material under the issues.[2]

§ 80. [1] For evidence by Reputation, see *post*, §§ 1608–1621 (Hearsay Rule); for evidence by Specific Acts of Negligence, see *post*, § 208; for evidence by Individual Opinion, see *post*, §§ 1984, 1987 (Opinion Rule). For the wholly different question, whether the employee's character may be used to argue that he was or was not negligent on a given occasion, see *ante*, § 65.

[2] 1904, Gould *v.* Magnolia Metal Co., 207 Ill. 172, 69 N. E. 896 (discharge of an employee for moral misconduct; the reputation for unchastity of his women associates, held material); 1911, Saunders *v.* Atchison T. & S. F. R. Co., 86 Kan. 56, 119 Pac. 552 (fire set by locomotives; engineer's character for care and skill, admissible as a part of the facts rebutting the presumption of negligence); 1896, Louisville Ins. Co. *v.* Monarch, 99 Ky. 578, 36 S. W. 563 (the competency of the captain and crew of a steamboat lost, as showing that she was properly manned and therefore seaworthy); 1874, Cleghorn *v.* R. Co., 56 N. Y. 44 (that the culpable employee was known to the defendant to be of intemperate habits, admitted as involving a culpability of the defendant which would support exemplary damages).

TOPIC I (*continued*): PROSPECTANT EVIDENCE OF A HUMAN ACT

CHAPTER VI.

Sub-topic B: PHYSICAL CAPACITY, SKILL, OR MEANS

Sub-topic C: HABIT OR CUSTOM

Sub-topic D: DESIGN OR PLAN

Sub-topic E: EMOTION OR MOTIVE

Sub-topic B: PHYSICAL CAPACITY, SKILL, OR MEANS, AS EVIDENCE OF AN ACT DONE

§ 83. **General Principle.** As indicating the likelihood of a person doing or not doing an act in question, his physical capacity (or lack of it), his technical skill (or lack of it), and his possession (or lack) of the appropriate means or tools, are usually of sufficient probative value to be admissible. The circumstances of each case usually make it clear whether one of these data is there relevant; and no more detailed rules need to be laid down, nor has any important controversy arisen over the relevancy of this species of evidence.

The considerations that have led to exclusion of such facts in a few instances have usually been considerations affecting some other use or aspect of the evidence, with which the present use was confounded. Thus, the rules against

the use of a party's character as evidence (*ante*, §§ 55, 64) have sometimes been thought to require exclusion of facts wrongly construed as equivalent to character. Again, the rule against using an accused person's specific misconduct to show character (*post*, § 193), and limiting such misconduct, when used to show intent, by strict conditions (*post*, § 300), may sometimes be thought to operate against the fact of possession of criminal tools or other means. The general impropriety of using against an accused person either character, or specific misconduct to show character, is so constantly in the mind of Courts that they occasionally ignore the possibilities of evidence from the present point of view, and, by a wrong construction of the purpose of the evidence, feel bound to apply to it exclusionary rules that have no concern with it. This much must be kept in mind as a key to rulings which are otherwise inexplicable and ought not to stand as precedents.

As a general principle, then, the *existence or lack of the physical capacity, skill, or means* to do an act is admissible as some evidence of the possibility or probability of the person's doing or not doing it:[1]

1879, TAYLOR, J., in *Ingalls* v. *State*, 48 Wis. 647, 651, 4 N. W. 785: "There can be no doubt as to the right of a person accused of crime to show that at the time of its commission he was physically incapable of committing it. There can be no doubt of the right of the accused to show that he was at the time prostrated by a disease which rendered it highly improbable that he could have endured the exertion and labor necessary to commit the crime. . . . In such case the intoxication is not shown for the purpose of excuse or mitigation of the offence charged, but as evidence tending to show that he was not present and did not commit the acts constituting the offence. Evidence of this kind would have but little weight against direct evidence showing the actual presence of the accused at the time and place when and where the crime was committed; but, certainly, in the absence of any such direct evidence, the accused may give in evidence any fact which would have a natural tendency to render it improbable that he was there and did the acts complained of; and the fact that drunkenness was the thing which tended to prove such improbability, can make no difference. If a man by voluntary drunkenness renders himself incapable of walking for a limited time, it is just as competent evidence tending to show that he did not walk during the time that he was so incapable, as though he had been so rendered incapable by paralysis of his limbs from some cause over which he had no control."

The inference from *heredity* belongs under this principle. Its propriety has been conceded, with certain limitations, as evidence of *paternity* and *race* (*post*, § 165), of *insanity* (*post*, § 232) and of *long life* (*post*, § 223).

§ 84. **Strength.** The physical strength of a person may be of probative value to show that he was peculiarly capable or peculiarly incapable of doing the act in question.[1] How to evidence the strength is a different question;

§ 83. [1] The contrary broad statement in Costelo *v.* Crowell, 139 Mass. 591, 2 N. E. 698 (1885), is unquestionably unsound, and is negatived by every day's trials.

§ 84. [1] 1792. Goodtitle *v.* Braham, 4 T. R. 498 (physical inability from old age of a testator to write as long a document as the alleged will, admitted); 1838, Ellis *v.* Short, 21 Pick. 142 (bodily strength of a person arrested, as indicating the struggles made and therefore the force necessary to detain him, admitted); 1895, Thiede *v.* Utah, 11 Utah 241, 94 Pac. 837, 139 U. S. 510, 16 Sup. 62 (that the defendant was a powerful man, admitted, the death-wound having been caused by a blow requiring strength); 1897, State *v.* Cushing, 17 Wash. 544, 50 Pac. 512 (physical strength; notice necessary where the fact of his strength was not otherwise material).

the use of *specific feats or other instances* of strength may be proper (*post*, § 220); a precedent admitting such evidence will usually be a precedent on the present subject also.

§ 85. **Intoxication.** A condition of intoxication by alcoholic liquor, as involving a peculiar condition of the body and faculties, may be of probative value as showing that the person could or could not do the act in question.[1] How to evidence intoxication or intemperance is a different question (*post*, § 235). Intemperance, or a *habit* of drinking, is not always to be distinguished from an intoxicated condition, but its evidential use rests often on a different principle (*post*, § 96).

§ 86. **Mental Powers.** The strength or feebleness of the mental or intellectual faculties may have probative value to show that an act was or was not done which required a certain amount or quality of such ability. The commonest use of this sort of evidence is in controversies over undue influence in executing a will; for the mental condition may indicate whether on a given occasion the testator succumbed to the influence. There may, however, be other situations where similar facts would be relevant.[1] In cases of *undue influence*, the usual evidentiary question is whether a previous or subsequent mental condition may be used to show the condition at the time in question (*post*, § 230).

§ 87. **Skill, Technical Knowledge.** The possession or lack of a special skill, dexterity, or knowledge, may be of probative value to show the probable

§ 85. [1] *Indiana:* 1895, Wright *v.* Crawfordsville, 142 Ind. 636, 42 N. E. 227 (admitting intoxication at the time of plaintiff's injury, to show probable contributory negligence); *Kansas:* 1872, State *v.* Horne, 9 Kan. 128 (admitting intoxication at the time of a homicide, as showing incapacity to attack, etc.); *Massachusetts:* 1883, Com. *v.* Ryan, 134 Mass. 223 (confirmed habits of drunkenness and debauchery as likely to cause death, admitted); *New Hampshire:* 1843, Cummings *v.* Nichols, 13 N. H. 429 (Parker, C. J.: "If intemperance tends to produce irritability of the nervous system, weaken the muscular action, and impair the mental faculties — all which is controverted by few at the present day, — evidence of its existence in any particular case certainly has a tendency to show that the labor and services of the subject of it are of less value, other things being equal"); 1902, Guertin *v.* Hudson, 71 N. H. 505, 53 Atl. 736 (injury to a wagon-party in a highway; the party's intoxication, and their destination to a road house for a debauch, held admissible to show probable contributory negligence); *Tennessee:* 1890, Franklin *v.* Franklin, 90 Tenn. 49, 16 S. W. 557 (that a person who was alleged to have forged the will in question had used morphine and whiskey "to such excess as to impair his mind and affect his moral character, thus rendering him capable of perpetrating crimes which in a normal state he would have avoided"; held, admissible to show general criminal irresponsibility, but not to show specific capacity to commit a forgery); *Wisconsin:* 1879, Ingalls *v.* State, 48 Wis. 647, 650 (larceny by cutting a hole in a window-pane, unfastening the window, and entering and taking certain goods in a store without disturbing other goods; evidence admitted that the defendant was at the time so drunk as to be incapable of the intelligent action thus required: see quotation *ante*, § 83).

Compare also the cases dealing with intemperance as a question of *negligence* (*ante*, § 65).

§ 86. [1] Perhaps the following cases belong here: 1897, Davis *v.* State, 51 Nebr. 301, 70 N. W. 984 (train-wrecking on Thursday; "the superstition or belief of [the defendant] D. that Thursday was a lucky day for him, and that anything he attempted on that day would succeed", admitted); 1847, Kauffman *v.* Swar, 5 Pa. St. 230 (action on a lost bond; plea, payment in full; replication, fraudulent procurement of a receipt in full; "the plaintiff's case was to be supported by proof of fraudulent practice, involving a great variety of transactions on the intellect of a weak and intemperate man; and to support it, required evidence of his general habits, thoughtlessness, and extravagance in transactions to many of which the defendant was not a party").

doing or not doing of an act requiring such skill or knowledge. Of the scores of daily instances in trials, uses that have called for rulings are chiefly those of knowledge of *poisons* or the like,[1] skill in *imitation of handwriting*,[2] an experience in *drafting wills* and other legal documents.[3] Often this sort of evidential fact is not to be distinguished from Character on the one hand — as in the case of a physician's skill (*ante*, § 67) — and from Habit on the other hand (*post*, §§ 92–98).

How the skill or knowledge is to be evidenced is another question. Whether skill in imitation of handwriting may be evidenced by particular instances is a mooted subject (*post*, § 221). Mere knowledge, as distinguished from skill, involves similar controversies (*post*, §§ 259, 266), especially in regard to particular instances of forgery and the like (*post*, § 309).

§ 88. **Means, Tools, Apparatus.** The previous possession or lack of special means, tools, apparatus, and the like, may be of probative value to show the doing or not doing of an act requiring such means.[1] Here, however, the

§ 87. [1] 1781, Donellan's Trial, Eng. (murder by poisoning; in the library at the house of the defendant was a volume having the pages cut at a single place; at this place, the effect of the poison in question was described); 1833, Thompson *v.* Mosely, 5 C. & P. 501 (alteration of a bill by chloride of soda; evidence received that the alleged alterer was a surgeon and acquainted with that substance).

[2] 1892, Croom *v.* Sugg, 110 N. C. 259, 14 S. E. 748 (bond said to be a forgery; "it would unquestionably have been competent to prove . . . that the plaintiff . . . was unusually clever in imitating the handwriting of others").

Contra: 1860, Dow's Ex'r *v.* Spenny's Ex'r, 29 Mo. 390 (skill in imitating handwriting, not admitted to show forgery).

[3] *England:* 1220, Richard, Prior *v.* Moses, Riggs' Select Pleas, etc., of the Jewish Exchequer (Selden Soc. XV, 1905, p. 4; forgery of a deed of debt purporting to be signed by Thomas, Prior of a convent; the plaintiff "says that the said Prior Thomas was a good and discreet and excellent clerk, and not the man to make a charter containing bad Latin as this charter does"); 1872, R. *v.* Castro, alias Tichborne (education and experience used as negativing the authorship of documents; see citation, *post*, § 270).

Canada: 1886, Scott *v.* Crerar, 11 Ont. 541, 553, 562, 14 Ont. App. 152 (libel in anonymous typewritten circulars sent to lawyers, imputing to the plaintiff improper professional conduct; the similarity of phrases therein to phrases recently used by the defendant in conversation, held admissible; but not the opinion of a witness, based on the style of expressions, that the defendant was the author; Rose, J., diss. on the latter point, in a sensible opinion; on appeal, the ruling below was held erroneous in excluding evidence, though the language of the opinion shows no essential difference of views; the report's failure to state precisely the evidence offered leaves the ruling obscure).

United States: 1906, Atkins *v.* Best, 27 D. C. App. 148, 153 (that a testatrix was "an unskilled person, . . . unlearned in the law", considered, in interpreting the will); 1903, Thurston's Adm'r *v.* Prather, — Ky. —, 77 S. W. 354 (execution of a will; that the testator "was a learned lawyer", considered); 1897, Gable *v.* Rauch, 50 S. C. 95, 27 S. E. 555 (the draughtsman of a will, who attested it; his experience and character as probate judge, etc., admitted to show that he "would see to it that the will was properly executed", the compliance with legal requirements being in issue); 1901, Claflin's Will, 73 Vt. 129, 50 Atl. 815 (testator's experience and habit of drawing wills, admitted to show probable due execution; compare the similar use of a style of spelling, *post*, § 99).

Not decided: 1898, Throckmorton *v.* Holt, 12 D. C. App. 552, 581 (forgery of a will; the "legal attainments and literary culture and style of the testator", offered to show a certain will not to have been written by him; not decided).

Contra: 1901, Throckmorton *v.* Holt, 180 U. S. 552, 21 Sup. 474 (will of a Judge Advocate General of the U. S.; opinion as to its genuineness by a witness familiar with his style of composition, that the purporting will was not genuinely his, excluded; unsound: no authority cited).

Compare here the cases cited *post*, §§ 270, 413, 2024, 2148, 2149.

§ 88. [1] *England:* 1792, R. *v.* Lambe, Peake N. P. 141 (forgery of a bank-note by tracing with a camel-hair pencil; the possession of drawings in ink of the design on a bank-note admitted); 1808, R. *v.* Ball, 1 Camp. 324 (uttering a forged bank-note; possession of appropriate tools, admitted); 1839, Griffits

negative fact is the one which usually supports this argument; and the more prominent significance of the affirmative fact — *e.g.* the prior possession of a gun or knife — will usually be its indication of a design or plan to use it for the act in question (*post*, §§ 237, 304).

§ 89. **Possession or Lack of Money as affecting the Probability of a Loan, Payment or the like.** A man destitute of property or credit cannot lend a large sum of money; his lack of the capacity to make such a loan is of some probative value to show that he did not make it:

1729, *Hales' Trial*, 17 How. St. Tr. 293; forgery of a promissory note for £4700, payable to Samuel Lee; to show that the payee could not have lent such a sum, counsel asked: "Is Lee a man of worth?" Witness: "No, sir; he is not worth £5 in the world." Counsel: "What say you to this, Mr. Hales? . . . This note, they say that you published it as a true note, how should it come to pass that such a poor person as this Lee is should indorse over such a note to you?"

1860, PIGOT, C. B., in *Dowling* v. *Dowling*, 10 Ir. C. L. 236, 239, 244: "It has been the constant practice of judges to receive such evidence . . . ; proof that a party was in such circumstances that he *could* not has been received as evidence that he *did* not pay the money in question. . . . It is said that evidence of this kind will be a surprise upon the parties; and so it sometimes may be. . . . [But] few cases can be imagined in which a party may not be surprised by unexpected evidence produced by his adversary. . . . There would be little safety against unfounded demands supported by reckless swearing if circumstances of this kind, not too remote, could not be submitted to the judgment and common sense of a jury."

Such a *lack* of money or other resources is therefore relevant to show the improbability of the making of such a loan or payment.[1] It is possible that

v. Payne, 11 A. & E. 131 (plea of forgery to an action against the acceptor of a bill; evidence was rejected that the plaintiff had been in possession of a mass of bills among which were three with the defendant's forged acceptance, and that these had been circulated; this is unsound).

United States: 1895, Thomas *v.* State, 107 Ala. 13, 18 So. 229 (previous possession of a jug which was used to saturate with oil the place set on fire, admitted); 1874, People *v.* Brotherton, 47 Cal. 402 (possession of a material which would remove ink from checks similar to the one alleged to have been altered by defendant, admitted); 1870, Com. *v.* Choate, 105 Mass. 451 (arson; the prior possession of a peculiar kind of apparatus adapted for setting the fire in question, as showing "the requisite skill, materials, tools, and opportunity", admitted); 1889, Miller *v.* S. P. Co., 118 N. Y. 199, 23 N. E. 462 (to show that the defendant had the means of preventing an accident caused by the giving way of a stick of wood used as the toggle for a rope, the fact was admitted that thereafter a capstan bar near by was used and stood the strain); 1895, Nicholas *v.* Com., 91 Va. 741, 21 S. E. 364 (admitting the possession of an auger fitting a hole in the bottom of a boat which the defendant was charged with sinking).

§ 89. [1] ENGLAND: 1762, Lane *v.* Dighton, 1 Ambl. 409, 413 (evidence received that "before that time he was a poor person, and not able to pay for them [estates] out of his own money"); 1774, Mayor of Hull *v.* Horner, Cowp. 102, 109 (Lord Mansfield, C. J.; payment may be disproved "by showing the party not to have been in circumstances to pay"); 1805, Lench *v.* Lench, 10 Ves. Jr. 511, 518; 1808, Williaume *v.* Gorges, 1 Camp. 217; 1812, Fladong *v.* Winter, 19 Ves. Jr. 196; 1837, Grenfell *v.* Girdlestone, 2 Y. & C. 662, 681.

UNITED STATES: *Indiana:* 1905, Henderson *v.* Henderson, 165 Ind. 666, 75 N. E. 269 (whether B. had deposited $1300; her lack of money at the alleged time, admitted); *Massachusetts:* 1866, Stebbins *v.* Miller, 12 All. 591, 594, 597; 1867, Winchester *v.* Charter, 97 Mass. 140, 143; 1868, Atwood *v.* Scott, 99 Mass. 177; 1871, Woodward *v.* Leavitt, 107 Mass. 453, 458; 1894, Bliss *v.* Johnson, 162 Mass. 323; *Michigan:* 1894, Rosenthal *v.* Bishop, 98 Mich. 527, 531, 57 N. W. 573 (an $1100 order for whiskey by a druggist; the limited business of the druggist, considered, as making it unlikely); *New Hampshire:* 1851, Demeritt *v.* Miles, 22 N. H. 523, 528; 1855, Wiggin *v.* Plumer, 31 N. H. 251, 268; *New York:* 1880, Pontius *v.* People, 82 N.

there are limits to this use of the evidence; but the circumstances of each case will suggest them, and no general exception seems to have been laid down.[2] As to the *time* of the lack of money, it may of course be so far anterior as to have no significance to the evidence; but the mere fact that the impecunious condition is anterior in time does not render it inadmissible.[3] This must be distinguished from the general question how far *anterior possession* is admissible to show present possession (*post*, § 379).

The *possession* of money will usually not be admissible as making probable the payment or loaning of money.[4] But where the lack of money is alleged,

Y. 339, 349 (lack of means admitted to disprove the lending of $4000); *Pennsylvania:* 1852, Strimpfler *v.* Roberts, 18 Pa. 283, 296 (resulting trust in lands purchased in the name of a clerk; to show that the clerk did not buy them for himself, evidence was received of his inability to pay the large sums actually paid by him); 1861, Stauffer *v.* Young, 39 Pa. 455, 461, 462 (pecuniary inability to make an alleged loan, admitted); *Washington:* 1896, Moore *v.* Palmer, 14 Wash. 134, 44 Pac. 142 (defendant's high financial standing and plaintiff's small means, to show that defendant would probably not have given an alleged large note to plaintiff, admitted); *West Virginia:* 1886, State *v.* Henderson, 29 W. Va. 147, 164, 1 S. E. 225 (forgery of a receipt; that the party whose name was receipted was in embarrassed circumstances and unable to pay such a sum, admitted); *Wisconsin:* 1884, Nash *v.* Hoxie, 59 Wis. 384, 386, 18 N. W. 408 (contract by the defendant to deliver logs to be sawed by the plaintiff; to disprove the making of the contract, the defendant's lack of logs such as alleged was rejected; this is sound; compare § 392, *post*); 1899, Williams *v.* Williams, 102 Wis. 246, 78 N. W. 419 (loan; the alleged lender's lack of means and the borrower's possession of ample means, admitted in disproof); 1904, Rickeman *v.* Williamsburg C. F. Ins. Co., 120 Wis. 655, 98 N. W. 960 (over-insurance; the insured's financial condition, admitted to show the improbability of carrying a large stock of goods).

Contra, but unsound: 1902, People *v.* Lapique, 136 Cal. 503, 69 Pac. 226, *semble* (forgery of a note in M.'s name; M.'s pecuniary condition, held inadmissible); 1861, Clark *v.* Fletcher, 1 All. Mass. 53, 56 (action for work done in tanning; evidence by the defendant of the plaintiff's insolvency, not admitted to show that the plaintiff had no teams with which he could have done the work; but evidence of the plaintiff's prior sale of all his teams was admitted for that purpose); 1901, Perkins *v.* Humes, 200 Pa. 235, 49 Atl. 934 (insolvency of payee, and possession of funds by alleged maker, not admitted on an issue of execution of notes).

For lack of money as a *motive for crime*, see *post*, § 392.

[2] 1870, Sherwood, J., in Woods *v.* Gummert, 67 Pa. 137: ("Surely it is not to be inferred from this that wherever a plaintiff brings an action for goods sold and delivered, or money lent and advanced, or paid out, laid out, and expended, that it is competent to the defendant to give evidence of the pecuniary inability of the plaintiff, and thus raise an issue entirely collateral. What legitimate inference in such case can be drawn from the insolvency of the plaintiff? Men heavily indebted, and even keeping their creditors at bay, often have large transactions in borrowing and lending, and are possessed of considerable sums of money"; but he intimates the propriety of such evidence in some cases); 1844, Rowe *v.* Polkinghorne, 1 C. & K. 618 (smallness of income, to disprove a large purchase, excluded; but received to show that the wedding dresses supplied to the alleged debtor's daughter were more likely to have been supplied on the credit of the daughter's future husband than on the defendant's credit).

These instances, however, involve rather the question of motive (*post*, § 392).

[3] 1860, Pigot, C. B., in Dowling *v.* Dowling, 10 Ir. C. L. 236, 243 ("It is said that this will open a wide issue for the jury as to time. Unquestionably it will; but it must be left to the discretion of the judge to take care that the evidence shall be confined within reasonable limits. Instances might be put in which it would be mere folly to give the slightest weight to such evidence, or indeed to admit it at all. . . . In the case of a merchant in extensive trade, no one would think it material to prove that thirty years ago he acted as a porter, in order to negative his ability to pay a debt or make a loan a year before the trial").

Accord: 1860, Dowling *v.* Dowling, *supra* (inability seven years before, with proof of intervening condition, admitted); 1851, Demeritt *v.* Miles, 22 N. H. 523, 528 (lack of money fifteen months before, admitted).

[4] 1868, Atwood *v.* Scott, 99 Mass. 177 (because "experience is not sufficiently uniform to raise a presumption that one who has the means of paying a debt will actually pay it"); 1876, Higgins *v.* Andrews, 121 Mass. 293; 1918, Farmer *v.* Williams, 92 Vt. 132, 102 Atl. 932 (payment of money borrowed; defendant's possession of money, here excluded).

as showing probable non-payment, this lack may be denied by evidence to the contrary, *i.e.* by proving possession.[5] Moreover, where the *presumption* of payment from *lapse of time* is sought to be raised, one way of supporting it is by showing that there were no obstacles in the interval to the collection of the claim, and, in particular, that the debtor was solvent and possessed of assets sufficient to satisfy the debt; this, however, is a different use of the evidence (*post*, §§ 224, 2517).

With what facts — *e.g.* the *non-payment of a debt* — this insolvency or destitution is to be evidenced, is a different question (*post*, § 224). The *sudden possession* of money, after the date of a theft, by one who had no money before it, as indicating an unlawful acquisition, also raises a different question (*post*, § 154). Still other distinct inquiries are whether *poverty* should be considered, as indicating a *motive for crime* (*post*, § 392); and whether there is to be a *presumption of payment by lapse of time* (*post*, § 2517).

Sub-topic C: Habit or Custom

§ 92. **General Principle.** Of the probative value of a person's habit or custom, as showing the doing on a specific occasion of the act which is the subject of the habit or custom, there can be no doubt. Every day's experience and reasoning make it clear enough:

1861, Flandrau, J., in *Walker* v. *Barron*, 6 Minn. 508, 512: "[Customs] may, like any other facts or circumstances, be shown when their existence will increase or diminish the probabilities of an act having been done or not done, which act is the subject of contest."

1873, Sargent, C. J., in *State* v. *Railroad*, 52 N. H. 528, 532: "It would seem to be axiomatic that a man is likely to do or not to do a thing, or to do it or not to do it in a particular way, [according] as he is in the habit of doing or not doing it."

1887, Sherwood, J., in *Mathias* v. *O'Neill*, 94 Mo. 527, 6 S. W. 253 (admitting evidence of a bookkeeper's custom of handing over collateral notes to the teller, as indicating that it was done in this instance): "It is really immaterial, under the authorities cited, whether he was able to do more than to verify his entries and prove his invariable custom. These things being proven, the presumption arises therefrom that the usual course of business was pursued in this particular instance. Every one is presumed to govern himself by the rules of right reason, and consequently that he acquits himself of his engagement and duty. . . . Whenever it is established that one act is the usual concomitant of another, the latter being proved, the former will be presumed; for this is in accord with the experience of common life. It is simply the process of ascertaining one fact from the existence of another."

There is, however, much room for difference of opinion in concrete cases, owing chiefly to the indefiniteness of the notion of habit or custom. If we conceive it as involving an invariable regularity of action, there can be no doubt that this fixed sequence of acts tends strongly to show the occurrence of a given instance. But in the ordinary affairs of life a habit or custom

[5] 1876, Higgins *v.* Andrews, 121 Mass. 293; 1851, Wiggin *v.* Plumer, 31 N. H. 251, 269; 1916, Gilfillan *v.* Gilfillan's Estate, 90 Conn. 94, 96 Atl. 704 (contract for board of intestate; to rebut an assertion that plaintiff was repaying a loan with services, her possession of ample money was admitted).

seldom has such an invariable regularity. Hence, it is easy to see why in a given instance something that may be loosely called habit or custom should be rejected, because it may not in fact have sufficient regularity to make it probable that it would be carried out in every instance or in most instances. Whether or not such sufficient regularity exists must depend largely on the circumstances of each case.[1]

There are two other difficulties that arise in connection with such evidence, both of them, however, depending on other doctrines of Evidence. (1) The idea of habit is sometimes difficult to distinguish from that of *Character;* — for example, where a negligent habit is charged; and if it is interpreted in the latter aspect, it may of course become obnoxious to the rule against the use of a party's character in civil cases (*ante*, § 65). (2) Assuming the relevancy of a Habit or Custom, the proof of it may often have to be made by marshalling various evidential instances as the basis of an inference to a habit or custom; this question — *how to evidence Habit or Custom* — is also a different one, dealt with elsewhere (*post*, §§ 370, 377). — Habit of making a record as a basis for testifying from refreshed recollection, is also a different question (*post*, §§ 98, 747).

§ 93. **Miscellaneous Instances.** Subject to the foregoing distinctions, the admissibility of a person's habit, usage, or custom as evidence that he did or did not do the act in question may be said to be universally conceded.[1] Yet

§ 92. [1] From the point of view of logic and psychology as applicable to argument before the jury (not the rules of Admissibility), see the materials collected in the present author's "Principles of Judicial Proof, as given by Logic, Psychology, and General Experience, and illustrated in Judicial Trials" (1913), §§ 130–136.

§ 93. [1] For cases of *negligent* or *careful* habit in *personal injury* cases, see also the rulings cited *post*, § 97: ENGLAND: 1795, Lucas *v.* Novosilieski, 1 Esp. 296 (to prove payment of wages, evidence was offered of the defendant's custom of paying the workmen every Saturday night, and of the plaintiff's presence waiting with the rest; admitted, "as he worked under the same terms with the other workmen"); 1811, Evans *v.* Birch, 3 Camp. 10 (action against a milk-carrier for moneys not turned over to his employer; the regular course of business in paying over the receipts daily, admitted as showing payment); 1829, Sellen *v.* Norman, 4 C. & P. 81, note (course of paying wages every Saturday night, admissible).

UNITED STATES: *Federal:* 1822, Bouldin *v.* Massie's Heirs, 7 Wheat. 153 (habit of never recording without a document of transfer, admitted; 1907, Chitwood *v.* U. S., 8th C. C. A., 153 Fed. 551 (stealing contents of mail; the defendant contended that the letter was open when it arrived; evidence of the habitual arrival of torn mail packages during two months prior was held admissible); 1909, Security Mutual L. I. Co. *v.* Klentsch, 8th C. C. A., 169 Fed. 104 (whether a premium had been paid; insured's custom as to paying by cash or by check, admitted);
Alabama: 1877, Fincher *v.* State, 58 Ala. 221 ("The place at which F. [the accused] kept his gun and the habits of the family as to rising, when Mrs. D. [the witness] lived there [six months before], have a very remote bearing, if any, on the fact of where the gun was on the night preceding and the morning of the murder, and on the fact of whether the State's witnesses, members of the family, were up at a particular hour that morning", and were rejected); 1902, Hartsell *v.* Masterson, 132 Ala. 275, 31 So. 618 (defendant's custom to employ his clerks by the year, not admitted on the question whether the plaintiff's employment was by the month or the year); 1905, Carwile *v.* State, 148 Ala. 576, 39 So. 220 (deceased's habit as to carrying a billbook, admitted);
Connecticut: 1913, Moffit *v.* Connecticut Co., 86 Conn. 527, 86 Atl. 16 (whether a car stopped at a corner and plaintiff boarded it; invariable custom of the cars to stop at another and not that corner, admitted);
Georgia: 1895, Grantham *v.* State, 95 Ga. 459, 22 S. E. 281 (habit of gambling with X, as indicating that goods of X were obtained from him in gaming and not by burglary, admitted; compare § 85, *ante*); 1897, White *v.* State, 100 Ga. 659, 28 S. E. 423 (habit of carrying a pistol with one charge only, admitted to show that it was so carried till the

the distinctions named, as well as the individual circumstances going to affect the regularity of the habit, will from time to time effect its exclusion. Courts vary, moreover, in their liberality of application of the principle. It may

moment of killing, and thus that it was not fully loaded and then partly fired); 1898, Oliver *v.* State, 106 Ga. 142, 32 S. E. 18 (carrying concealed weapon; habit of carrying it openly, not admitted for defendant);
Illinois: 1865, American Express Co. *v.* Haggard, 37 Ill. 465, 469, 472 (non-delivery of a package; custom of the plaintiff's drivers in delivering, admitted; also, in rebuttal, past thieving habits of the particular driver); 1901, Sorenson *v.* Sorenson, 189 Ill. 179, 59 N. E. 555 (habitual partisan affiliations of a voter, admitted to evidence the tenor of his vote); 1914, Rexroth *v.* Schein, 206 Ill. 97, 69 N. E. 247 (party affiliations are evidence of voting for the party nominees; cases collected);
Indiana: 1870, Foltz *v.* State, 33 Ind. 215 (business habits, admitted to evidence the selling of cigars);
Iowa: 1861, Smith *v.* Clark, 12 Ia. 32 (whether a parol acceptance of a draft had been made; the defendant's custom to accept in writing only, admitted); 1874, Beiderbecke *v.* Transp. Co., 39 Ia. 500 (whether goods were to be delivered at D.; previous habit of the parties as to delivering goods, admitted); 1888, Riordan *v.* Guggerty, 74 Ia. 693, 39 N. W. 107 (the destruction of a telegram-original, evidenced by a custom of the office to destroy all such papers after six months); 1912, Frederickson *v.* Iowa C. R. Co., 156 Ia. 26, 135 N. W. 12 (deceased's habit at a railway crossing, admitted);
Kansas: 1899, Missouri P. R. Co. *v.* Moffatt, 60 Kan. 113, 55 Pac. 837 (former careful custom of deceased in approaching a railroad-crossing, admitted);
Kentucky: 1899, Tunks *v.* Vincent, 106 Ky. 829, 51 S. W. 622 (a voter's regular party, admitted to show his vote);
Maryland: 1837, Pocock *v.* Hendricks, 8 G. & J. 421, 427, 433 (whether a conveyance had been executed absolutely or conditionally, and whether it had been read over to the illiterate grantor; the habit of the draughtsman, a magistrate, to ask grantors whether they wished an absolute or a conditional conveyance, and to read over documents to the grantor before execution, excluded);
Massachusetts: 1901, Perlstein *v.* Express Co., 177 Mass. 530, 59 N. E. 194 (prescribed routes for defendant's drivers, admitted to show that the presence of one driver at a certain place was not in the course of duty);
Michigan: 1877, Hamilton *v.* Billingsley, 37 Mich. 109 (to show that H. did not promise to go to a place on Sunday, the fact that he was a strict observer of the Sabbath was rejected);
Minnesota: 1908, Rogers *v.* Clark Iron Co., 104 Minn. 198, 116 N. W. 739 (custom as to use of forms for soldiers' homestead scrip, admitted);
Missouri: 1862, Goodfellow's Exr's *v.* Meegan, 32 Mo. 230, 281, 284 (that it was not the custom for pasturers to become responsible for cattle, excluded); 1920, Lock *v.* Chicago B. & Q. R. Co., 281 Mo. 532, 219 S. W. 919 (injury by stumbling over a brakebeam between tracks in a railroad yard; the habit of defendant's employees to leave materials scattered over the yard, admitted on the issue of the location of the brakebeam);
Nebraska: 1894, Lincoln V. P. & P. B. Co. *v.* Buckner, 39 Nebr. 83, 85, 57 N. W. 749 (injury from a pile of ashes; habitual deposit of ashes at that place, admitted to show defendant to be the source); 1898, Gate City Abstract Co. *v.* Post, 55 Nebr. 742, 76 N. W. 471 (to show the indexing of a judgment on the day of filing, the clerk's uniform custom received); 1898, Barr *v.* Post, 56 Nebr. 698, 77 N. W. 123, *semble* (that "he never used profane language", admissible, to show non-user on a particular occasion);
New Hampshire: 1877, Hall *v.* Brown, 58 N. H. 93 (injury at a highway blockaded by a train; to disprove the blockade, evidence was admitted of a practice of managing trains so as not to obstruct the highway); 1877, State *v.* Shaw, 58 N. H. 73 (a course of liquor-sales in a preceding month, admitted to show a specific sale; "where there is a question whether a particular act was done, the existence of any course of business according to which it naturally would have been done is a relevant fact"); 1900, Smith *v.* R. Co., 70 N. H. 53, 47 Atl. 290 (death at a crossing; deceased's "uniform habit of slackening the speed of his horse" at the crossing, admitted to show "that he did so on his fatal trip"); 1903, Stone *v.* R. Co., 72 N. H. 206, 55 Atl. 359 (habitual speed of a particular train at a certain point, admitted); 1904, Wright *v.* Davis, 72 N. H. 448, 57 Atl. 335 (making of a loan; the alleged borrower's habit of depositing at a bank, admitted). 1905, Tucker *v.* B. & M. R. Co., 73 N. H. 132, 59 Atl. 943 (deceased's habit to stop and look at a crossing; Smith *v.* R. Co., followed); 1909, Bourassa *v.* Grand Trunk R. Co., 75 N. H. 359, 74 Atl. 590 (like Smith *v.* R. Co.);
New York: 1864, Dubois *v.* Baker, 30 N. Y. 369 (habit of carrying an inkstand, not admitted to show that it was in his possession on a certain day);
North Carolina: 1860, Ashe *v.* De Rosset, 8 Jones L. 240 (whether a receipt for rice was given by a miller; his habit to give a receipt, admitted); 1868, Vaughan *v.* R. Co., 63 N. C. 11 (whether goods had been received by a rail-

be noted here, however, that the prohibitions of the *Opinion rule* about testimony to usage or custom (*post*, § 1955), and as to the *Parol Evidence rule* concerning usage (*post*, §§ 2440, 2464), are not here involved in any way.

§ 94. **Course of Dealing in Sales and Agencies.** Where a transaction of selling, or of authorizing an agent to sell, has taken the form of a usual and fixed course of business between two persons, this habit is admissible to indicate the probable tenor of a particular transaction; the circumstances will determine whether in a given case the relations have reached a sufficient degree of fixity to become relevant.[1] The usual doubt here, however, arises in

road company; its habit to weigh and mark goods when received, admitted, as showing that they would have been found marked); 1899, White *v.* Tripp, 125 N. C. 523, 34 S. E. 686 (whether a promise was to pay the debt of another; "usage and method of keeping accounts in such cases", admitted as corroborative; 1906, Barrott *v.* Atlantic & N. C. R. Co., 140 N. C. 546, 53 S. E. 432 (expulsion from a car for lack of a ticket; conductor's habit as to taking tickets, admitted); 1915, Fourth National Bank *v.* Wilson, 168 N. C. 557, 84 S. E. 866 (custom of a bank as to sending notice of dishonor, admitted);

North Dakota: 1904, Nelson *v.* Grondahl, 12 N. D. 130, 100 N. W. 1093 (notary's habit to present notes for payment at the place where payable, admitted);

Oregon: 1900, Wade *v.* R. Co., 36 Or. 311, 59 Pac. 875 (whether speed of cars on a particular occasion may be evidenced by customary speed, not decided);

Pennsylvania: 1850, Schoneman *v.* Fegley, 14 Pa. St. 376, 380 (whether a receipt was given for a payment; the person's usual practice of giving receipts, excluded, where the witness had no memory as to the specific act in question; explained in Meighen *v.* Bank, *infra*, as based on the witness' failure to give direct testimony to which the habit could be corroborative); 1855, Meighen *v.* Bank, 25 Pa. 288, 291 (whether a deposit was received; the habit of the cashier to enter deposits daily, and the absence of an entry, admitted to show no receipt of a claimed deposit, as corroborating the direct testimony; Schoneman *v.* Fegley explained); 1898, Wheeler *v.* Ahlers, 189 Pa. 138, 42 Atl. 40 (alteration of note by maker after indorsement; a card in the maker's writing, showing a practice in changing figures, admitted); 1898, Morris *v.* Guffey, 188 Pa. 534, 41 Atl. 731 (defendant's printed form of lease, not admitted to show terms of a particular lost lease); 1905, Custer *v.* Fidelity M. A. Ass'n, 211 Pa. 257, 60 Atl. 776 (custom to attach a copy of the application to an insurance policy, excluded, as not sufficient of itself, on the theory of Schoneman *v.* Fegley, *supra*);

Tennessee: 1833, Leiper *v.* Erwin, 5 Yerg. 97 (that a creditor was habitually prompt in collecting, admitted to evidence the payment of a debt, other circumstances corroborating); 1881, Bender *v.* Montgomery, 8 Lea 591 (similar);

Texas: 1896, McCray *v.* R. Co., 89 Tex. 168, 34 S. W. 95 (the duties of brakemen generally, inadmissible without showing that the same practice prevailed on all roads);

Utah: 1916, Beaureguard *v.* Gunnison City, 48 Utah 515, 160 Pac. 815 (illegal voting; partisan affiliations are evidence of the tenor of a person's vote);

Vermont: 1867, Hine *v.* Pomeroy, 24 Vt. 211, 214, 219 (whether an attorney had directed a process-server to take N. and M. as receiptors; his uniform course of business to give no instructions as to receiptors, admitted as corroborative); 1901, Scott *v.* Bailey, 73 Vt. 49, 50 Atl. 557 (issue of payment; defendant's habit to pay the plaintiff personally, excluded); 1917, Dionne *v.* American Express Co., 91 Vt. 521, 101 Atl. 209 (loss of goods; defendant's habit never to receive goods for transportation without giving a receipt, excluded; unsound);

Virginia: 1920, Graham *v.* Com., 127 Va. 808, 103 S. E. 565 (homicide of an officer while arresting defendant's sister; to rebut defendant's evidence of deceased's use of violent and profane language to the woman at the time; the State was allowed to introduce witnesses who "never heard him make use of an oath");

For other examples, which involve the use of *particular instances* to evidence a habit or general plan, see *post*, §§ 373, 377. For the use of particular instances in *criminal cases*, see *post*, §§ 300–367.

For a *habit of intoxication*, see *ante*, §§ 65, 85, *post*, § 96.

§ 94. [1] ENGLAND: 1866, Howard *v.* Sherward, L. R. 2 C. P. 148 (whether the defendant's servant, who had warranted a horse sold to the plaintiff, had authority to do so was disputed; and to show the probable non-existence of it, evidence was offered of a usage among horse-dealers not to warrant under the circumstances: the Court found that there was an ostensible authority, and therefore, per Willes, J., the usage "if not objectionable on the ground of remoteness, which I think it was, after all only amounted to a tacit direction

the attempt to evidence this fixity by particular instances of the repetition of the transaction (*post*, §§ 372, 377).

§ 95. **Course of the Mail and Telegraph.** The fixed methods and systematic operation of the *Government's postal service* have been long conceded to be evidence of the due delivery to the addressee of mail matter placed for that purpose in the custody of the authorities. The conditions are that the mail matter shall appear to have conformed to the chief regulations of the service, namely, that it shall have been sufficiently prepaid in stamps, correctly addressed, and placed in the appropriate receptacle.[1]

from the principal to his agent not to warrant on this particular occasion", and was therefore legally ineffective).

UNITED STATES: *Federal:* 1863, Schuchardt *v.* Allens, 1 Wall. 359, 363, 368 (false warranty, alleging the defendant warranted an article as fit to be used in the plaintiff's business; a broker was allowed to testify what kind of the article "he had been in the habit of selling the plaintiffs"); *Connecticut:* 1896, Plumb *v.* Curtis, 66 Conn. 154, 33 Atl. 998 ("The jury, in the case at bar, were to determine whether it was probable that the plaintiff, after charging all the materials furnished on the order of Simeon Plumb for the construction of three houses in Bridgeport, to the defendant, as the principal for whom Plumb acted, and for whom it was not denied that he had authority to act, proceeded to furnish like materials for the construction of five other houses in Bridgeport on the order of Plumb, and to charge them to the defendant, when he really gave credit to Plumb, and dealt with him as the only party to the transaction. . . . If he has been selling to him the same line of goods previously, as an agent for a responsible principal, and claims that the sales in question were made in the same way and under the same circumstances, any evidence which renders a change of credit improbable is relevant to an inquiry as to whether such a change was made"); *Pennsylvania:* 1896, Hamilton *v.* Hastings, 172 Pa. 308, 34 Atl. 43 (to show the parties included in a sale, evidence of the state of accounts and of the former course of dealings was admitted "as tending to make the proposition in controversy more or less probable").

§ 95. [1] This is universally conceded, and the strength of the evidence is even raised to a presumption (*post*, § 2534); the following list of citations does not attempt to be complete, because the decisions frequently involve also the matter of substantive law mentioned in note 6, *infra:*

ENGLAND: 1795, Saunderson *v.* Judge, 2 H. Bl. 509 (notice to an indorser; on objection that "it was not proved that the defendant received the letter which was put into the post-office", held that "the sending the letter by the post was sufficient evidence of notice"); 1836, Shipley *v.* Todhunter, 7 C. & P. 680, 686; 1834, Warren *v.* Warren, 1 C. M. & R. 250, 252 (Parke, B.: "If a letter is sent by the post, it is 'prima facie' proof, until the contrary be proved, that the party to whom it is addressed received it in due course").

UNITED STATES: *Federal:* 1876, U. S. *v.* Babcock, 3 Dill. C. C. 571; 1883, Rosenthal *v.* Walker, 111 U. S. 185, 193, 4 Sup. 382; 1897, Dunlop *v.* U. S., 165 U. S. 486, 17 Sup. 175 (the course of delivery in the post-office, admitted as indicating that certain papers had come through the mail); 1905, Davidson S. S. Co. *v.* U. S., 142 Fed. 315, 318, C. C. A.; *Alabama:* 1915, Corry *v.* Sylvia Y Cia, 192 Ala. 550, 68 So. 891 (posting in mailbox); *Arkansas:* 1904, Planters' Mut. I. Ass'n *v.* Green, 72 Ark. 305, 80 S. W. 151; 1905, Merchants' Exch. Co. *v.* Sanders, 74 id. 16, 84 S. W. 786; *California:* C. C. P. 1872, § 1963 (par. 24); *Georgia:* 1904, National Bldg. Ass'n *v.* Quin, 120 Ga. 358, 47 S. E. 962; 1906, Burch *v.* Americus G. Co., 125 Ga. 153, 53 S. E. 1008; *Illinois:* 1892, Young *v.* Clapp, 147 Ill. 176, 190, 35 N. E. 372; 1896, Ashley Wire Co. *v.* Ill. Steel Co., 164 Ill. 149, 158, 45 N. E. 410; 1906, Clark *v.* People, 224 Ill. 554, 79 N. E. 941; *Iowa:* 1890, Pennypacker *v.* Ins. Co., 80 Ia. 56, 45 N. W. 408; 1896, Goodwin *v.* Assur. Soc., 97 Ia. 226, 66 N. W. 157; 1899, Watson *v.* Richardson, 110 Ia. 673, 80 N. W. 407; *Kentucky:* 1885, Sullivan *v.* Kuykendall, 82 Ky. 483; 1904, Bloom *v.* Wanner, — Ky. —, 77 S. W. 931 (notice); 1909, Continental Ins. Co. *v.* Hargrove, 131 Ky. 837, 116 S. W. 256; 1922, Proctor *v.* Ray, 194 Ky. 746, 240 S. W. 1063 (and the addressee's denial of receipt of the letter does not necessarily take away the effect of this evidence); *Louisiana:* 1921, McWilliams *v.* Reith, 149 La. 298, 88 So. 913 (postage not being stated to have been prepaid, no presumption arises; unsound); *Maine:* 1896, Chase *v.* Surry, 88 Me. 468, 34 Atl. 270; *Maryland:* 1901, Bostain *v.* Separator Co., 92 Md. 483, 48 Atl. 75; *Massachusetts:* 1810, Munn *v.* Baldwin, 6 Mass. 316; 1870, Huntley *v.* Whittier, 105 Mass. 391 (distinguishing this rule and that of constructive notice, or due diligence, for commercial paper); 1895, McDowell *v.* Ins. Co., 164 Mass. 444, 41 N. E. 665; *Michigan:* 1901, Lowry *v.* Saginaw S. P.

The habit of a *private person* or commercial house, doing systematically a similar service, is equally relevant; the principle has been applied to an *express carrier's* delivery of packages[2] and to a *telegraph company's* transmission of telegrams.[3]

The same application of the principle would admit a private person's usual course of business to evidence *any act of delivery or transmission*, such as the sending of a notice, or the placing of letters in the mailbox; the only differences are, first, that the fact of the governmental system will be judicially noticed without further evidence (*post*, § 2575), and secondly, that the course of business of an individual may under the circumstances not appear sufficiently fixed to be of probative value.[4] A consequence of the combination

Co., 128 Mich. 246, 87 N. W. 194; 1906, Long Bell L. Co. *v.* Nyman, 145 Mich. 477, 108 N. W. 1019; *Minnesota:* 1893, Dade *v.* Ins. Co., 54 Minn. 336, 56 N. W. 48 (proofs of loss); 1922, Rasmussen *v.* McComb, — Minn. —, 187 N. W. 513 (advertising contract); *Missouri:* 1868, Phillips *v.* Scott, 43 Mo. 86, 89; *Nebraska:* 1899, National Mas. A. Ass'n *v.* Burr, 57 Nebr. 437, 77 N. W. 1098; 1912, Omaha *v.* Yancy, 91 Nebr. 261, 135 N. W. 1044; *New Jersey:* 1897, State *v.* Howell, 61 N. J. L. 142, 38 Atl. 748; *New Mexico:* 1913, Feder Silberberg Co. *v.* McNeil, 18 N. M. 44, 133 Pac. 975 (mere mailing, without proof of proper address, insufficient); *North Carolina:* 1905, Sherrod *v.* Farmers' M. F. I. Ass'n, 139 N. C. 167, 51 S. E. 910 (insurance notice); 1916, Lynch *v.* Johnson, 171 N. C. 611, 89 S. E. 61 (mailing a deed); *North Dakota:* Comp. L. 1913, § 7936, par. 24; N. D. St. 1897, c. 110, § 3 (24); *Oregon:* Or. Laws 1920, § 799, par. 24; *Pennsylvania:* 1893, Jensen *v.* McCorkell, 154 Pa. 323, 325, 26 Atl. 366., 1905, Neubert *v.* Armstrong W. Co., 211 Pa. 582, 61 Atl. 123 (demand-letter); 1906, Beeman *v.* Supreme Lodge, 215 Pa. 627, 64 Atl. 792 (the due mailing, etc., at 9 A. M. in Philadelphia is evidence of delivery to destination in the same city on the same day); *Philippine Islands:* C. C. P. 1901, § 334, par. 22 (like Cal. C. C. P. § 1963, par. 24); 1913, U. S. *v.* Kosel, 24 P. I. 594 (fraud); *Porto Rico:* Rev. St. & C. 1911, § 1470 (like Cal. C. C. P. § 1963); *Rhode Island:* 1857, Russell *v.* Buckley, 4 R. I. 525 (even for letters containing money); *Utah:* 1898, Brown *v.* Frat. A. Assoc., 18 Utah 265, 55 Pac. 63; *Vermont:* 1844, Oaks *v.* Weller, 16 Vt. 63, 70; 1897, McDermott *v.* Jackson; *Wisconsin:* 97 Wis. 64, 72 N. W. 375; 1899, Small *v.* Prentice, 102 Wis. 256, 78 N. W. 415.

Contra: 1846, Allen *v.* Blunt, 2 Woodb. & Man. 121, 131 (mailing said to be not sufficient; it would be "a presumption contradicted daily by the immense dead-letter collections never received by correspondents"); 1913, Com. *v.* O'Bryan, U. & Co., 153 Ky. 406, 155 S. W. 1126 (failure to file a statement in a public office; the mere mailing of the statement without other evidence, held inadmissible; unsound).

[2] Cases cited *ante*, § 93, *passim*.

[3] *Can.:* N. Br. Cons. St. 1903, c. 127, § 36 (the delivery and receipt of a message at a telegraph-office for transmission shall be evidence of its transmission and its receipt by the addressee); 1888, White *v.* Flemming, 20 N. Sc. 335 (Com. *v.* Jeffries, *infra*, followed); *U. S.:* 1896, Eppinger *v.* Scott, 112 Cal. 369, 44 Pac. 723; 1863, Com. *v.* Jeffries, 7 All. Mass. 548, 563 (transmission by the operator in Boston of a message, relevant to show its receipt by the addressee in New York); 1897, Perry *v.* Bank, 53 Nebr. 89, 73 N. W. 538; 1885, Oregon S. S. Co. *v.* Otis, 100 N. Y. 446, 452, 3 N. E. 485; 1899, Western Twine Co. *v.* Wright, 11 S. D. 521, 78 N. W. 942.

The course of business in *telephone* transmission is equally relevant; but this is complicated with other principles, and is dealt with *post*, § 2155.

[4] ENGLAND: 1815, Hetherington *v.* Kemp, 4 Camp. 193 (to show the sending of a letter, the usage of the counting-house in placing the letters on a table, and the testimony of the partner as to his habit of posting them, admissible); 1837, Hart *v.* Alexander, 7 C. & P. 746, 751 (whether a circular announcing a dissolution of partnership was sent; "the practice of the house to send circulars on every change in the firm", admitted; Lord Abinger, C. B.: "That does not show that a particular person received a circular, except upon the presumption that a jury may make upon the general habit").

UNITED STATES: *Federal:* 1825, Coyle *v.* Gozzler, 2 Cr. C. C. 625 (to show the making and mailing of a notice on a specified day, the notary's habit of giving notice on the day of making the demand was received); 1876, U. S. *v.* Babcock, 3 Dillon 571, 575 (telegrams delivered to a door-keeper accustomed to distribute despatches to defendant's office, admitted); 1922, U. S. *v.* Rice, D. C. S. D. Tex., 281 Fed. 326 (mode of sending notice by the Texas Adjutant-General for the U. S. provost-marshall-general's office to registrants for mili-

of these two applications of the principle is that, upon proper evidence of the habit of an individual commercial house as to addressing and mailing, the mere execution of a letter in the usual course of business may be evidence of its subsequent receipt by the addressee.[5]

Certain other principles must here be distinguished. (1) By the law of commercial paper, actual receipt of *notice of dishonor* is, in certain conditions,

tary service, held sufficient to evidence the preparing and mail of a notice to H.); *California:* 1915, American Can Co. *v.* Agricultural Ins. Co., 27 Cal. App. 647, 150 Pac. 996 (insurance company's custom of sending expiration notices, admitted); *Georgia:* 1906, Burch *v.* Americus G. Co., 125 Ga. 153, 53 S. E. 1008 (business habit as to using only government-stamped envelopes, admitted to show that a particular letter was stamped); 1920, Rawleigh Med. Co. *v.* Burney, 25 Ga. App. 20, 102 S. E. 358 (usage as to mailing letters from a box in a grocery store, held not sufficient on the facts; most instances of this type of decision are too strict, going against the probabilities of daily experience); *Kentucky:* 1866, Trabue *v.* Sayre, 1 Bush 129, 131 (to prove the writing and mailing of a notice, the habits of a notary and of the respective bank-officers having the duty of preparing and mailing notices were received); *Maine:* 1862, Union Bank *v.* Stone, 50 Me. 595, 597, 601 (the "usual course of proceeding and customary habits of business" of a notary and his clerk, admitted to show the giving of notice); *Maryland:* 1831, Flack *v.* Green, 3 G. & J. 474 (to prove the forwarding of a notice, the general course of business of the firm to forward such notices, excluded); 1848, Bell *v.* Bank, 7 Gill 216, 227 (to prove the mailing of a notice, the invariable habit of the bank-messenger charged with that duty to mail such notices, admitted; explaining the ruling in Flack *v.* Green as based on the indefiniteness of the proof of the habit); 1859, Brailsford *v.* Williams, 15 Md. 150, 152, 159 (to prove the mailing of a notice, the custom of the firm to leave letters on the desk for the clerk to mail, held not sufficient; the clerk whose duty it was to mail the letters should have been called); *Massachusetts:* 1837, Dana *v.* Kemble, 19 Pick. 112, 114 (letter left at a hotel, where the usage was regularly to distribute letters so left; held sufficient); *Minnesota:* 1903, Dowagiac M. Co. *v.* Watson, 90 Minn. 100, 95 N. W. 884 (business custom of the plaintiff to mail notices of acceptance of contracts, excluded on the facts); *Missouri:* 1920, Pierson-Lathrop Grain Co. *v.* Barker, — Mo. App. —, 223 S. W. 941 (custom to sign letters with instructions as to mailing, held insufficient on the facts; another example of over-strict ruling); 1920, Locke *v.* Woodman, — Mo. App. —, 225 S. W. 353 (custom of a business office, held sufficient on the facts); *New York:* 1810, Miller *v.* Hackley, 5 Johns. 375, 384 (the habit of a notary as to giving notice on the same day as demand, admitted to show that notice was given); 1826, Thallheimer *v.* Brinckerhoff, 6 Cow. 101 (whether a letter was sent; the clerk's invariable custom to mail letters as soon as copied, admitted); 1891, Beakes *v.* Da Cunha, 126 N. Y. 293, 27 N. E. 251 (whether notices were mailed on the 20th of the month; the person's habit to be at home on the 20th of each month for the purpose of transacting the business of that kind, admitted); 1910, Gardam & Son *v.* Batterson, 198 N. Y. 175, 91 N. E. 371 (whether certain letters of the defendant had been mailed; the defendant himself testified that he was the head of a company, that he put all letters on a desk-tray to be mailed by an employee; that a clerk "periodically through the day" gathered up the mail and posted it; held, purporting to follow Hetherington *v.* Kemp, that the evidence was insufficient, because it was essential to call the clerk, whose duty it was to collect and mail, and obtain his testimony that "he had invariably collected the letters upon the defendant's desk and had posted them"; "there was the gap in the proof." Having regard to the habits of commercial houses, does not this smack of Carlyle's "owl-eyed pedantry"?); *Wisconsin:* 1920, Federal Asbestos Co. *v.* Zimmerman, 171 Wis. 594, 177 N. W. 881 (letter from plaintiff to defendant; copy excluded, because no proof of mailing of original; the evidence consisted of a detailed statement by plaintiff of the office system of employees as to dictating, signing, sealing, and mailing of letters; the plaintiff testified that he remembered dictating this letter, but did not testify as to signing it or ever seeing it later; held insufficient for lack of "testimony from which it might be inferred that the custom in this particular instance had been followed"; this type of ruling is finical and unpractical; it brings the law into distrust among business men, who not only rely upon such evidence but know that it often represents the most that is honestly obtainable; standards of probative value in court must have some fair relation to standards accepted outside).

[5] 1879, Trotter *v.* MacLean, L. R. 13 Ch. D. 574, 580; 1922, Myers *v.* Moore-Kile Co., 5th C. C. A., 279 Fed. 233 (business usage as to mailing letters, here held sufficient); 1897, McKay *v.* Myers, 168 Mass. 312, 47 N. E. 98 (usual course of business, as indicating the mailing of a letter of which a copy had been kept).

unnecessary; the payee's due diligence (or, as sometimes improperly termed, the indorsee's constructive notice) suffices; hence a rule of commercial paper that the mere fact of seasonably mailing the notice suffices in law.[6] Here the fact of mailing is not used evidentially at all; for the receipt of the notice is not desired to be proved. (2) The receipt of a letter or telegram through the mails or telegraph-office may suffice as evidence of the *genuineness* of the letter or telegram, as being really sent by the person purporting to be its author; this rests on peculiar considerations and involves the principle of Authentication (*post*, §§ 2153, 2154). (3) When a letter is received through the mail, and the receiver desires to establish the time and place of posting, the *postmark* on the envelope is evidential. This involves two inquiries, first, whether the postmark may be assumed to be genuine, under the principles of Authentication (*post*, § 2152), and secondly, whether, under the exception to the Hearsay rule, the postmark, if genuine, can be treated as an official certificate of the act of marking and therefore be used as testimony without calling the postmaster himself to the stand (*post*, § 1674).

§ 96. **Habit of Intemperance.** In general, it would seem that, while a habit or fixed principle of abstaining from liquor would have value to show probable sobriety on a given occasion, yet "habits" of intemperance or intoxication could not be used for the contrary purpose; for the term "habit" here signifies thereby frequent indulgences, and not constant or periodical intoxication. If indeed a steady practice of intoxication can be shown, it would be equally probative. By reason of this looseness of meaning in the word "habit", the judicial applications of the principle are by no means uniform.[1]

[6] 1846, Woodcock *v.* Houldsworth, 16 M. & W. 124 (Parke, B.: "He has done all that was usual and necessary; and he does not guarantee the certainty or correctness of the post-office delivery"); 1848, Dunlop *v.* Higgins, 1 H. L. C. 381, 398; 1821, Hartford Bank *v.* Stedman, 3 Conn. 489; 1858, Loud *v.* Merrill, 45 Me. 516, 520.

§ 96. [1] ENGLAND: 1849, Alcock *v.* Assur. Co., 13 Q. B. 292 (the question was whether a stranded ship might have been got off without total loss if the captain had exercised good judgment at the time; evidence was received of his previous "drunken habits", as "tending to show that he probably was drunk, or that, in consequence of former drunkenness, his perceptions were imperfect"; this involves both the present use and that of § 85, *ante*).

UNITED STATES: *Federal:* 1866, Thompson *v.* Bowie, 4 Wall. 467, 471 (action on notes; defence, that they were given for gambling debts; the fact that the defendant when drunk had a habit of gambling, excluded, though the notes were in the handwriting of a professional gambler and were payable to the keeper of a gambling house, and although the opinion, by Davis, J., concedes that "it is highly probable that the notes were executed by him for a gaming consideration"; this is a discreditable decision; Grier, J., diss.); 1896, Baltimore & O. R. Co. *v.* Henthorne, 19 C. C. A. 623, 73 Fed. 634 (intemperate habits of an engineer, not received to show that he was drunk at the time in question); *California:* 1894, Cosgrove *v.* Pitman, 103 Cal. 268, 273, 37 Pac. 232 (habit of intemperance, admissible to show intoxication at a given time); *Kentucky:* 1903, Chesapeake & O. R. Co. *v.* Riddle, — Ky. —, 72 S. W. 22 (whether the injured person was intoxicated at the time; testimony "that he was a perfectly sober man, and that he [the witness] had never seen him take a drink in his life", excluded; this is not common sense); *Maine:* 1898, Sullivan *v.* Sullivan, 92 Me. 84, 42 Atl. 230 (divorce for habits of intoxication; defendant's reputation for sobriety before marriage, not admitted as tending to disprove the charge; treated as a question of character); *Massachusetts:* 1862, Heland *v.* Allen, 3 All. 407, 408 (habits of sobriety or general character as a temperate man, not admissible to show that a plaintiff was not drunk at a given time); 1875, McCarty *v.* Leary, 118 Mass. 509, 510 (same); 1898, Edwards *v.* Worcester, 172 Mass. 104, 51 N. E. 447 (plaintiff's habits of sobriety, as tending

Distinguish the evidential use (*ante*, § 85) of a condition of intoxicated incapacity as indicating that a certain act was or was not done while in that condition.

§ 97. **Habit of Negligence or Care.** Negligence is, in one aspect, the not-doing of a particular act; but in another and more correct aspect, it is the doing of one act in a manner which amounts to negligence in that some other act is omitted which ought to have accompanied it. There is no reason why such a habit should not be used as evidential, — either a habit of negligent action or a habit of careful action:[1]

to negative his intoxication, excluded); 1910, Com. *v.* Rivet, 205 Mass. 464, 91 N. E. 877 (murder; deceased being found dead alone, his frequent custom of intoxication and of getting into a fight when drunk, offered for defendant to evidence that deceased "came to his death by having got into a fight when drunk", excluded; this ruling might have been correct on the principle of § 142, *post*, but the Court justifies it with the preposterous assertion that "the fact that a person's *habits* or character are such that he would be apt to do an act is not competent evidence that he did the act"; it is apparently hard to dislodge some shibboleths); *Michigan:* 1897, Kingston *v.* R. Co., 112 Mich. 40, 70 N. W. 315, 74 N. W. 230 (whether the plaintiff was drunk at the time of the accident; previous habits of intoxication excluded); *Missouri:* 1896, Lane *v.* R. Co., 132 Mo. 4, 33 S. W. 645 (Sherwood, J., delivering the opinion, but no other judges concurring on this point: "the habit of intoxication, when once proven to exist, is presumed to continue, and raises, in the case of an accident, a presumption of negligence, which stands until rebutted. . . . If evidence of the intemperate habits of a conductor of a railroad company may be gone into, in order to charge his employer with his negligence in case of an accident, though no intoxication be shown on that particular occasion, it is difficult to see why, in fairness and upon principle, the like rule should not prevail, and similar evidence be admitted, and similar consequences follow, where a railroad company pleads the contributory negligence of one injured by its train"); *New York:* 1871, Warner *v.* R. Co., 44 N. Y. 465 (previous habits of intoxication, not admitted to show intoxication at a particular time); 1874, Cleghorn *v.* R. Co., 56 N. Y. 44, 46 (same); *Pennsylvania:* 1868, Pennsylvania R. Co. *v.* Books, 57 Pa. 339, 343 (evidence admitted of the intemperate habits of the conductor of the defendant's train; "it would cast upon the defendants the burthen of proving that he was not intoxicated at the time, and had used due care"); 1876, Huntington B. T. M. R. Co. *v.* Decker, 82 Pa. 119, 124 (superintendent's intemperate habits excluded, because he was not the cause of the injury; but the conductor's intemperate habits admitted, as "raising a presumption of negligence"); *Vermont:* 1895, Smith's Ex'r *v.* Smith, 67 Vt. 443, 32 Atl. 256 (habits of intoxication, admitted to show intoxication at a given time, a certain amount of other evidence being first offered).

Some of the above rulings, it will be observed, are based upon a confusion of the present principle with that of the Character rule (*ante*, § 64).

Distinguish the fact of intemperance as *constituting incompetence* under the fellow-servant rule or under the rule for exemplary damages; 1872, Chicago & A. R. Co. *v.* Sullivan, 63 Ill. 293, 297 (an employee's intemperate habits, known to the employer, used as fixing his liability for the employee's incompetence); 1881, Michigan C. R. Co. *v.* Gilbert, 46 Mich. 176, 182, 9 N. W. 243 (same); 1885, Hilts *v.* R. Co., 55 Mich. 437, 444, 21 N. W. 878 (same); 1874, Cleghorn *v.* R. Co., 56 N. Y. 44, 46 (admissible, if known to the employer, as ground for exemplary damages).

§ 97. [1] ENGLAND: 1916, Joy *v.* Phillips Mills & Co., 1 K. B. 849 (workmen's compensation; deceased, a stable boy, was found dead from the kick of a horse in the stable; on the issue whether the kick was received in the course of employment, the deceased's habit of teasing the horses, admitted; "especially in these cases under the workmen's compensation Act, the books are full of cases where evidence as to the habits or practice of the deceased, or even of his class, has been admitted, both in favor of the applicant and against him or her"); UNITED STATES: *Alabama:* 1920, Jackson *v.* Vaughn, 204 Ala. 543, 86 So. 469 (injury by automobile; "that defendant always blew his horn in turning around the corner", excluded; no authority cited); *California:* 1921, Wallis *v.* Southern Pacific Co., 184 Cal. 662, 195 Pac. 408 (death by a railroad collision; that decedent "not only at this crossing, but elsewhere, was in the habit of stopping his team", etc., held admissible, regardless of whether there were eye-witnesses; prior rulings considered; the opinion does not sufficiently distinguish between this specific habit-evidence and that of general careful or negligent character; the eye-witness qualification has been advanced for the latter rule,

1873, SARGENT, C. J., in *State* v. *M. & L. Railroad*, 52 N. H. 528, 532, 549 (indictment for negligently running over a person at a crossing; one of the issues was whether the bell had been rung and the whistle sounded; evidence was received that the same train, run by the same engineer and fireman, had sometimes passed the same crossing during the preceding year without those precautions; the testimony as to the actual doing or omitting on this occasion being in conflict): "It would seem to be axiomatic that a man is likely to do or not to do a thing, or to do it or not to do it in a particular way, as he is in the habit of doing or not doing it. But this must be understood of acts which are done or omitted to be done without any particular intent or purpose to injure any one; it cannot apply to acts that are done intentionally, wilfully, or maliciously, because such acts are done with a specific object in view, and they are performed, not by force of habit, but with a definite purpose. . . . But when the question is, did these servants of the road, without any intention whatever and through mere negligence or carelessness, omit to give these signals on that occasion, we think the inquiry was properly made as to what they had done before in that regard, and whether they had or had not grown habitually negligent of the requirements of the road in that particular. In this view of the case, we think the evidence was admissible, — not as evidence of character, not as evidence of fitness or unfitness, but simply as having some tendency to show that on this particular occasion these agents were more probably negligent and careless because they had before frequently neglected the same duty with impunity and had thus become habitually negligent in that regard."

The real difficulties here seem to be two: Is it possible to believe that careless action can ever be anything more than casual or occasional? If it is, are we not really predicating a careless disposition, rather than a genuine

but has not played a part in the former rule); 1921, Starr *v.* Los Angeles R. Co., 187 Cal. 270 201 Pac. 599 (injury by starting of a car while the passenger was alighting; conductor's habit of sitting in the car and talking to passengers, excluded); *Georgia:* 1893, Tennessee V. & G. R. Co. *v.* Kane, 92 Ga. 187, 192, 18 S. E. 18 (action for the death of an engineer; defence, his own negligent act in using excessive speed; the engineer's habitual use of excessive speed, excluded on the facts; prior rulings discussed); *Kansas:* 1899, Missouri P. R. Co. *v.* Moffatt, 60 Kan. 113, 55 Pac. 837 (cited *ante*, § 93, n. 1); *Massachusetts:* 1885, Whitney *v.* Gross, 140 Mass. 232, 5 N. E. 619 (distinguishing carelessness in driving a horse down hill on former occasions and training the horse so that he habitually broke into a rapid rate of speed, the latter being admissible); 1894, Brouillette *v.* R. Co., 162 Mass. 198, 204, 206, 38 N. E. 507 (the plaintiff's repeated boasts "about his ability to keep out of the way of trains and not get hurt", admitted, as bearing upon his "carefulness or readiness to take risks"); *Missouri:* 1913, Hodges *v.* Hill, 175 Mo. App. 441, 161 S. W. 633 (collision between plaintiff's mare and defendant's buggy; that plaintiff's son, riding the mare, was in the habit of riding there at high speed, admitted; careful opinion by Sturgis, J.); *Montana:* 1897, Mulville *v.* Ins. Co., 19 Mont. 95, 47 Pac. 651 (that the deceased made a practice of jumping on trains while in motion, excluded); *New Hampshire:* 1873, State *v.* M. & L. Railroad, 52 N. H. 528 (admitted; see quotation *supra*); 1878, State *v.* B. & M. Railroad, 58 N. H. 410 (similar); 1877, Hall *v.* Brown, 58 N. H. 93 (cited *ante*, § 93, n. 1); 1900, Smith *v.* R. Co., 70 N. H. 53, 47 Atl. 290 (cited *ante*, § 93, n. 1); 1905, Tucker *v.* B. & M. R. Co., 73 N. H. 132, 59 Atl. 943 (cited *ante*, § 93, n. 1); 1909, Bourassa *v.* Grand Trunk R. Co., 75 N. H. 359, 74 Atl. 590 (like State *v.* M. & L. R. Co.); *New York:* 1912, Zucker *v.* Whitridge, 205 N. Y. 50, 98 N. E. 209 (injury by a street-car at a crossing; the habit of the plaintiff in taking precautions when approaching a railway track, held not admissible where there were four eye-witnesses); *Oklahoma:* 1916, St. Louis & S. F. R. Co. *v.* Hodge, 53 Okl. 427, 157 Pac. 60 (boy hurt by a train while trespassing; the boy's habit of "crawling underneath the cars whenever he found the tracks blocked", held not improperly excluded on the facts; citing the above text with approval); *Pennsylvania:* 1896, Baker *v.* Irish, 172 Pa. 528, 532, 33 Atl. 558 (that the plaintiff "before the accident made a practice of attempting to jump out of the elevator" before it stopped; rejected, because too remote to show that he did so on this occasion).

For the use of *particular instances* to evidence the careful or careless habit, see *post*, §§ 199, 376.

habit, and then are we not violating the rule against Character in civil cases (*ante*, § 64) in employing such evidence? These doubts serve to explain the precedents that exclude such evidence; but the doubts are not well founded, and that such evidence is often of probative value, and is not attended by the inconveniences of Character evidence.

§ 98. **Habit as a substitute for Present Recollection.** It will be seen, in examining the qualifications of witnesses (*post*, §§ 734, 747) that a past recollection may be resorted to, if known to have been accurately recorded at the time; and one of the permissible ways for the witness to guarantee the accuracy of his record is to vouch for a habit of accurate recording. But theoretically such testimony may be resolved into circumstantial evidence of habit, neglecting the use of the record; or the record may be wanting, and thus the circumstantial evidence of habit alone is practically available. Thus, a notary may testify that his habit is always to mail a notice of protest, and this habit alone (apart from or in the absence of a minute of the sending) would be receivable to indicate the probability that a specific notice was sent:[1]

1867, STRONG, J., in *Eureka Ins. Co.* v. *Robinson*, 56 Pa. 264 (admitting evidence of the company's custom to send a notice, as indicating that the notice was sent): "We think it not uncommon in practice to corroborate the defective memory of a witness by proof of what was his habit in similar circumstances. Thus, a subscribing witness to a will or a bond, if unable to recollect whether he saw the testator or obligor sign the instrument or heard it acknowledged, is often permitted to testify to his own habit never to sign as a witness without seeing the party sign whose signature he attests or hearing that signature acknowledged. And it seems to be persuasive and legitimate supporting evidence."

§ 99. **Traits of Handwriting and Spelling, to evidence Authorship of a Writing.** When we are shown a signature, and, without having seen X write it, or handle the document, we infer nevertheless from the appearance of the writing that X was the writer, our process of thought is that, since X has a peculiar style or habit of handwriting known to us in its features, therefore, whenever he writes, the writing must bear these peculiar marks, and thus a writing bearing these marks was the product of his hand. Just as we think, of a deed of violence, "This man's character, his plan, his emotions, would be likely to lead him to this deed," so we argue, "This man's handwriting would result in his penning such a signature as the one in issue." It is commoner to evidence the authorship of a signature by the direct testimony of those who declare it to resemble the general qualities of the alleged person's handwriting as known to them; there the style of writing is not expressly offered in evidence, but is merely the ground of their competency to testify. When handwriting is offered circumstantially in evidence, it is

§ 98. [1] 1909, State *v.* Day, 108 Minn. 121, 121 N. W. 611 (custom in administering an oath); 1832, Den *v.* Downam, 1 Green N. J. 142 (posting an advertisement of sheriff's sale; the sheriff's testimony to his "constant practice to do it [post it], without a single exception ever known by me", admitted).

The principle is further exemplified by the citations *post*, § 747, and also by the cases cited under the attesting-witness rule (*post*, § 1302).

The presumption from *regular performance of official duty* (*post*, § 2534) rests on the present principle.

expressly described or shown to the jury as the source of their inference; for thus only does the trait of the handwriting become available for them as the basis of an inference.

Now, the relevancy of handwriting-traits, as of probative value to show whether or not a given act of writing was done by the person alleged, has always been conceded, since the beginning of the 1700s. The difficulty that has arisen over handwriting-evidence has not been over the relevancy of handwriting-traits to show the authorship of writing but over the mode of evidencing them by circumstantial evidence, and that is by examining one or more specimens of the writing of the person in question and drawing inferences as to its peculiar traits (on the principle of § 383, *post*). This, however, being a different question from the present one, and complicated by many collateral considerations, is treated elsewhere (*post*, §§ 1996–2021). The qualifications of witnesses to speak as to handwriting-traits involve also distinct questions (*post*, §§ 693–709).

A person's mode of *spelling* is also a trait which evidences whether or not a document with words spelled in a given way was probably executed by him. Spelling and handwriting alike seem to be more or less personal and physical traits, like corporal strength and manual skill, in their probative bearing. A peculiar mode of spelling has always been treated as relevant to evidence a document's authorship; but the subject is more conveniently dealt with in connection with the rules for handwriting (*ante*, § 87, *post*, § 2024).

Sub-topic D: DESIGN OR PLAN

§ 102. **General Principle.** The presence of a design or plan to do or not to do a given act has probative value to show that the act was in fact done or not done. A plan is not always carried out, but it is more or less likely to be carried out. The existence of the plan is always used in daily life as the basis of an inference to the act planned. There is no question about the relevancy in general of such evidence:

1853, BIGELOW, J., in *Cook* v. *Moore*, 11 Cush. 213, 216: "The existence in the mind of a deliberate design to do a certain act, when once proved, may properly lead to the inference that the intent once harbored continued and was carried into effect by acts long subsequent to the origin of the motive by which they were prompted."

The probative value of such a design or plan, for the purpose of admissibility, will depend chiefly on two elements, either of which may be very weak in a given instance, — the fixedness or absolute quality of the design, *i.e.* its subjection to no contingencies or conditions; and the specific direction of it to the act in question, *i.e.* its application, not merely to a class of acts indefinitely foreseen, but to the exact deed in question.[1] The only questions

§ 102. [1] From the point of view of logic and psychology as applicable to argument before the jury (not the rules of Admissibility), see the materials collected in the present author's "Principles of Judicial Proof, as given by Logic, Psychology, and General Experience, and illustrated in Judicial Trials" (1913), §§ 121–129.

of relevancy that have arisen are due to the probative importance of these elements.

§ 103. **Discrimination of other Principles.** It is necessary first to distinguish, from the relevancy of Design or Plan, certain very different evidential questions:

(1) *Hearsay expressions of Design.* When it is sought to evidence a design or plan by expressions of the person alleged to have entertained it, the question immediately arises whether the Hearsay rule applies and whether such expressions may enter under some exception to it (*post*, §§ 1725, 2726). This has nothing to do with the relevancy of the design itself, when properly evidenced.

(2) *Conduct as evidence of Design.* The design or plan being assumed to be relevant, a common source of evidencing it is the conduct of the person, *i.e.* not express assertions of it, but conduct circumstantially indicating it. This raises questions of relevancy, but very different ones from the relevancy of the design itself to evidence an act; just as the admissibility of conduct to evidence character raises different questions from the admissibility of character to evidence an act. Not only in theory, but in view of practical results, these two things are constantly to be distinguished; for, however relevant the design, the evidence to establish it may be inadmissible (*post*, §§ 237, 304).

(3) *Design or Intention, distinguished from Intent.* The probative feature of an intention or design is its direction forward to the accomplishment of a purpose by action. That is why it is relevant to show the later doing of the act. This is a different thing from Intent, in the legal sense, *i.e.* the state of mind which accompanies an act and imparts to it a criminal or innocent quality. The two things are as different as the design with which a man buys a good cigar and his state of mind later when he is smoking it. His plan is, when buying, to smoke it; later, when his design is being fulfilled, his smoking is accompanied by sentiments of comfort and self-satisfaction. But his design may be frustrated and yet the accompanying sentiments may be experienced; as, if he loses the cigar and a friend gives him another. Or his design may be carried out, but the sentiments not be experienced; as, if the cigar turns out to be a poor one. So, too, a person may design to write a document and this design is relevant to show that he did later write it; but his intent, while writing it, to make false representations depends on different considerations. Again, a person may design to take another's property, and this design is relevant to show the subsequent taking; but whether the taking was under a claim of right or with felonious intent involves a different mental state. In short, the importance of Design, plan, or intention is chiefly its evidentiary aspect, as looking forward and tending to prove the act in question; while the important aspect of Intent is chiefly not an evidentiary one at all, but one of substantive law, as a state of mind accompanying the act in question and necessary to its legal effect. Occasionally, to be sure, Intent has an evidentiary significance, — as where an intent at an earlier

time is used to indicate the existence of the same intent at a later time, but here the evidentiary use is to prove another mental state or condition, and not an act. The practical consequences of this distinction between Design and Intent are elsewhere dealt with (*post*, §§ 242, 300–371).

§ 104. **Miscellaneous Instances.** There is no situation in which a design to do an act would be irrelevant to show the doing of the act.[1] Since the chief difficulty is usually as to the Hearsay rule, the precedents under the exception for Statements of Intention (*post*, §§ 1725, 1726) are also material; for a ruling admitting expressions of design under that exception to the rule is usually a precedent also for the relevancy of the design.

§ 105. **Threats of one charged with Crime or Tort.** A threat to do a criminal or tortious act is in general admissible [1]; the threat being receivable under

§ **104.** [1] *Federal:* 1905, The San Rafael, 141 Fed. 270, 278, C. C. A. (whether a person was lost at sea on a certain vessel and trip; his expression of intent to travel thither at that time, etc., admitted); *Alabama:* 1895, Burton *v.* State, 107 Ala. 68, 18 So. 240 (the intention of a witness, not now to be found, as showing that he had left the State, admitted); *Connecticut:* 1881, State *v.* Smith, 49 Conn. 380 (murder of a chief of police making an arrest, the deceased's intention, on leaving his house, "to go to arrest Chip Smith", admitted); *Iowa:* 1884, State *v.* Jones, 64 Ia. 349, 352, 17 N. W. 911, 20 N. W. 470 (murder; deceased's intention to go to a place to buy cattle, admitted to show the reason of his presence near defendant's house); 1898, State *v.* Smith, 106 Ia. 701, 77 N. W. 499 (husband-poisoning; defendant's declarations, in seeking to hire rooms, that herself and her daughter would be alone, admitted); *Kentucky:* 1899, Throckmorton *v.* Com., — Ky. —, 49 S. W. 474 (Federal license to sell liquor, admissible to show probable possession); *Maryland:* 1895, Baltimore & O. R. Co. *v.* State, 81 Md. 371, 32 Atl. 202 (an intention of taking a railroad journey, admitted to show that the deceased was proceeding to get a ticket); *Massachusetts:* 1885, Com. *v.* Cotton, 138 Mass. 502 (keeping liquor with intent to sell; the defendant was driving a wagon of liquors through a no-license suburb of a city; evidence admitted of orders from his employers to go through that suburb without selling and to sell only upon reaching the region where sales were allowed); 1897, Inness *v.* R. Co., 168 Mass. 433, 47 N. E. 193 (intention to take the cars, admitted to show later conduct); 1901, Com. *v.* O'Brien, 179 Mass. 533, 61 N. E. 213 (intention of going with a certain object, admitted); *Nebraska:* 1894, Houston *v.* Gran, 38 Nebr. 687, 691, 57 N. W. 403 (damage by sale of liquor; defendant's instructions to his servants not to sell to the deceased, not admissible to disprove the sale; unsound); *Wisconsin:* 1908, Barker *v.* Western Union Tel. Co., 134 Wis. 147, 114 N. W. 439 (damage by loss of patronage; a patron's intention to accept the plaintiff's services is evidence that the services would have been accepted).

Compare the rulings upon *conduct as evidence of design* (*post*, §§ 237, 304).

§ **105.** [1] The following miscellaneous examples raise no difficulty: ENGLAND: 1760, Earl Ferrer's Trial, 19 How. St. Tr. 919 (killing);

CANADA: 1911, Allen *v.* King, 44 Can. Sup. 331 (cross-examination of accused to threats as testified to by a witness at the police court, not now called, held improper);

UNITED STATES: *Ala.* 1896, Wilson *v.* State, 110 Ala. 1, 20 So. 415; 1904, Pitts *v.* State, 140 Ala. 70, 37 So. 101; 1921, Nickerson *v.* State, 205 Ala. 684, 88 So. 905 (murder; "I will work 40 years in the penitentiary and give $4000 to get to kill you", admitted); *Ark.* 1883, Casat *v.* State, 40 Ark. 517 (killing); *Colo.* 1889, Babcock *v.* People, 13 Colo. 521, 29 Pac. 817 (killing); *Ga.* 1877, Fulton *v.* State, 58 Ga. 224 (arson); *Ill.* 1887, Spies *v.* People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, *passim* (killing); 1893, Painter *v.* People, 147 Ill. 462, 35 N. E. 64; 1902, Henry *v.* People, 198 Ill. 162, 65 N. E. 120; *Ind.* 1871, Cluck *v.* State, 40 Ind. 263, 270; *Iowa:* 1895, State *v.* Windahl, 95 Ia. 470, 64 N. W. 420 (killing); 1897, State *v.* Millmeier, 102 Ia. 692, 72 N. W. 275; 1905, State *v.* Thompson, 127 Ia. 440, 103 N. W. 377 (assault with intent); *La.* State *v.* Edwards, 34 La. An. 1012 (arson); 1884, State *v.* Birdwell, 36 La. An. 859, 861; 1896, State *v.* Pain, 48 La. An. 311, 19 So. 138; *Me.* 1848, New Gloucester *v.* Bridgham, 28 Me. 68; *Mass.* 1869, Com. *v.* Madan, 102 Mass. 1 (killing); *Mich.* 1897, People *v.* Holmes, 111 Mich. 364, 69 N. W. 501; *Minn.* 1895, State *v.* Hayward, 62 Minn. 474, 65 N. W. 63 (killing); *Miss.* 1905, Johnson *v.* State, 85 Miss. 572, 37 So. 926 (threats, and an attempt to secure help in the intended killing, admitted); 1905, Sinclair *v.* State, 87 Miss. 330, 39 So. 522; *Mo.* 1895, State *v.* Harlan, 130 Mo. 381, 32 S. W. 997 (killing); *Nebr.* 1905, Schroeder *v.* Blum, 74 Nebr. 60, 103 N. W. 1073 (malicious prosecution on a charge

the Hearsay exception or as an admission, and the design, thus evidenced, being relevant under the present principle:

1668, *Standsfield's Trial*, 11 How. St. Tr. 1371, 1373, 1377, 1385 (Scotland); parricide; it was proved that the defendant, who had been disinherited by his father, "did declare, threaten, and vow at several times that he would cut his throat", and did "swear, if he had a sword, he would run it through him", and the like. Mr. *Hume*, arguing for defendant: "[These circumstances] are but very remote and uncertain. For, as to that expression that the defender is alleged to have threatened his father's death, it is the opinion of all lawyers who have written upon the subject that that is but a very remote presumption. And as Carpzovius expresses it (pt. 3, qu. 121, no. 51): 'Quod est indicium admodum periculosum quippe cum homines sæpe nil minus faciant quam quod minas exequantur, et iracundia agitatus minas de crimine perpetrando sæpe jactet, ipso tamen animo fervore paulo post discusso, cohibeat manus, et abstineat a facinore illo, quod forsan ab alio postea committitur.'" The *King's Advocate*, in reply: "And whereas it is answered to this qualification [*i.e.* circumstance] that the saying that a son would cut a father's throat is but a remote circumstance, it is replied that the law and all lawyers do agree that 'minæ præcedentes et damnum sequentum' is a most pregnant qualification [*i.e.* circumstance] of that party's crime, especially where the threats were to cut a father's throat, which of itself was so horrid and unnatural a villainy that it cannot be doubted he who durst vow it wanted but an occasion to act it, and it is acknowledged, that though this be the clearest presumption,

of assault with a gun; threats of the now plaintiff, made before the alleged assault, but not communicated to the now defendant until after the prosecution, and therefore inadmissible if offered on the principle of § 258, n. 2, *post*, held admissible on the present principle). *North Carolina:* 1847, State *v.* Shepherd, 8 Ired. 195 (the fact that the deceased had bought the defendant's land at a sheriff's sale, that the defendant had threatened him with death if he took a deed, and that he had just taken the deed, admitted); 1880, State *v.* Norton, 82 N. C. 628 (assault and battery on S., the defendant's words two weeks before, when showing a pistol, that "if S. ever crossed his path he would send him to hell", rejected, because "neither malice nor intent nor knowledge nor motive forms any ingredient of the offence"); 1882, State *v.* Skidmore, 87 N. C. 509, 512 (approving State *v.* Norton *obiter;* citing no other cases); 1887, State *v.* Thompson, 97 N. C. 496, 1 S. E. 921 (arson; threats to do injury to the son and the grandson of the occupant, admitted as showing general ill-will to the family, and a motive); 1892, State *v.* Rhodes, 111 N. C. 647, 15 S. E. 1038 (arson; threats of harm against the son of the owner, admitted); 1895, State *v.* Goff, 117 N. C. 755, 23 S. E. 355 (threat to kill, as showing the defendant the aggressor; admitted with the obscure distinction that "while this was not competent as evidence of motive, it was admissible to show temper"); 1895, State *v.* Lytle, 117 N. C. 799, 23 S. E. 476 (threat to burn a house, admitted; but *semble*, not where the doing by the defendant is not disputed); 1896, State *v.* Mace, 118 N. C. 1244, 24 S. E. 798 ("Damn Bango Branch and everybody that lives on it; . . . I intend to kill some man this night", admitted, in the light of other circumstances); 1901, State *v.* Hunt, 128 N. C. 584, 38 S. E. 473 (declarations that he would go to the place where deceased was and "raise some hell", admitted); 1915, State *v.* Shouse, 166 N. C. 306, 81 S. E. 333 (that he "never expected to rest until he had killed two more", admitted; but why does the opinion, in view of the above line of decisions, cite merely a compilation of anonymous authorship for the singular proposition that "general threats to kill, not shown to have any reference to the deceased, are not admissible"?); *Tenn.* 1872, Maxwell *v.* State, 3 Heisk. 420; *Tex.* 1920, Sapp *v.* State, 87 Tex. Cr. 606; 223 S. W. 459 (wife-murder; wife's declarations of her state of mind, admitted); *Vt.* 1905, State *v.* Atkins, 77 Vt. 215, 59 Atl. 826 (breach of the peace by driving a wagon into collision); *Wash. T.* 1888, White *v.* Terr., 3 Wash. T. 397, 403, 19 Pac. 37 ("admissible in all cases"); *Wisconsin:* 1920, State *v.* Barber, — Wis. —, 179 N. W. 798 (assault with intent to rape a woman boarding with defendant; conditional threat 15 months before, held not too remote in trial Court's discretion).

Distinguish the question of a *co-indictee's* threats: 1901, State *v.* Weaver, 165 Mo. 1, 65 S. W. 308 (co-indictee's threats, inadmissible where no conspiracy at the time was shown; see *post*, § 1079); 1906, State *v.* Quen, 48 Or. 347, 86 Pac. 791 (threats of a third person, in the accused's presence, with no evidence of conspiracy, excluded).

yet 'per se' it is not full probation, for though the son had both vowed and resolved, yet by an accident he might have been prevented. But the presumption at least lays the burden."

1810, Chief Justice SWIFT, Evidence, 136: "When one threatens to do an injury to another, and that or a similar injury afterwards happens, this furnishes ground to presume that he who threatened the fact was the perpetrator or instigator."

1873, GROVER, J., in *Stokes* v. *People*, 53 N. Y. 175: "Threats to commit the crime for which a person is upon trial are constantly received as evidence against him, as circumstances proper to be considered in determining the question whether he has in fact committed the crime; for the reason that the threats indicate an intention to do it, and the existence of this intention creates a probability that he has in fact committed it."

1892, SHIRAS, J., in *Worth* v. *R. Co.*, 51 Fed. 173: "It is also said [by counsel] that a threat to do an act in the future is not proof that the person will in fact do the act threatened. It may not be proof conclusive, but it may be evidence competent to be considered with other facts in determining the question. Thus, if the two persons who made the threats in question had been charged, either civilly or criminally, with the tort of having wrecked the train, can it be questioned that on the trial of the case evidence of the threats made by them would have been competent as tending to show their complicity in the wrong done?"

Such threats may also be circumstantially evidential of *hatred*, ill-feeling, or *malice* towards the injured person; in this way they are evidence to show Emotion (*post*, § 394), while the emotion itself is evidential (*post*, § 117) as an independent circumstance to show the act. But the practical difference is that almost any antagonistic expression may serve to denote ill-feeling, and rules can hardly be laid down for such evidence; while, on the other hand, regarding the expressions as indicating a design, the nature of the design may seriously affect its relevancy. That which would suffice as evidence of ill-feeling may show no design, or a design too indefinite to be relevant. Again, the expressions may be regarded as showing *intent*, or *malice* in the legal sense of a deliberate intent to do the act charged, and the presence of this intent at a former time may be evidential (*post*, § 242) of a later intent at the time of the act. The practical difference is (1) if the doing of the act is conceded, then the design is no longer needed to prove it; but the same evidence of expressions may still be useful to show intent; (2) in an offence where intent is immaterial, the intent-evidence is immaterial, yet the design to do the act may still be relevant.

These are not much more than quibbles, for no harm is ordinarily done by admitting superfluous evidence; but if these quibbles are to be raised, they should be solved correctly; and the peculiar doctrines resulting from the raising of these quibbles are sometimes found to be hopelessly inconsistent and unsound.

§ 106. **Same: Generic Threats.** It has been noted (*ante*, § 103) that the more specific a design is, the greater its probative value. There may come a point at which the design is too indefinite in its indications to be of any probative value; but the mere fact that it is generic, *i.e.* points towards a

class of acts, however broad, does not in itself destroy its relevancy, provided the purpose might naturally include the act charged.[1]

§ 106. [1] ENGLAND: 1873, R. *v.* Hagan, 12 Cox Cr. 357 (murder of a child brought up in the defendant's family; his remark a fortnight before, "The child is no good; he is eating the other children's food", admitted).

UNITED STATES: *Federal:* 1898, Stevenson *v.* U. S., 29 C. C. A. 600, 86 Fed. 106 (murder of a deputy marshal; threat made three months before "to kill the next damn marshal that arrested him", excluded; preposterous ruling); 1900, Bird *v.* U. S., 180 U. S. 356, 21 Sup. 403 (quarrels and threats of assault upon another member of the same party of voyagers about a month before, excluded, partly as being a separate criminal act and partly as too remote; only two precedents cited for the first reason, and none for the second; opinion valueless);

Alabama: 1877, Commander *v.* State, 60 Ala. 1, 7 (murder; threat to kill any one who sued him under like circumstances, admitted, the deceased having sued him); 1881, Redd *v.* State, 68 Ala. 492, 497 (murder of a negro paramour; statements that "he did n't mind killing a negro, if he fooled with him, any more than he would a buck-rabbit", excluded); 1882, Ford *v.* State, 71 Ala. 385, 396 (to kill some one, admitted); 1885, Clarke *v.* State, 78 Ala. 474, 477 (murder; threats against a third person, received exceptionally, because the defendant shot the deceased, mistaking him for the third person); 1895, Prater *v.* State, 107 Ala. 26, 18 So. 239 (arson; that the defendant belonged to a band of "white caps" who had posted threats to burn down the houses of a certain class of persons of whom the owner of the burned house was one, admitted); 1896, Drake *v.* State, 110 Ala. 9, 20 So. 450 ("I will see you later", said after a quarrel, admitted); 1897, Linehan *v.* State, 113 Ala. 70, 21 So. 497 (that "he would show O. [the deceased] how to throw slurs on him", admitted); 1897, Burton *v.* State, 115 Ala. 1, 22 So. 585 (that he would "shoot some one", admitted); 1901, Caddell *v.* State, 129 Ala. 57, 30 So. 76 (threats to kill "anybody that interfered", admitted); 1904, Pitts *v.* State, 140 Ala. 70, 37 So. 101 (merely asking for a pistol is no more than a general threat); 1904, Harbour *v.* State, 140 Ala. 103, 37 So. 330 ("I will stamp the life out of somebody", excluded);

Arizona: 1918, Sparks *v.* State, 19 Ariz. 455, 171 Pac. 1182 (murder; "Courts will not exclude threats because of their remoteness");

California: 1896, People *v.* Craig, 111 Cal. 460, 465, 44 Pac. 186 (threats that "something would happen sure before it would end", and on certain conditions "he would put a hole through them", speaking of the members of a family, admitted on a charge of wife-killing); 1899, People *v.* Gross, 123 Cal. 389, 55 Pac. 1054 (that he would "wipe out the name" of the deceased's family, admitted); 1904, People *v.* Suesser, 142 Cal. 354, 75 Pac. 1093 (threats against D. and A., admitted, the deceased F. having been killed while preventing the execution of these threats); 1916, People *v.* Wilt, 173 Cal. 477, 160 Pac. 561 ("I will get my revenge on that bunch"); 1921, Cordts *v.* Superior Court, — Cal. App. —, 200 Pac. 726 (homicide of a police officer in a motor-car collision; "if anybody undertakes to stop me, I will put on all the gas I have and run them down", admitted);

Colorado: 1899, Moore *v.* People, 26 Colo. 213, 57 Pac. 857 (that "he would get the son of a bitch yet", admitted);

Columbia (Dist.): 1881, Guiteau's Trial, D. C., II, 95 (that the defendant in 1872 or 1873 said he would "shoot some of our public men", "would imitate Wilkes Booth", admitted);

Connecticut: 1880, State *v.* Hoyt, 47 Conn. 518, 522, 539 (murder of father; the defendant's declaration, "I don't know but I shall kill some one in a week", admitted);

Florida: 1866, Dixon *v.* State, 13 Fla. 636, 645 (the deceased being a policeman, threats of violence against "policemen", shortly before, admitted to show intent);

Georgia: 1876, Stafford *v.* State, 55 Ga. 591, 593 (murder and robbery; a plan, of a week or so before, to rob others, admitted); 1878, Shaw *v.* State, 60 Ga. 246, 250 (wife-murder by beating; a declaration, four years before, by the defendant while beating her, that he had a right to beat her, admitted); 1897, Shaw *v.* State, 102 Ga. 660, 29 S. E. 477 (train-wrecking; defendant's statement that "he was going to have a wreck of his own some day", received); 1899, Harris *v.* State, 109 Ga. 280, 34 S. E. 583 (murder of negro; defendant's remark, just before, "A negro took my woman, and I am gwine over there and get me a negro", admitted); 1905, Rawlins *v.* State, 124 Ga. 31, 52 S. E. 1 (threats against the father of the children killed, admitted); 1912, Helms *v.* State, 138 Ga. 826, 76 S. E. 353 (murder);

Idaho: 1898, State *v.* Davis, 6 Ida. 159, 53 Pac. 678 (murder of sheep-man; threats against sheep-men generally, admitted); 1897, State *v.* Larkins, 5 Ida. 200, 47 Pac. 945 (murder, "I have a dirty piece of business to do to-night", admitted); 1917, State *v.* Rogers, 30 Ida. 259, 163 Pac. 912 (murder: "if there is any cutting done, I will be there", excluded);

Illinois: 1886, Schoolcraft *v.* People, 117 Ill. 271, 277, 7 N. E. 649 (that "some serious", would occur, admitted); 1920, People *v.* Steinkraus, 291 Ill. 283, 126 N. E. 202 (murder; intention to hold up another man that day, and willingness to "hold up a man with a gun and rob him", excluded; the present line of authorities not considered); 1920, People *v.*

In evidencing the existence of this general design, use is made of conduct or expressions, as evidence of the state of mind, and it is often a question

Sorrells, 293 Ill. 591, 127 N. E. 651 (homicide of wife; threat intimating injury to the mother-in-law, excluded; erroneous on the facts); 1918, People *v.* Scott, 281 Ill. 465, 120 N. E. 553 (homicide by a school board official of a pupil's parent; the deceased's statement, "There is going to be hell at the schoolhouse", etc., held inadmissible; astounding);

Indiana: 1893, Parker *v.* State, 136 Ind. 284, 287, 35 N. E. 1105 (threats to get even with a certain class of persons, which included the deceased, admitted); 1902, Wheeler *v.* State, 158 Ind. 687, 63 N. E. 975 (threats against persons eating food intended for defendant's children, the deceased being such a person, admitted); 1903, Starr *v.* State, 160 Ind. 661, 67 N. E. 527 (threat to kill "the s— of a b—", admitted); 1910, Porter *v.* State, 173 Ind. 694, 91 N. E. 310 (wife-murder; the defendant's statement that "there was nothing too low down for him to do", excluded, as involving his character); 1910, Miller *v.* State, 174 Ind. 255, 91 N. E. 930 (after arrest, "when I get out of this, I will get even with some of them", excluded);

Iowa: 1894, State *v.* Pierce, 90 Ia. 506, 512, 58 N. W. 891 (threats to kill any person who interfered in a certain way, admitted); 1896, State *v.* Helm, 97 Ia. 378, 66 N. W. 751 (a threat that "some of the C. boys would die with their boots on some of these days", the deceased being a C.; admitted, but perhaps only as a self-contradiction); 1896, Laird *v.* Ass. Co., 98 Ia. 495, 67 N. W. 385 (an angry husband to the deceased, his wife, "You 'll run against a stump yet"); 1899, State *v.* Lightfoot, 107 Ia. 344, 78 N. W. 41 (indefinite threats admitted);

Kansas: 1872, State *v.* Horne, 9 Kan. 123, 128 (hostile desire to find the deceased, "By God, we want to see him", admitted);

Kentucky: 1896, Brooks *v.* Com., 100 Ky. 194, 37 S. W. 1043 ("he wanted some damned man to jump on him, so that he could kill him", admitted); 1901, Quinn *v.* Com., — Ky. —, 63 S. W. 792 (murder; threats "that he would kill or be killed before he would go to the workhouse", admitted); 1914, Combs *v.* Com., 160 Ky. 386, 169 S. W. 879 (murder; that he would his father as soon as anyone else, admitted);

Maryland: 1916, Frick *v.* State, 128 Md. 122, 97 Atl. 138 (manslaughter by a railroad policeman; "the next one he caught on the car he was going to shoot", admitted); 1916, Frick *v.* State, 128 Md. 122, 97 Atl. 138 ("remoteness . . . makes no difference as to competency");

Massachusetts: 1869, Com. *v.* Madan, 102 Mass. 1 (murder; threats to have revenge against certain witnesses, the deceased being one, admitted); 1887, Com. *v.* Chase, 147 Mass. 597, 18 N. E. 565 (threats of harm to a person who had testified against the defendant, admitted to show that the defendant was the one who burned the former's barn); 1890, Com. *v.* Quinn, 150 Mass. 401, 23 N. E. 54 (arson; the defendant's threats, after being formerly charged with robbery by the owner of the burned building, to "make him sweat for it", admitted);

Minnesota: 1906, State *v.* Yates, 99 Minn. 461, 109 N. W. 1070 (arson for insurance; the defendant's statement, about a year before, to a friend who had a stock of goods, "Why don't you get everything you have got here insured for $800 or $1000 and in four or five days after you get the insurance all right set them afire?" excluded though the opinion concedes that it "tended to characterize her as an incendiary, willing to burn property for the purpose of the insurance thereon"; this is one of the most depressing rulings in our records); 1922, State *v.* Miller, — Minn. —, 186 N. W. 803 (murder; defendant's prior statement that he had a right "to shoot a sewing-machine agent P., who persisted in calling at his home in his absence . . . and would do so if he came again", P. not being the deceased in question, excluded, because tending rather to show a vicious disposition);

Missouri: 1879, State *v.* Guy, 69 Mo. 430 (a threat to kill an unnamed person, admitted); 1883, State *v.* Dickson, 78 Mo. 438, 449 ("he shall not eat my bread and meat much longer", etc.); 1883, State *v.* Grant, 79 Mo. 113, 137 (murder of a policeman; threats against "policemen", admitted); 1885, State *v.* McNally, 87 Mo. 649 ("going to have blood before morning", admitted); 1885, Culbertson *v.* Hill, 87 Mo. 553, 555 ("general or special"); 1889, State *v.* Crawford, 99 Mo. 74, 12 S. W. 354 (vague threats, admitted); 1895, State *v.* Fitzgerald, 130 Mo. 407, 32 S. W. 1113 (threats to kill some one and then himself, admitted); 1899, State *v.* Cochran, 147 Mo. 504, 49 S. W. 558 (that he "would like to kill some damned old Grand Army man", and "would like to kill somebody before the week was out", admitted, though the deceased was not a member of the G. A. R.); 1906, State *v.* Feeley, 194 Mo. 300, 92 S. W. 663 (a threat showing "general malice" and a disposition "to an act which was criminal" is admissible);

Montana: 1909, State *v.* Hanlon, 38 Mont. 557, 100 Pac. 1035 ("I am coming back and drive all you old-timers out of the camp", admitted);

Nebraska: 1903, Keating *v.* State, 67 Nebr. 560, 93 N. W. 980 (general expressions of a plan to rob, admitted);

Nevada: 1880, State *v.* Hymer, 15 Nev. 49, 54, per Beatty, C. J. (murder; statements, about three hours before, "It is the first time I have been drunk since I have been in town; I got drunk just to kill two or three —— in this

whether the weakness of the inference lies in this evidence of the actual state of mind (*post*, § 238), or in the present inference from the mental condi-

town, and I'll do it, too", admitted: distinguishing State *v.* Walsh, 5 Nev. 315, 1869, in which a threat was uttered against "a party" who had been talking about his wife, but the person was not identified with the deceased);
New Hampshire: 1898, State *v.* Davis, 69 N. H. 350, 41 Atl. 267 (illegal sale of liquor; a letter declaring a general intention not to open a hotel unless he sold liquor in it, admitted; also a conversation telling a prospective tenant that he would have to sell liquor, admitted);
New Mexico: 1921, State *v.* Bailey, — N. M. —, 198 Pac. 529 ("He said he would protect his ground; if he couldn't by law, he would with his gun");
New York: 1865, People *v.* Kennedy, 32 N. Y. 141 (threats by the defendant, a discharged farm-hand, to do all the damage he could to the employer and to destroy his property, admitted to connect the defendant with the burning of the other's barn); 1873, Stokes *v.* People, 53 N. Y. 174 (general threats; he "would beggar him first and then kill him"; "I go prepared for him all the time; so sure as my name is Jim Fisk I will kill him"; per Grover, J., "the difference is only in degree" between these and more specific designs); 1874, Weed *v.* People, 56 N. Y. 628 (abortion; evidence admitted, after connecting the defendant with the act, of an advertisement issued by him, about two years before, offering advice and assistance in the procuring of miscarriages); 1897, People *v.* Sutherland, 154 N. Y. 345, 48 N. E. 518 (murder by shooting; showing a pistol on the same day shortly before, remarking, "This means business some day", received); 1898, People *v.* Decker, 157 N. Y. 186, 51 N. E. 1018 (taking up a revolver, and saying to a wife, "I have your medicine if you do not do as I say", admitted); 1906, People *v.* Johnson, 185 N. Y. 219, 77 N. E. 1164 (threats five months before, repeated, admitted);
North Carolina: (see citations *ante*, § 105);
Ohio: 1865, Mimms *v.* State, 16 Oh. St. 221, 230 (threat to rob A, not admissible to show the killing of A, unless A was both robbed and killed);
Oklahoma: 1912, McDaniel *v.* State, 8 Okl. Cr. 209, 127 Pac. 358;
Oregon: 1919, State *v.* Merls, 92 Or. 678, 182 Pac. 153 (homicide of husband by wife; defendant's threats against another member of the family, held inadmissible);
Pennsylvania: 1865, Hopkins *v.* Com., 50 Pa. 9 (murder; the defendant, a sailor, had been in irons for turbulence; and after being released, and less than an hour before the killing, declared that he would kill somebody before twenty-four hours; admitted, for it was not "necessary that the premeditated malice should have selected its victim"; here the only issue was that of the degree of homicide;) 1882, Abernethy *v.* Com., 101 Pa. 322, 324, 328 (threats to kill "somebody", admissible: but here they were followed by a specifying of a third person, and hence were held improperly considered); 1918, Com. *v.* Delfino, 259 Pa. 272, 102 Atl. 949 (murder; threats more than two years before, admitted);
South Dakota: 1895, State *v.* Isaacson, 8 S. D. 69, 65 N. W. 430 (charge of poisoning a horse: threats during the preceding year to kill animals of that person admitted);
Tennessee: 1844, Kinchelow *v.* State, 5 Humph. 9, 12 (larceny of a bag of flour, a proposal of the defendant to the witness, on the night of the larceny, to "join him in various schemes of forgery, larceny, kidnapping, etc." excluded);
Texas: 1892, Massey *v.* State, 31 Tex. Cr. 371, 379, 20 S. W. 758 (declaration that he intended to rape some person, admitted); 1898, Holley *v.* State, 39 Tex. Cr. 301, 46 S. W. 39 (threats not directed to deceased by name, inadmissible, unless otherwise shown to have signified or included him); 1914, Hiles *v.* State, 73 Tex. Cr. 17, 163 S. W. 717 (murder); 1921, Green *v.* State, 90 Tex. Cr. 149, 233 S. W. 962 ("You come over Sunday and we will beat hell out of him", admitted);
Utah: 1911, State *v.* Vacos, 40 Utah 169, 120 Pac. 497 ("I will get him to-night", admitted);
Vermont: 1878, State *v.* Smalley, 50 Vt. 736, 738, 749 (arson of the defendant's own house, to defraud the insurer; evidence of threats to be revenged on other persons, rejected, though the houses of the others had also been burned);
Virginia: 1910, Hardy *v.* Com., 110 Va. 910, 67 S. E. 522;
Washington: 1902, State *v.* Gates, 28 Wash. 689, 69 Par. 385 (general threats against any person running into defendant's fishing net, admitted);
Wisconsin: 1861, Benedict *v.* State, 14 Wis. 423 (murder; threats that a knife exhibited by him "would probably be the death of some person before the week was out", and the like, admitted; "such declarations . . . are not to be excluded because they are general, or because the accused did not choose fully to divulge his plans").

Compare, with the above cases, those cited *post*, §§ 363, 396 (intent or motive from conduct) where other principles may lead to different results; and also the cases cited *post*, § 237, especially n. 7, "Evidence of Design or Plan."

The following ruling is unique: 1907, Conklin *v.* Consolidated R. Co., 196 Mass. 302, 82 N. E. 23 (assault by a car-conductor on a passenger; to show that the conductor began the affray, the conductor's statement, shortly before, that he would "assault some one on the car before he got through", was excluded; the opinion concedes its relevancy, but

tion to the doing of an act. The precedents under both heads may be concerned.

§ 107. **Same: Conditional Threats.** It has been pointed out (*ante*, § 103) that the probative value of a design involves some notion of positiveness or absoluteness. The mere fact, however, that it is expressed in the alternative or with a condition or contingency does not destroy its probative value; but the intervening fulfillment of the condition should ordinarily be shown, if it occurred.[1]

§ 108. **Same: Time of Threats.** The element of fixedness is lacking, and the probative value disappears, if the threats were made at such a time anterior that the design cannot possibly be supposed to have continued throughout the interval. But no mere distance of time in itself should make the threats irrelevant. A design once formed may continue.[1] The defendant

excludes it because it did not satisfy the rule for agents' admissions; this perverse ruling is calculated to shake one's faith in the possibility of ever improving our law of evidence, for it ignores the simple and fundamental principle of multiple relevancy, *ante*, § 13).

§ 107. [1] *Ala.* 1881, Redd *v.* State, 68 Ala. 492, 496 (Brickell, C. J.: "Whatever may be its force, whether absolute or conditional, whether it indicates a purpose only contemplated or fully matured, it is admissible"); *Ark.* 1896, Phillips *v.* State, 62 Ark. 119, 34 S. W. 539 (that he "would make his wife come back home to him or beat her to death", admitted); *Ga.* 1878, Everett *v.* State, 62 Ga. 65, 70 (murder of a paramour; threats three years before that he would kill her before any other man should have her, admitted); *Ky.* 1902, Abbott *v.* Com., — Ky. —, 68 S. W. 124 (murder of a brother-in-law the day after his marriage; defendant's threats, a year before, to kill the deceased if he married the former's sister, admitted); *Mass.* 1896, Com. *v.* Crowe, 165 Mass. 139, 42 N. E. 563 (threat to burn the building "unless his mother got something out of the property", admitted, though she did get something out of the property); *Mo.* 1882, State *v.* Johnson, 76 Mo. 121, 124 (threat "to fix him if he fooled with him", admitted); State *v.* Adams, 76 Mo. 357 (similar); 1883, Carver *v.* Huskey, 79 Mo. 509 ("if they hunted in that neighborhood with hounds, he would kill them", admitted); *Mont.* 1899, State *v.* Sloan, 22 Mont. 293, 56 Pac. 364 (conditional threats, admitted); *Pa.* 1898, Com. *v.* Farrell, 187 Pa. 408, 41 Atl. 382 (defendant "swore he would get B.'s money, if he had to kill the old man to do so"; not admitted as evidence of defendant's robbery and murder of B., because "there is no legal presumption that such a threat will be executed"; a ruling supremely ridiculous); *Vt.* 1892, State *v.* Bradley, 64 Vt. 468, 470, 24 Atl. 1053 (murder of a paramour; threats six or eight months before, to kill her if she left him, admitted, "proof tending to show that the condition had transpired having been introduced"); 1895, State *v.* Bradley, 67 Vt. 465, 32 Atl. 240 (threats to kill under certain circumstances, admitted); 1911, State *v.* Averill, 85 Vt. 115, 81 Atl. 461 (murder); *Va.* 1910, Hardy *v.* Com., 110 Va. 910, 67 S. E. 522.

§ 108. [1] *Alabama:* 1881, Redd *v.* State, 68 Ala. 492 (see quotation *supra*); 1889, Barnes *v.* State, 88 Ala. 204, 207, 7 So. 38 (rape; expressions, uttered three months before, admitted); *California:* 1867, People *v.* Cronin, 34 Cal. 190, 200, 205 (lapse of time affects weight only; threats to kill, made nearly a year before, admitted); 1882, People *v.* Hong Ah Duck, 61 Cal. 387 (same principle; here threats to kill, made about a month before, were admitted); *Columbia* (Dist.): 1880, U. S. *v.* Neverson, 1 Mackie, D. C. 152, 169 (admitting threats made the summer before a killing in January); *Florida:* 1903, Johns *v.* State, 46 Fla. 157, 35 So. 71 (threats three weeks before, admitted); *Georgia:* 1896, McDaniel *v.* State, 100 Ga. 67, 27 S. E. 158 (threats "a considerable period beforehand", admitted); *Kentucky:* 1902, Abbott *v.* Com., — Ky. —, 68 S. W. 124 (threats a year before, admitted); *Massachusetts:* 1859, Com. *v.* Goodwin, 14 Gray 55 (arson; threats of revenge one or two years before, admitted; admissibility "would not be affected" by "the length of time which intervened"); 1890, Com. *v.* Quinn, 150 Mass. 401, 23 N. E. 54 (arson; threats three years before; admitted in trial Court's discretion); 1892, Com. *v.* Holmes, 157 Mass. 233, 239, 32 N. E. 6 (wife-murder; threats at various times during nine years, admitted; their "remoteness" "was for the Court, in the exercise of its discretion"); 1896, Com. *v.* Crowe, 165 Mass. 139, 42 N. E. 563 (a threat fourteen months before, admitted, the ill-feeling having continued); 1900, Com. *v.* Corkery, 175 Mass. 460, 56 N. E. 711 (larceny; declarations three months before, admitted); *Minnesota:* 1896, Hale *v.* Life Ins. Co., 65

may use the lapse of time as a circumstance explaining away the significance of the threats by indicating the probable abandonment of the design:

1881, BRICKELL, C. J., in *Redd* v. *State*, 68 Ala. 492, 496 (murder of a paramour; threats made two years before were admitted): "The length of time elapsing between the making of the threat and the criminal act, when the crime is to be proved only by circumstantial evidence, is of importance in determining the weight to be accorded to it. . . . If a long period intervenes, during which there were opportunities of doing the threatened injury, and there was no attempt to do it, and no repetition of the threat, it would be but a slight circumstance in connecting the accused with the injury, and there would be more reason for regarding it as having been a mere careless, thoughtless utterance, or idle bravado, or ebullition of temporary passion. The length of time would impair its probative force, but would not render it inadmissible. So the probative force of the threat would be increased if it was frequently repeated during the whole time intervening . . . and the same cause for ill-will and hate continued to exist; then it could be imputed to a malignant spirit, and a purpose that may have been vacillating but at last became fixed and settled."

1896, START, C. J., in *Hale* v. *Life Ins. Co.*, 65 Minn. 548, 68 N. W. 182 (in an action on an insurance policy, excluding threats of the deceased to commit suicide): "The declarations must, in order to be admissible in evidence, bear a reasonably close relation, in point of time, to the alleged act. The reason for the rule suggests and enforces the necessity of this relation between the declaration of the party and the doing of the alleged act by him. They must be so near in point of time as to justify a reasonable probability, in connection with the other evidence in the case, that the party in fact carried his declared intention into execution. No definite rule applicable to all cases can be laid down as to when, and when not, such declarations will be received. It is a matter largely in the sound discretion of the trial Court in each particular case."

§ 109. **Same: Explaining away Threats.** Under the principle of Explanation (*ante*, § 34), the defendant may of course attempt to explain away the design-evidence. Thus, he may show that the lapse of time probably led to the abandonment of the design; or that it did not apply to the act charged; or that it was otherwise without real significance.[1]

§ 110. **Uncommunicated Threats by the Deceased against one charged with Homicide; General Principle.** Where on a charge of homicide the excuse is self-defence, and the controversy is whether the deceased was the aggressor, the deceased's threats against the accused are relevant. The deceased's design to do violence upon the defendant is of some value to show

Minn. 548, 68 N. W. 182 (see quotation *supra*); *Missouri:* 1882, State *v.* Adams, 76 Mo. 357 (lapse of time held immaterial; followed in later cases); 1883, State *v.* Grant, 79 Mo. 137; 1883, Carver *v.* Huskey, 79 Mo. 509; 1885, State *v.* McNally, 87 Mo. 650; 1897, State *v.* Wright, 141 Mo. 333, 42 S. W. 934; 1905, State *v.* Coleman, 186 Mo. 151, 84 S. W. 978 (threats eighteen months before, admitted); *Montana:* 1889, Terr. *v.* Roberts, 9 Mont. 12, 14, 22 Pac. 132 (threats about two months before the shooting, admitted; "mere lapse of time does not exclude" such evidence); *New Hampshire:* 1898, State *v.* Davis, 69 N. H. 350, 41 Atl. 267 (discretion of trial Court controls); *North Carolina:* 1905, State *v.* Exum, 138 N. C. 599, 50 S. E. 283 (threats nine months before, admitted); 1916, State *v.* Merrick, 172 N. C. 870, 90 S. E. 257 (murder; threats made "within 6 or 12 months", admitted); *Vermont:* 1892, State *v.* Bradley, 64 Vt. 466, 470, 24 Atl. 1053 (murder; threats of six or eight months before, admitted; time goes "not to the admissibility but to the weight").

§ 109. [1] 1855, Atkins *v.* State, 16 Ark. 581 (explanation of circumstances under which threats to kill were uttered by defendant); 1846, State *v.* Duncan, 6 Ired. N. C. 236, 239 (evidence that the defendant was accustomed when angry to make threats of violence without carrying them out, excluded; unsound).

that on the occasion in question he did carry out, or attempt to carry out, his design. Moreover, it is the fact of his design, irrespective of its communication to the defendant, that is evidential:

1860, BALDWIN, J., in *People* v. *Arnold*, 15 Cal. 481: "[The defendant urged] that this assault was not made by him, but that it was made by Sweeney [the deceased]; and to prove this, he proposed to show that Sweeney had armed himself with this pistol, that he had borrowed it, and that it was found at the place of the rencounter. He was permitted to show these facts, but he proposed to show a further fact, and that was that, at the time of Sweeney's getting the pistol, he declared what he meant to do with it. . . . This leads to the inquiry, whether the fact that A procures a weapon for a particular purpose conduces at all to show, in a question of conflicting proofs as to the manner in which he used it, what that manner was. We apprehend that if a man goes into a house, borrows a gun, goes out with it, saying that he means to use it on another, and a rencounter happens between him and that other, and the witnesses who see the difficulty differ, or the circumstances are equivocal, as to which one of the two commences the affray, that some light might be thrown upon this question, conducing to or towards its solution, by the proof of these facts as to A's procuring it and his motives in doing so. The jury might possibly, with some reason, conclude that as the weapon was procured for this purpose of assault on another, that purpose was fulfilled; that the assault, in other words, was made in pursuance of the intended purpose when the weapon was procured, and especially if other facts in corroboration of this conclusion existed. It is true there would be nothing conclusive in this. But the fact of the conclusiveness of this proof to establish the proposition which it is introduced to prove is not the decisive question; that question is, whether this item of fact be matter proper to be considered by the jury in arriving at their conclusion upon this mooted point. And we have no doubt that it is."

1873, GROVER, J., in *Stokes* v. *People*, 53 N. Y. 174: "[Why are such threats if communicated admissible?] For the reason that threats made would show an attempt to execute them probable,when an opportunity occurred, and the more ready belief of the accused would be justified to the precise extent of this probability. But an attempt to execute threats is equally probable, when not communicated to the party threatened, as when they are so; and when, as in this case [of self-defence alleged] the question is whether the attempt was in fact made, we can see no reason for excluding them in the former that would not be equally cogent for the exclusion of the latter."

1892, RANEY, C. J., in *Wilson* v. *State*, 30 Fla. 242, 11 So. 556: "The principle of the admission of threats under such circumstances is that they tend to show that it was the intention of the deceased at the time of the meeting to attack the accused, or that he was seeking the latter's life, and hence they tend to prove that the former brought on the conflict, and consequently are relevant evidence. The philosophy of the matter is that where there has been an encounter, and it is not shown by direct evidence who was the assailant, threats of an intention to assail are some evidence of an assault having been made by the one who made the threats."

§ 111. **Same: Discriminations and Limitations.** This evidence is now conceded to be admissible, by virtually all Courts.[1] But the following discriminations must be noted:

§ **111.** [1] The rulings in the various jurisdictions are as follows:
Federal: 1876, Wiggins *v.* Utah, 93 U. S. 465 (the question who fired the first shot being in dispute, held that on the evidence the trial judge improperly treated the defendant's aggression as being beyond doubt, and therefore wrongly excluded the evidence of the threats of the deceased; Clifford, J., dissents, apparently only because there was no evidence rendering the defendant's aggression doubtful); 1895, Allison *v.* U. S., 160 U. S. 203, 16 Sup. 252 (admissible where there is a doubt); 1915, Trapp *v.* Terr., 8th C. C. A., 225 Fed. 968

(1) The use of *communicated threats* to show the defendant's apprehension of violence is to be distinguished (*post*, § 247), because the principle is different and does not need the limitations of the present doctrine.

1889, LUCAS, J., in *State* v. *Evans*, 33 W. Va. 426, 10 S. E. 792: "Evidence of communicated threats is intended to shed light upon the mental attitude of the prisoner towards the deceased when the homicide occurred; uncommunicated threats are evidence of the mental attitude of the deceased towards the prisoner."

(murder of M.; threats of M. against defendant's father, not communicated to defendant, held admissible on the present principle, defendant being at the time at home with his father); *Alabama:* 1851, Powell *v.* State, 19 Ala. 577, 581 (a suggestion that there might be a proper use for uncommunicated threats); 1853, Carroll *v.* State, 23 Ala. 37 (threats two weeks before offered "to show the character of the conduct of the deceased" in his trespass; excluded, because the deceased actually used no violence, and because the threats should be nearer in time to the affray, and be part of the 'res gestæ'); 1873, Burns *v.* State, 43 Ala. 374 (threats uncommunicated are admissible when they "form part of the 'res gestæ'", on the theory that they "show the mental status of the deceased and his motive in going" to the place, and thus they "may enable the jury to determine who was the aggressor"; here threats made the same afternoon were received, and threats made the day before were rejected); 1880, Roberts *v.* State, 68 Ala. 163 (repudiating former limitations; the essential condition is that "the deceased had sought a conflict with the accused, or was making some demonstration, or overt act of attack" at the time of the killing; if so, "uncommunicated threats, recently made, are admissible for the purpose of showing the 'quo animo' of such demonstration or attack", or for "corroborating those that are communicated", or, where the aggressor is doubtful, "to show who was probably the first assailant"); 1881, Green *v.* State, 69 Ala. 7 (preceding case affirmed); 1896, Gunter *v.* State, 111 Ala. 23, 20 So. 632 (admitted); 1899, Henson *v.* State, 120 Ala. 316, 25 So. 23 (mere general threat, not applying to defendant, excluded);

Arkansas: 1855, Atkins *v.* State, 16 Ark. 568, 584 (present principle not considered); 1859, Coker *v.* State, 20 Ark. 53, 55 (same); 1860, Pitman *v.* State, 22 Ark. 353, 356 (recognizing the present principle, and admitting uncommunicated threats made on the day of the killing, as manifesting "the use he [the deceased] intended to make of the pistol, etc.", "the motive that was taking him to G.", and "his hostile feelings" towards the defendant); 1879, Harris *v.* State, 34 Ark. 469, 472 (no rule attempted, but the preceding case approved; the deceased's non-aggression being clearly shown, the threats were rejected); 1904, Lee *v.* State, 72 Ark. 436, 81 S. W. 385;

California: 1860, People *v.* Arnold, 15 Cal. 476, 481 (admitted; but *semble* only where the evidence was conflicting as to the aggressor); 1869, People *v.* Scoggins, 37 Cal. 676, 684, 696 (admitted, where there is other evidence — no definite measure being given — that the deceased was the aggressor); 1880, People *v.* Alivtre, 55 Cal. 263 (the preceding cases approved; no specific rule laid down); 1880, People *v.* Travis, 56 Cal. 251, 253 (threats admissible, *semble;* no authorities cited); 1880, People *v.* Carlton, 57 Cal. 83 (following Arnold's Case); 1906, People *v.* Lamar, 148 Cal. 564, 83 Pac. 993;

Colorado: 1878, Davidson *v.* People, 4 Colo. 145 (former threat admitted "to show that at the time of the meeting the deceased was seeking the defendant's life"; here, in view of the existence of a long-standing feud and of threats at the time); 1889, Babcock *v.* People, 13 Colo. 515, 521, 29 Pac. 817 (length of time does not exclude; here, a year before);

Delaware: 1905, State *v.* Powell, 5 Penn. Del. 24, 61 Atl. 966 (murder with a knife; the deceased's admissions that she had poisoned the defendant's coffee, and was going to kill the defendant, admitted);

Florida: 1886, Bond *v.* State, 21 Fla. 738, 751 (admissible when so near the time of the killing as to be part of the transaction, or when the question of the aggression "is in any manner of doubt"); 1891, Garner *v.* State, 28 Fla. 113, 133, 9 So. 835 (same); 1892, Wilson *v.* State, 30 Fla. 234, 242, 11 So. 556 (same); 1894, Steele *v.* State, 33 Fla. 348, 350, 14 So. 841, *semble* (same); 1896, Lester *v.* State, 37 Fla. 382, 20 So. 232 (as showing that "the deceased was shot while he was in the act of endeavoring to carry out the threat"); 1903, Fields *v.* State, 46 Fla. 84, 35 So. 185 (threats, and the habit of going armed, admissible, where there is "doubt as to who began the difficulty");

Georgia: 1846, Reynolds *v.* State, 1 Kelly, 222, 230, *semble* (admitting evidence that the deceased had armed himself just before the affray); 1848, Monroe *v.* State, 5 Ga. 85, 138, *semble* (self-defence; admitted to show "the state of feeling of the parties towards each other at the time of the act"); 1855, Haynes *v.* State, 17 Ga. 465, 482 (self-defence; "It is important to ascertain the temper and conduct of the parties, to determine who was most likely to have brought about the emergency";

Nevertheless, as so few Courts in the beginning perceived the present use of threats, it was natural that some confusion should arise in the process of establishing the distinction, especially through the erroneous application of rulings from other jurisdictions. The distinction itself rests on the same principle as that between character used to show the probability of the deceased's act, and communicated character used to show the defendant's apprehensions (*ante*, § 63). Occasionally a Court still applies the same tests to both uses, communicated and uncommunicated; but the distinctness of the two uses is now generally understood. — The use of the deceased's expressions as evidence of *prior ill-feeling* or *malice* should also be here distinguished (*post*, § 396).

admitting threats); 1855, Keener *v.* State, 18 Ga. 194, 224, 228 (admitting evidence of threats to show the deceased's "evil intent" in going to where the defendant was; "remoteness or nearness of time" is immaterial as to admissibility); 1858, Hawkins *v.* State, 25 Ga. 207, 210 (the deceased's prior design to kill the defendant, excluded, the deceased being unarmed at the time of the killing); 1859, Lingo *v.* State, 29 Ga. 470, 483 (the doctrine ignored); 1869, Hoye *v.* State, 39 Ga. 718, 722 (Keener's Case held not applicable, as the deceased was unarmed at the time of the killing; prior threats excluded); 1871, Pound *v.* State, 43 Ga. 88, 129 (what the deceased said when taking an axe to the field; admissible according to circumstances); 1873, Peterson *v.* State, 50 Ga. 142 (recognizing Keener's Case, but regarding it as not to be extended); 1891, Vaughn *v.* State, 88 Ga. 731, 736, 16 S. E. 64 (excluded, where there was no hostile conduct at the time; the defendant's unsworn statement not sufficient to lay this foundation); 1892, May *v.* State, 90 Ga. 793, 797, 17 S. E. 108 (admitted where the aggressor was in doubt, Keener's Case approved; Vaughan's Case distinguished); 1893, Pittman *v.* State, 92 Ga. 480, 17 S. E. 856 (preceding case approved); 1904, McKinney *v.* Carmack, 119 Ga. 467, 46 S. E. 719 (rule applied); 1906, Warrick *v.* State, 125 Ga. 133, 53 S. E. 1027 (prior cases reviewed, and the ruling in McKinney *v.* Carmack approved "as stating both the general rule . . . and the exceptional instance"); 1910, Rouse *v.* State, 135 Ga. 227, 69 S. E. 180;

Illinois: 1850, Campbell *v.* People, 16 Ill. 1 (admitted as furnishing "a reasonable inference that the deceased sought the defendant for the purpose of executing those threats"); 1870, Williams *v.* People, 54 Ill. 422, 426 (admitted); 1892, Siebert *v.* People, 143 Ill. 571, 590, 32 N. E. 431 (approving Campbell *v.* People); 1907, Neathery *v.* People, 227 Ill. 110, 81 N. E. 16 (admitted);

Indiana: 1871, Holler *v.* State, 37 Ind. 57, 60; 1881, Combs *v.* State, 75 Ind. 217 ("they supply grounds for an inference that the deceased was the assailant"); 1891, Bowlus *v.* State, 130 Ind. 227, 229, 28 N. E. 1115 (no rule particularized); 1898, Ellis *v.* State, 152 Ind. 326, 52 N. E. 82 (excluded here because there had been no aggression on the defendant); 1908, Duncan *v.* State, 171 Ind. 444, 86 N. E. 641 (but here excluded because evidence by hearsay only); 1917, Houe *v.* State, 186 Ind. 139, 115 N. E. 81 (threats of a co-conspirator, excluded for lack of evidence of an overt act);

Indian Terr.: 1899, Helms *v.* U. S., 2 Ind. T. 595, 52 S. W. 60 (deceased's hostile feelings, admissible, if self-defence is in issue); 1905, Burroughs *v.* U. S., 6 Ind. T. 164, 90 S. W. 8 (decedent's threats admissible, even where the issue is provocation to manslaughter, and not self-defence);

Iowa: 1875, State *v.* Woodson, 41 Ia. 428 (left undecided); 1876, State *v.* Maloy, 44 Ia. 104, 114 (excluded under the other principle, without noticing the present one); 1877, State *v.* Elliott, 45 Ia. 490 (excluded, unless, *semble*, the question of self-defence is in issue); 1907, State *v.* Blee, 133 Ia. 725, 111 N. W. 19 (admissible; "the precise question is now before this Court for the first [!] time"); 1916, State *v.* Menilla, 177 Ia. 283, 158 N. W. 645 ("age and remoteness of threats bear only upon their probative value, and not upon their admissibility");

Kansas: 1879, State *v.* Brown, 22 Kan. 222 (admissible when the question of aggression is "in any manner of doubt", or to corroborate communicated threats); 1880, State *v.* Scott, 24 Kan. 68, 70 (approving State *v.* Brown); 1890, State *v.* Spendlove, 44 Kan. 1, 24 Pac. 67 (same);

Kentucky: 1855, Cornelius *v.* Com., 15 B. Monr. 539, 546 (admissible because "his intention to make an attack on the accused was an important matter, as well as the belief of the existence of such an intention"; also to corroborate the testimony as to communicated threats); 1890, Sparks *v.* Com., 89 Ky. 644, 20 S. W. 167 (threats by deceased showing his plan of aggression, admitted); 1897, Young *v.* Com., — Ky. —, 42 S. W.

(2) A necessary condition of relevancy of uncommunicated threats is that the fact of killing is conceded, and is justified as done in *self-defence*, and that the virtual controversy is whether there was in truth any need for defence, *i.e.* whether the deceased was the aggressor. This is universally settled, expressly or by implication.

(3) There is much opportunity for abuse of this sort of evidence. Not only may it be manufactured; but, even when genuine, it may be employed improperly to help the defendant by way of justification, — in certain communities at least, where the Courts have been compelled repeatedly to make clear the law that a threat to shoot another is no justification for the latter to kill on sight. For these reasons various *limitations* have been attempted:

1141 (threats admitted); 1897, Tudor *v.* Com., — Ky. —, 43 S. W. 187 (doctrine conceded; but where the defendant interfered in a fight between deceased and T., the deceased's threats against D. were excluded); 1901, Hollingsworth *v.* Warnock, — Ky. —, 65 S. W. 163 (here excluded as too general); 1887, Hart *v.* Com., 85 Ky. 77, 2 S. W. 673 (uncommunicated threats, admitted); 1905, Wheeler *v.* Com., 120 Ky. 697, 87 S. W. 1105 (Young *v.* Com. followed); 1907, Com. *v.* Thomas, — Ky. —, 104 S. W. 326 (generic threats, admitted); 1921, Duke *v.* Com., 191 Ky. 138, 229 S. W. 122 (murder of W.; to prove that W. had been convicted of being accessory to shooting the accused; the clerk's testimony to the conviction, and the indictment only without the judgment, were held not sufficient);

Louisiana: 1851, State *v.* Bradley, 6 La. An. 554, 560 (excluding the evidence as an attempt at a plea of justification); 1869, State *v.* Gregor, 21 La. An. 475 (excluded, but this principle not considered); 1878, State *v.* Ryan, 30 La. An. 1177 (excluded; no reason given); 1881, State *v.* Fisher, 33 La. An. 1344 (same); 1888, State *v.* Williams, 40 La. An. 168, 170, 3 So. 629 (citing decisions in other jurisdictions, but not the above cases, and admitting the evidence as "corroborating the evidence as to the communicated threats", and "establishing the purpose with which the deceased provoked the rencontre", and "confirming the reality of the danger" apprehended by the defendant); 1892, State *v.* Walsh, 44 La. An. 1122, 1131, 11 So. 811 (the trial Court's recital as to whether a foundation was laid is conclusive); 1893, State *v.* Harris, 45 La. An. 842, 845, 13 So. 199 (the rule of the preceding case recognized); 1893, State *v.* Depass, 45 La. An. 1151, 1152, 14 So. 77 (excluded, because the defendant's aggression was clear; no preceding case cited); 1895, State *v.* King, 47 La. An. 28, 16 So. 566 (threats offered to show merely "who was the aggressor", excluded, the matter being treated as governed by the overt-act rule of communicated threats, *post*, § 247, and the Williams Case not being cited); 1896, State *v.* Compagnet, 48 La. An. 1470, 21 So. 46 (admitted, under the overt-act rule, *semble*); 1897, State *v.* Pruett, 49 La. An. 283, 21 Sl. 842 (see § 247, *post*); 1903, State *v.* Harrison, 111 La. 304, 35 So. 560 ("some hostile demonstration" must be shown); 1915, State *v.* Wooten, 136 La. 291, 67 So. 366 (admissible, even though there are eye-witnesses);

Maryland: 1880, Turpin *v.* State, 55 Md. 462, 473, *semble* (admissible only in case of doubt as to the aggressor);

Michigan: 1868, People *v.* Garbutt, 17 Mich. 9, 15 (excluded; obscure); 1878, People *v.* Lilly, 38 Mich. 277 (preceding deportment admitted as indicating his deportment at the time of the affray); Brownell *v.* People, 38 Mich. 736, *semble* (same); 1893, People *v.* Palmer, 96 id. 580 (admissible; no limitations stated); 1895, People *v.* Palmer, 105 Mich. 568, 63 N. W. 656 (similar);

Minnesota: 1860, State *v.* Dumphey, 4 Minn. 438, 449 (uncommunicated threats excluded; the present principle not considered);

Mississippi: 1859, Newcomb *v.* State, 37 Miss. 383, 400, 404 (uncommunicated threats, excluded, but the present principle not considered); 1877, Johnson *v.* State, 54 Miss. 430 (the whole subject reviewed in the light of the Wiggin's Case, U. S., *supra*, and the evidence held admissible only where there is doubt as to who was the aggressor, *i.e.* ordinarily, when there are no witnesses to the act, but not even then, if a lying-in-wait otherwise appears; the opinion of Chalmers, J., is one of the best on the subject); 1877, Holly *v.* State, 55 Miss. 424, 428 (citing no precedents, and apparently applying the same rule as for communicated threats, *q. v.* in § 247, *post*); Kendrick *v.* State, 55 Miss. 436, 450 (approving Johnson's Case, and applying the same rule, though with a rider admitting such evidence where "peculiar circumstances" demand it); 1885, Moriarty *v.* State, 62 Miss. 654, 661 (applying the same rule, apparently, as in the case of communicated threats, *q. v.*, in § 247, *post*); 1896, Prine *v.* State, 73 Miss. 838, 19 So. 711 (admitted, under the rule of Johnson's Case); 1906, Brown *v.* State, 88 Miss. 166, 40 So. 737

(a) The evidence of threat is inadmissible where there is clear evidence that the *defendant was the aggressor*. Most jurisdictions adopt this rule, and none seem to negative it. (b) Furthermore, the threat is only admissible (as most Courts provide) where there is some *other evidence of an aggression by the deceased*. This is usually expressed by saying that there must have been some "demonstration of hostility", or, more shortly, some "overt act", by the deceased. It is difficult to say whether this limitation originated in the 'res gestæ' notion (*infra*) or in a rule of criminal law that an overt act is a necessary element of the justification of self-defence, or merely in a general policy of preventing the abuse of this evidence. At any rate, it seems a satisfactory limitation, provided the multiplication of quibbles as to "overt acts" is avoided by leaving the whole matter in the hands of the trial judge; for it prevents the defendant from trying to use the threats as a mere pretext

(prior threats, and details of prior quarrels, admissible, following Holly's Case, *supra;* the majority opinion, however, errs on another point, noted *post*, § 396); 1911, Echols *v.* State, 99 Miss. 683, 55 So. 485;
Missouri: 1871, State *v.* Sloan, 47 Mo. 604, 609 (admitted, in effect overruling McMillen *v.* State, 1850, 13 Mo. 30); 1876, State *v.* Elkins, 63 Mo. 159, 164 (admitted in doubtful cases, where the issue is self-defence); 1877, State *v.* Taylor, 64 Mo. 358, 361 (excluded, because no question of self-defence arose); State *v.* Brown, 64 Mo. 367, 375 (admitted); 1877, State *v.* Alexander, 66 Mo. 148, 161 (admissible where there is "evidence tending to show" the deceased to be the aggressor; "unless an attempt be made to execute the threat", it is irrelevant); 1879, State *v.* Guy, 69 Mo. 435 (excluded; obscure); 1882, State *v.* Eaton, 75 Mo. 586, 590 (admitted, *semble*); 1885, State *v.* McNally, 87 Mo. 650 (threats received); 1886, State *v.* Rider, 90 Mo. 54, 60, 1 S. W. 825 (admitting threats without restriction, to determine who was the assailant, but pointing out that they constitute no legal justification without an overt act); 1888, State *v.* Rider, 95 Mo. 476, 484, 8 S. W. 723 (threats apparently usable to show whether the deceased did make the first assault, and the requirement that there must be other evidence of aggression apparently repudiated); 1897, State *v.* Thomas, 138 Mo. 168, 39 S. W. 459, *semble* (inadmissible, where no other evidence of aggression is offered); 1898, State *v.* Hopper, 142 Mo. 478, 44 S. W. 272 (the vagueness of the threat held here to affect its weight only); 1901, State *v.* Smith, 164 Mo. 567, 65 S. W. 270 (admissible only "in case the evidence leaves a doubt as to whether the defendant or the deceased was the aggressor"); 1907, State *v.* Kelleher, 201 Mo. 614, 100 S. W. 470 (admissible); 1910, State *v.* Sovern, 225 Mo. 580, 125 S. W. 769 (instructions discussed);
Montana: 1901, State *v.* Shadwell, 26 Mont. 52, 66 Pac. 508 (threats held admissible; overt-act rule defined in detail); 1903, State *v.* Felker, 27 Mont. 451, 71 Pac. 668 (prior threats admitted; no definite rule stated);
New Jersey: 1824, State *v.* Zellers, 7 N. J. L. 237 (excluded; the point apparently not considered); 1907, State *v.* Scaduto, 74 N. J. L. 289, 65 Atl. 908 (uncommunicated threats held admissible if "there was an overt act of attack" and "the defendant at the time of the collision was in imminent danger"; the latter clause is hardly required; State *v.* Zellers practically repudiated, though not cited);
New Mexico: 1911, Terr. *v.* Trapp, 16 N. M. 700, 120 Pac. 702 (there must be other evidence of aggression);
New York: 1873, Stokes *v.* People, 53 N. Y. 174 (see quotation *supra*);
North Carolina: 1877, State *v.* Turpin, 77 N. C. 473, 479 (admitted as tending to show prior attack, the evidence being wholly circumstantial; also as corroborating communicated threats); 1882, State *v.* Skidmore, 87 N. C. 509, 511, 512 (mayhem; self-defence in issue; threats of the prosecutor, two weeks before, excluded; citing only State *v.* Norton, *ante*, § 105); 1897, State *v.* Byrd, 121 N. C. 684, 28 S. E. 353 (admissible only where the evidence of the killing is wholly circumstantial; opinion obscure); 1911, State *v.* Baldwin, 155 N. C. 494, 71 S. E. 212 (admitted); 1920, State *v.* Hines, 179 N. C. 758, 103 S. E. 374 (inadmissible, when offered "only to show self-defence"; citing State *v.* Blackwell, *ante*, § 63, and State *v.* Byrd, *supra*);
Ohio: 1850, Stewart *v.* State, 19 Oh. 302 (admitted);
Oklahoma: 1910, Saunders *v.* State, 4 Okl. Cr. 264, 111 Pac. 965 (above doctrine approved); 1921, Agent *v.* State, — Okl. Cr. —, 194 Pac. 233 (murder of W., the defendant asserted that he mistook W. for S. who had threatened him; uncommunicated threats of S., excluded);
Oregon: 1894, State *v.* Tarter, 26 Or. 38, 41, 37 Pac. 53 (admissible where self-defence is in issue; also to corroborate communicated threats; also where the aggressor is doubtful

for justifying the killing of one who was making no actual attempt to injure him. (c) Another condition, sometimes suggested, but inconsistent with and more stringent than the preceding one, is that the threat should be received only when there is *no other direct evidence* as to who was the aggressor, *i.e.* when there were no eye-witnesses. Perhaps in practice a combination of (b) and (c) would be the best; *i.e.* to admit the evidence when by eye-witnesses there was some other evidence of the deceased's aggression, *or* when there were no eye-witnesses to the affair.

(4) Another and additional use, independent of the preceding, receives the uncommunicated threat in "*confirmation*" or " corroboration " of communicated threats. This is usually coupled with one of the preceding limitations as an alternative condition of admission.

(5) The doctrine of 'res gestæ' is sometimes appealed to as the ground of receiving the evidence; and the same notion underlies the occasional suggestion that the threats " characterize " the deceased's conduct. This employment of 'res gestæ' as a veil for obscurity of thought is elsewhere examined (*post*, § 1795); and it is enough here to say that it has no possible application to this kind of evidence, and cannot be made to fit its rules; the sooner such phrases are abandoned, the better for clearness of legal thought.

(6) In some jurisdictions it is impossible to ascertain the exact rule. Previous precedents are ignored, inconsistent tests laid down in succeeding rulings, decisions in other jurisdictions are cited to the exclusion of local precedents; and the oftener the matter comes up for a ruling, the more it is obscured.

on the evidence); 1907, State *v.* Thompson, 49 Or. 46, 88 Pac. 583 (uncommunicated threats, admissible);
Pennsylvania: 1881, Nevling *v.* Com., 98 Pa. 322, 337 (point not raised);
South Carolina: 1890, State *v.* Bodie, 33 S. C. 130, 11 S. E. 624 ("there may be cases in which uncommunicated threats might be competent"); 1895, State *v.* Faile, 43 S. C. 52, 20 S. E. 798 (admissible; but, *semble*, there must be other evidence of the deceased's aggression); 1907, State *v.* Emerson, 78 S. C. 83, 58 S. E. 974 (murder of a woman's father; whether the deceased knew of illicit relations between defendant and the woman, excluded);
Tennessee: 1846, Copeland *v.* State, 7 Humph. 479, 495 (the deceased's threats were treated by the Court as throwing light on the question of her aggression; no objection of law had been raised); 1872, Williams *v.* State, 3 Heisk. 376, 396 (the deceased's threats were treated as indicating that he was the aggressor; no objection of law having been made);
Texas: 1920, Ott *v.* State, — Tex. —, 222 S. W. 261 (murder of husband by wife; plea, self-defence; husband's uncommunicated threat, admitted); 1921, Watt *v.* State, 90 Tex. Cr. 403, 235 S. W. 888 (murder; uncommunicated threats of deceased, admitted; affirming Stewart *v.* State, 36 Tex. Cr. 130, 35 S. W. 985);
Vermont: 1847, State *v.* Goodrich, 19 Vt. 116, 120, *semble* (self-defence; a declaration of the injured person, while on his way to the defendant's house, that he wanted some powder to blow it up, admitted);
Washington: 1888, White *v.* Terr., 3 Wash. T. 397, 403, 19 Pac. 37 ("admissible in all cases, whether or not the deceased was the first assailant and whether or not the deceased" made a demonstration at the time of the killing); 1896, State *v.* Cushing, 14 Wash. 527, 45 Pac. 45 (approving the preceding); 1897, State *v.* Cushing, 17 Wash. 544, 50 Pac. 512, *semble* (excluded);
West Virginia: 1875, State *v.* Abbott, 8 W. Va. 743 (admissible to show the deceased's state of mind, but only after communicated threats have been shown); 1889, State *v.* Evans, 33 W. Va. 417, 425, 10 S. E. 792 (same); 1906, State *v.* Trail, 59 W. Va. 175, 53 S. E. 17 (murder of B.; B.'s prior declaration that he was going to defendant's to debauch his daughter if he could get defendant drunk, excluded, not being communicated to defendant; Sanders, J., diss. and properly). 1921, State *v.* Arrington, 88 W. Va. 152, 106 S. E. 445 (murder; uncommunicated threats admitted, to show deceased's aggression).

(7) The prosecution may of course *rebut* the evidence of threats by counter-testimony of the *deceased's peaceful plans*.[2] It would seem also that, whenever the deceased's aggression is in issue, the prosecution could begin with its evidence of peaceful plans.

(8) There may be *sundry other cases* in which the threats of a deceased person would be relevant apart from the present doctrines.[3]

(9) The threats of a *third person* may also be admitted, where it is desired to show that he, and not the accused, was the aggressor.[4]

(10) In *other issues* in which the *aggression* of the plaintiff or prosecuting witness is material, his threats are admissible on the foregoing principles.[5]

§ 112. **Plans and Intentions as to Wills, Contracts, Deeds.** Where the issue is whether a will was *executed*, or whether a will was *revoked*, or whether a will was made in a certain *tenor* or *provision* (as where an *alteration* is at issue), the plan or design or prior intention of the testator is relevant to show the doing or not doing of this alleged act, as of any other act. The argument is, "Because he planned to make a will, or planned to revoke a will, or planned to will property to A, therefore he probably carried out this plan." The relevancy of such a plan is well established:[1]

[2] 1880, People *v.* Carlton, 57 Cal. 83, 85; 1891, People *v.* Powell, 87 Cal. 348, 362, 25 Pac. 481 (the deceased's declarations that he had no arms; his habit of not carrying them; and his refusal to carry them, excluded); 1904, Taylor *v.* State, 121 Ga. 348, 49 S. E. 303; 1899, State *v.* Chaffin, 56 S. C. 431, 33 S. E. 454 (deceased's expressions negativing hostile intent, admissible in rebuttal); *Contra:* 1920, People *v.* Wansker, App. Term, 181 N. Y. Suppl. 783 (homicide by a woman; defence that the deceased, her landlord, was attempting rape; in rebuttal, the deceased's statement that he was afraid the defendant would "frame up" something on him, and his request to T. to come and stay with him while defendant was there, excluded; erroneous; this evidence directly rebutted the state of mind suggested by defendant's evidence; such a ruling would choke off the vindication of any innocent deceased and virtually would assist "frame-ups" by professional criminals); 1919, Lopez *v.* State, 85 Tex. Cr. App. 402, 212 S. W. 954 (deceased's intention to rendezvous with his wife, not admitted as explaining his presence to be due to this plea and not to his former threats to kill defendant, excluded; unsound; a good example of the artificial strait-jacket method of criminal trial favored by some courts).

[3] 1854, Com. *v.* Wilson, 1 Gray Mass. 339 (where the defendant claimed to have done the killing under an insane delusion that the deceased was conspiring against him, the deceased's uncommunicated hostile expressions were admitted for the State, to show that there was real ground for the defendant's feeling and that it was no insane delusion). Compare § 231, *post* (insanity evidenced by conduct).

[4] 1905, State *v.* Gaylord, 70 S. C. 415, 50 S. E. 20; and compare the cases cited *post*, § 140.

[5] 1905, State *v.* Atkins, 77 Vt. 215, 59 Atl. 826 (breach of the peace by intentional collision; the prosecuting witness' threats of running into the defendant, admitted, to show aggression).

§ **112.** [1] *Accord:* ENGLAND: 1873, Keen *v.* Keen, L. R. 3 P. & D. 107 (Hannen, J.: "[A statement by the testator as to his alteration of mind tends to show] intention, from which the fact of destruction may be inferred, there being other circumstances leading to the same conclusion"); 1877, Dench *v.* Dench, L. R. 2 P. D. 60, 64 (to determine whether an alteration favoring H. D. was made before execution, prior declarations in H. D.'s favor were received); 1880, Gould *v.* Lakes, L. R. 6 P. D. 1 (Hannen, J.: "In considering whether or no several pieces of paper constitute the will, evidence would be admissible to show that it was the intention of the testator to make dispositions in conformity with those which are found upon the several sheets of paper. . . . The question of law would not be different if the suggestion were that the first sheet was a forgery or an interpolation by somebody after the event"; following Sugden *v.* St. Leonards); and the cases quoted in the text.

UNITED STATES: *Connecticut:* 1905, Spencer's Appeal, 77 Conn. 638, 60 Atl. 289 (revocation; general principle stated); *Delaware:* 1855, Davis *v.* Rogers, 1 Houst. 44, 74, 93 (the testator was said to be blind, and his intelligent execution was denied; his previous expressions

1851, Lord CAMPBELL, C. J., in *Doe* v. *Palmer*, 16 Q. B. 747 (issue whether an alteration in a will was made by the testator before or after execution): "[We may consider] whether if in a will which is not in the handwriting of the testator an alteration appears, evidence might be received of previous declarations by him that he intended to dispose of the property in the manner in which it is disposed of by the will in its altered form. If the draft of the will could be produced, corresponding with the will in its altered form, would it not be admissible evidence, and might not the jury infer from it that before the will was executed the draft and the will had been compared and the mistake rectified? Would not written or verbal instructions from the testator to his solicitor to draw the will in the altered form be equally admissible? In what respect do such verbal instructions differ, for this purpose, from a contemporaneous declaration by the testator to another person that he had determined in his will to dispose of his property in the manner carried into effect by the will as altered? . . . It would not be very creditable to the law if such evidence were to be excluded, as a legal inference might be fairly drawn from it respecting

of intention, instructions, and depositions, admitted to show his state of mind when signing); *Kentucky:* 1922, Atherton *v.* Gaslin, 194 Ky. 460, 239 S. W. 771 (forgery of a will; testator's prior declarations of intention received; citing with approval the text above, and declining to follow Throckmorton *v.* Holt, U. S.); *Maryland:* 1883, Hoppe *v.* Byers, 60 Md. 393 (intention before the execution of a will to make one of a certain tenor, held admissible to show that a document offered as a will is genuine and not forged, when other evidence of genuineness is also offered; following Sugden *v.* St. Leonards, and Gould *v.* Lakes); *Massachusetts:* 1862, Converse *v.* Allen, 4 All. 512 (to show that the omission as legatees of children born illegitimate, was not accidental, previous declarations of intention were admitted; Bigelow, C. J.: "They tended to prove that [the testator] had then a fixed design in regard to the disposition of the estate, by which the appellants would be excluded from any share therein"); 1900, Wilton *v.* Humphreys, 176 Mass. 253, 57 N. E. 374 (whether a marginal addition to a codicil in different ink, the codicil reciting a part of the prior will, was there before execution; the testator's oral statement of the terms of the part thus recited, made two weeks before, held properly excluded in the trial Court's discretion, the will itself being in the testator's possession at the time of executing the codicil, and the prior declaration being therefore of little value on the facts); 1913, Aldrich *v.* Aldrich, 215 Mass. 164, 102 N. E. 487 (intent to revoke; compare the citations *post*, § 1737, n. 3); *Michigan:* 1882, Hope's Appeal, 48 Mich. 520, 12 N. W. 682 (plan to change an existing will, admitted as bearing on the execution of an alleged later will); *Missouri:* 1897, Gordon *v.* Burris, 141 Mo. 602, 43 S. W. 642 (undue influence; the devisees' plan to prevent the testatrix from leaving property to the plaintiff, admitted); *New Jersey:* 1910, State *v.* Ready, 78 N. J. L. 599, 75 Atl. 564 ("whether a person's intention to make a will, or to make a will of a particular purport, can be shown by his antecedent declarations of that intention", answered in the affirmative, "when not too remote to be material"); *North Dakota:* 1920, Ostlund *v.* Ecklund, 45 N. D. 76, 176 N. W. 350 (declarations of intention made two hours before signing the will, excluded because the only issue was as to the fulfilment of the formalities of execution); *Pennsylvania:* 1896, Gardner *v.* Gardner, 177 Pa. 218, 35 Atl. 558 (testator's plan admitted, as pointing to non-revocation); 1899, Swope *v.* Donnelly, 190 Pa. 417, 42 Atl. 882 (genuineness of a will; declarations of testamentary intentions at various preceding times, excluded as too vague; opinion ill-considered); *S. Dakota:* 1920, State *v.* Nieuwenhuis, 43 S. D. 198, 178 N. W. 976 (forgery of will; prior expression of intention to make such a will, admitted); *Texas:* 1879, Johnson *v.* Brown, 51 Tex. 80 (testator's declarations admitted, on the question of a will's genuineness).

The only case ever intimating the contrary seems to be: 1901, Throckmorton *v.* Holt, 180 U. S. 552, 21 Sup. 474 (excluding ante-testamentary declarations of intention, since "there is no good ground for the distinction" between these and subsequent ones; citing only Stevens *v.* Vancleve, 4 Wash. C. C. 262, *post*, § 1738, and making the surprising statement that the "weight of authority" so agrees; the opinion hopelessly ignores the various distinct kinds of testamentary declarations; Harlan, White, and McKenna, JJ., diss.; Brown, J., accord as to the result of the case only). Cited *post*, § 1734, n. 2. In State *v.* Ready, N. J. *supra*, the learned chief justice's statement that on this rule "judicial sentiment is altogether out of harmony" and "courts are divided", is comprehensible only as an expression of delicate consideration for the Federal Supreme Court's lonesome decision of Throckmorton *v.* Holt; for the fact seems to be that Throckmorton *v.* Holt is the *only* case ever decided to the contrary; and the New Jersey opinion itself points out the inadequacy of the citations in Throckmorton *v.* Holt to sustain its decision.

the priority of two events, that is to say, the making of the alteration and the execution of the will, and I am not aware of any principle, rule of law, decided case, or dictum against the admissibility of such evidence. . . . They demonstrate that the alteration is not an afterthought."

1876, JESSEL, M. R., in *Sugden* v. *St. Leonards*, L. R. 1 P. D. 154 (admitting ante-testamentary declarations of a lost will's provisions): "It is not strictly evidence of the contents of the instruments; it is simply evidence of the intention of the person who afterwards executes the instrument. It is simply evidence of probability, — no doubt of a high degree of probability in some cases, and of a low degree of probability in others. The cogency of the evidence depends very much on the nearness in point of time of the declaration of intention to the period of the execution of the document." MELLISH, L. J.: "The declarations of the testator as to what he intended to put in his will, made either contemporaneously with or prior to the execution of his will, are obviously evidence which may corroborate the other testimony as to what is contained in the will, . . . because it is more probable that the testator has than that he has not made a particular devise or a particular bequest when he has told a person previously that he intended to make it, inasmuch as it shows that he had it in his mind to make such a will at the time he made that declaration."

Two other principles are to be discriminated. (1) The admissibility of the expressions or *utterances themselves*, to evidence the testator's plan, under an exception to the Hearsay rule, is well established, but raises a different question; the distinction between the various hearsay kinds of ante- and post-testamentary declarations is elsewhere discussed, with a survey of the subject (*post*, §§ 1734–1740). (2) The relevancy of mental condition at one time to show it at a *later* or *earlier* one is elsewhere treated (*post*, §§ 233, 241).

The same principle which admits a testator's designs as to a will serves also to admit the design of a person to make a *gift* [2] or to execute a *contract*.[3] Here, however, the usual source of difficulty is the use of particular instances of conduct to evidence this design or plan (*post*, §§ 238, 371, 377).

§ 113. **Plans of Suicide by the Deceased, in a charge of Homicide.** Where on a charge of homicide the defence offers the hypothesis of suicide to explain the death of the person whose killing is charged, one of the relevant pieces

[2] 1846, Powell v. Olds, 9 Ala. 861, 864 (intention as to the nature of a gift afterwards made, admitted); 1899, Kyle v. Craig, 125 Cal. 107, 57 Pac. 791 (whether a deed was given on a certain condition in view of death; grantor's intention held relevant); 1886, Woodcock v. Johnson, 36 Minn. 217, 219 (issue whether a deed was forged; the fact "that he had previously directed the deed to be prepared precisely as it was executed, and with intent to execute it, would add probability to the testimony of those witnesses who testified that he directed his name to be signed to the deed"); 1898, Fellows v. Fellows, 69 N. H. 339, 46 Atl. 474 (whether a discharge was executed by a bondholder; his declarations of intention to do so, admitted).

Compare the *verbal act* rule, *post*, § 177.

[3] 1862, Kumler v. Ferguson, 7 Minn. 442 (to show the consideration actually paid, the preceding negotiations admitted); 1899, Aikin v. Oil Co., 189 Pa. 39, 41 Atl. 997 (terms of a contract; promise to sign a contract with certain terms, admitted); 1877, Torrey v. Nixon, 43 Wis. 142 (oral lease; disputed whether it was to P. or to N.; an unexpected written lease to P., admitted as showing the probabilities).

Contra: 1878, Richardson v. Robbins, 124 Mass. 105 ("previous talk of the parties", excluded to prove terms of a lost deed).

Compare the use of *value as showing a motive* for the *price* of a sale (*post*, § 392).

The parol evidence rule (*post*, § 2430) would of course exclude prior negotiations when offered in competition with the terms of an existing document, and not, as here, merely to show what the terms of a lost document are.

of evidence to show the suicide is a *plan of suicide*. This fact, however, has been sometimes excluded, not because irrelevant, but because a certain quantity of other evidence of suicide may be required before this can be received. This requirement is elsewhere discussed (*post*, § 143).

Sub-topic E: Emotion or Motive

§ 117. **General Principle.** The term "motive" is commonly used in a confusing way, as if there were but one thing and one evidential question involved. But there are two things, and two distinct evidential steps.

(1) We may argue, first, that since a specific emotion or passion is likely to lead to the doing of the appropriate act — for example, desire for money to theft or robbery, or angry hostility to an act of violence — the presence of such an emotion in the person in question is likely to lead to the deed in question. In this step of the argument we assume the emotion as a fact, proved somehow or other. Just as a specific sort of disposition, of habit, of plan, is likely to lead to the appropriate act, so a specific sort of emotion or passion has a similar evidential bearing. The basis of this inference is the living, impelling, active emotion, seeking for an outlet in action.

But this emotion must in its turn be proved, — just as character, design, capacity, must be proved. This is the next step, and evidentially a very different one. Usually the evidence is circumstantial; and of two sorts, (*a*) conduct of the person, and (*b*) events about him tending to excite the emotion. In (*a*) his conduct is the expression and effect of the existing internal emotion. In (*b*) the outward facts are such as may be the stimulus and cause of the emotion. But what conduct and what outer events are of value as showing the probable existence of the emotion is a different question from the relevancy of the emotion to show the probability of an act induced for it. The latter (which is the present subject) raises practically no evidential disputes; the former raises a host of them (*post*, §§ 385–406).

The unfortunate ambiguity in the word "motive" thus reveals itself. That which has value to show the doing or not doing of the act is the inward emotion, passion, feeling, of the appropriate sort; but that which shows the probable existence of this emotion is also termed — when it is of the sort (*b*) above, *i.e.* some outer fact — the "motive." For example, the prosecution of A by B in a suit at law may be said to have been a "motive" for A's subsequent burning of B's house. But in strictness the external fact of B's suit cannot be A's "motive"; for the motive is a state of mind of A; the external fact does tend to show the excitement of the hostile and vindictive emotion, but it is not identical with that emotion.

This use of the word "motive" thus tends to obscure the double evidential step involved; for when it is said that B's suit may be offered in evidence as the "motive" for A's burning, we are apt to conceive ourselves as inferring directly from the suit (as the evidentiary fact) to the burning (as the proposi-

tion to be proved); when in truth there are two steps involved, — from the lawsuit to the emotion, and the emotion to the act. Although the evidential questions connected with the latter inference are practically none, nevertheless the true nature of the evidentiary questions connected with the former inference is much obscured when we fail to understand clearly what it is that we are trying to infer. Thus, the question of Relevancy in the above illustration is, whether the fact of a lawsuit is of real probative value to show the probable excitement of a violently vindictive desire to destroy the opponent's property, and this inference may not be an admissible one.

It ought, therefore, to be clearly understood that the "motive", in the correct sense is the emotion supposed to have led to the act, and that the external fact is merely the possible exciting cause of this "motive", and not identical with the "motive" itself; and the evidentiary question is, not whether that external fact is admissible as a motive, but whether it is admissible to show the probable existence of the emotion or "motive." It would be more conducive to clearness of thought if the word "motive", so misleading in its popular associations, could be abandoned altogether in discussing evidential questions.[1]

§ 118. **Motive always Relevant, but never Essential.** (1) Conceiving an emotion, then, as a circumstance showing the probability of appropriate ensuing action, it is *always relevant:*

1868, WOODRUFF, J., in *Kennedy* v. *People*, 39 N. Y. 245, 254: "It is always a just argument on behalf of one accused that there is no apparent motive to the perpetration of the crime. Men do not act wholly without motive. On the other hand, proof of motive tends in some degree to render the act so far probable as to weaken presumptions of innocence and corroborate evidences of guilt."

1897, DALE, C. J., in *Son* v. *Terr.*, 5 Okl. 526, 49 Pac. 923: "Motive to commit crime, if shown, may in many cases be sufficient alone, almost, to induce a belief of guilt. Upon the other hand, where no motive for the commission of a crime can be shown it is almost impossible to convince the mind of guilt. Men do not ordinarily commit grave crimes unless there is in their minds a motive strong enough to overcome the natural repugnance against crime, and the fear of punishment which usually follows detection. This view of this question is so universally recognized as being true that it has become incorporated into the law, and in almost all cases where the guilt of a defendant depends upon the facts and circumstances in proof in the case the Court instructs the jury to consider the motive or lack of motive which the proof shows may or may not exist in the mind of a defendant on trial charged with crime."

All the questions of relevancy, then, can be, and should be for simplicity's sake, resolved into questions of the relevancy of the evidence to show this emotion (*post*, §§ 385–406). Thus, the relevancy of an intrigue by an alleged wife-murderer with a paramour raises the question, not whether lust is a sufficient emotion for murder, but whether the intrigue was a sufficient circumstance to excite a murderous impulse or emotion.

§ 117. [1] From the point of view of logic and psychology, see the materials collected in the present author's "Principles of Judicial Proof, as given by Logic, Psychology, and General Experience, and illustrated in Judicial Trials" (1913), §§ 101–115.

(2) It is sometimes popularly supposed that in order to establish a charge of crime, the prosecution *must show a possible motive.* But this notion is without foundation. Assuming for purposes of argument that "every act must have a motive", *i.e.* a prior conscious impelling emotion (which is not strictly correct), yet it is always possible that this necessary emotion may be undiscoverable, and thus the failure to discover it does not signify its non-existence. The kinds of evidence to prove an act vary in probative strength, and the absence of one kind may be more significant than the absence of another; but the mere absence of any one kind cannot be fatal. There must have been a plan to do the act (we may assume); the accused must have been present (assuming it was done by manual action); but there may be no evidence of preparation; or there may be no evidence of presence; yet the remaining facts may furnish ample proof. The failure to produce evidence of some appropriate motive may be a great weakness in the whole body of proof;[1] but it is not a fatal one, as a matter of law. In other words, there is no more necessity, in the law of Evidence, to discover and establish the particular exciting emotion, or some possible one, than to use any other particular kind of evidential fact:[2]

1894, HARLAN, J., in *Pointer* v. *U. S.*, 151 U. S. 396, 413, 14 Sup. 410, approving the following charge by PARKER, J.: "'The law does not require impossibilities. The law recognizes that the cause of the killing is sometimes so hidden in the mind and breast of the party who killed that it cannot be fathomed; and, as it does not require impossibilities, it does not require the jury to find it. Yet, if they do find it, it simply becomes an item of evidence in the case, which is only evidentiary at best, — that is, it is only an item of evidence going to show whether a particular party may have committed an act, and sometimes going to show the characteristics of that act.' It is not indispensable to conviction that the particular motive for taking the life of a human being shall be established by proof to the satisfaction of the jury. The absence of evidence suggesting a motive for the commission of the crime charged is a circumstance in favor of the accused, to be given such weight as the jury deems proper; but proof of motive is never indispensable to conviction."

1902, PRENTICE, J., in *State* v. *Rathbun*, 74 Conn. 524, 51 Atl. 540: "The State was under no obligation to show a motive for the commission by the accused of the crime charged, much less a sufficient or adequate one. While it is a recognized rule of human conduct that crime is the response of the evil mind to some temptation, and that men of sound mind are rarely, if ever, prompted to commit crime without some impelling motive, it does not follow, and it is not the law, that the prosecution, to justify a conviction in a given case, must be so successful in fathoming the mysteries of the human mind and in revealing the possibly hidden secrets influencing it as to develop and disclose to the jury a motive suffi-

§ 118. [1] 1898, State *v.* Foley, 144 Mo. 600, 46 S. W. 733.

It is sometimes said that the Court must charge that the absence of any apparent motive is evidence for the defendant: 1910, Porter *v.* State, 173 Ind. 694, 91 N. E. 340. But all such detailed charges are poor policy.

[2] *Accord:* 1900, Brunson *v.* State, 124 Ala. 37, 27 So. 410; 1897, People *v.* Durrant, 116 Cal. 179, 48 Pac. 75; 1922, Williams *v.* State, 152 Ga. 498, 110 S. E. 286 (murder); 1921, State *v.* Ward, 119 Me. 482, 111 Atl. 805 (murder); 1920, Com. *v.* Feci, 235 Mass. 562, 127 N. E. 602 (murder); 1916, State *v.* Santino, — Mo. —, 186 S. W. 976 (arson); 1919, State *v.* Dooms, 280 Mo. 84, 217 S. W. 43 (murder); 1900, State *v.* Lucey, 24 Mont. 295, 61 Pac. 994; 1904, Robinson *v.* State, 71 Nebr. 142, 98 N. W. 694 (murder); 1904, State *v.* Jaggers, 71 N. J. L. 281, 58 Atl. 1014 (murder); 1917, People *v.* Seppi, 221 N. Y. 62, 116 N. E. 793 (homicide); 1885, State *v.* Green, 92 N. C. 779, 782; 1919, State *v.* Wiseman, 178 N. C. 784, 101 S. E. 629 (murder); 1877, Lanahan *v.* Com., 84 Pa. 80, 87; 1903, Cupps *v.* State, 120 Wis. 504, 97 N. W. 210.

cient and adequate for the commission of the offence. Recognizing the fact that crimes are generally committed from some motive, evidence tending to show the existence or non-existence of such motive is held to be admissible, and often forms an important factor in the inquiry as to the guilt or innocence of an accused. For the purpose of this evidential inquiry the sufficiency of the motive is most pertinent. It is pertinent, however, only in so far as it tends to furnish evidence indicative of guilt, or the reverse, to be considered and weighed in connection with the other evidence in the case. The other evidence may be such as to justify a conviction without any motive being shown. It may be so weak that, without a disclosed motive, the guilt of the accused would be clouded by a reasonable doubt."

(3) An emotion may impel *against* as well as towards an act. Thus, a defendant's strong feeling of affection for a deceased person would work against the doing of violence upon him, and would thus be relevant to show the not-doing. This is also the significance of evidence that there was "no apparent motive" for a murder; for a state of emotional indifference — *i.e.* the absence of any anger, jealousy, or the like — is almost equally powerful in its operation against a deed of violence.[3] Sometimes, of course, such evidence merely negatives an alleged murderous emotion, or negatives the tacit possibility of it; but there is also this affirmative aspect to the argument, namely, that emotional indifference makes against crimes.

(4) Where the doing of the *act is conceded*, and the dispute turns on an issue such as self-defence, there is in strictness no materiality for evidence which tends merely to prove the doing of the act, and, in particular, there is no evidential function remaining for the fact of emotion or motive. It does not necessarily follow that in criminal cases all such evidence should be excluded; for there are no pleadings to make clear what is conceded and what is not, and it is possible that the defence would improperly take advantage of the apparent failure of proof of the act. It has occasionally been said that the superfluousness of the evidence, and the possible unnecessary prejudice it might create against the defendant, require its exclusion;[4] but this seems an unwise rule.

§ 119. **"Motive" as a Fact in Issue.** In the proper sense of "emotion", a "motive" can seldom be a fact in issue under the substantive law. But in some of its loose popular senses, "motive" is frequently in issue, and these uses must be distinguished from the evidentiary use of emotion or "motive" as tending to prove the doing of an act. (1) "Motive" may be in issue, in the sense of *good or bad faith;* as where the motive of a transfer is charged to have been in fraud of creditors. (2) "Motive" may be in issue, in the sense of *purpose* aimed at in an act — a sense not materially different from the preceding one. (3) "Motive" may be in issue, in the sense of *reason or ground* for conduct; as where the motive of a wife for leaving her husband is disputed, or of employees for leaving their employer. (4) "Motive" may be in issue, in the sense of *malice* or *criminal intent.* The modes of evidencing these various states of mind are elsewhere dealt with (*post*, §§ 244–406).

[3] 1861, People *v.* Ah Fung, 17 Cal. 377; and the quotations *supra.*

[4] 1895, People *v.* Gress, 107 Cal. 461, 40 Pac. 752 (that the accused had endeavored to seduce the deceased's wife); 1913, People *v.* Cummins, 209 N. Y. 253, 103 N. E. 169 (not decided).

SUB-TITLE I (*continued*): EVIDENCE TO PROVE A HUMAN ACT

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

CHAPTER VII.

§ 130. **General Principle.** It has already been noted (§ 43), that convenience requires the groupings of the various kinds of evidentiary facts according as they come, in time, before, at, or after the act to be evidenced. The various facts of the first or Prospectant class have been examined (*ante*, §§ 51–119). The second or *Concomitant* class may now be considered. There is no radical distinction between the classes; they serve as convenient ways of subdividing the great mass of evidentiary facts and of associating those which are most closely related.

A fact having a Concomitant indication is one which is thought of as being in existence *at the time of and in connection with the act to be proved;* the logical indication or inference is that the person bearing that fact as a mark is thereby to be associated more or less closely with the act. There is a *negative* as well as an *affirmative* form of inference; the two being related much in the same way as good character (*ante*, § 55) points forward to the non-doing of a crime, while bad character points forward to its doing. In the Concomitant inference, there is the affirmative form, *e.g.* X was at the place of the murder, therefore he may have committed it; and the negative form, *e.g.* X was at a different place at the time of the murder, therefore he did not commit it. The theory of the former is that the fact of presence at the time is more or less intimately and necessarily associated with the doing of the act; the theory of the latter is that the fact of absence at the time is more or less certainly

inconsistent with the doing of the act. Under each form of argument, there are opportunities for explaining away by other hypotheses the significance of the evidentiary fact, on the general theory of Explanation (*ante*, § 34).

So far as the scope of evidentiary facts is concerned (where the doing of a given act is disputed), the present class usually comprises a great number of circumstances in the ordinary trial; but the occasions for laying down rules of evidence are comparatively few. Interesting illustrations from celebrated trials might be multiplied almost without number.[1] But the present purpose is merely to examine such rules of limitation as may have been prescribed by the Courts.

A. OPPORTUNITY

§ 131. **Nature of the Argument.** When an act is done, and a particular person is alleged to have done it (not through an agent but personally), it is obvious that his physical presence, within a proper range of time and place, forms one step on the way to the belief that he did it. It is true that another person may have done it, but the former is at least within the limited number of persons who could have done it, and thus is fit to become a subject for further investigation.

Under the evidential canon that to a fair extent the possibility of other hypotheses must be first excluded (*ante*, § 31), it might be asked whether the mere possibility involved in Opportunity is not too slender, whether something more than mere opportunity — for example, exclusive opportunity — should not first be shown. The answer to this is that, by the very showing of an opportunity, countless hypotheses are negatived; and the person charged, who might otherwise have been one of innumerable other persons at the time, is shown to have been one of the limited number who are in a position to do this particular act. In short, opportunity alone, and *not exclusive opportunity*, is a sufficient showing for admissibility.

The circumstances involving Opportunity will of course vary with the facts of each case; and no rule of evidence seems to have been laid down. That the offer involves incidentally the doing of *another crime* by the defendant does not affect its propriety.[1] Since the showing of Opportunity leaves open all the hypotheses of other persons' equal opportunity, it is proper for the proponent of the evidence to strengthen it by cutting off, so far as possible, these other hypotheses, *i.e.* by showing that the person charged was

§ 130. [1] From the point of view of logic and psychology as applicable to argument before the jury (not the rules of Admissibility), see the materials collected in the present author's "Principles of Judicial Proof, as given by Logic, Psychology, and General Experience, and illustrated in Judicial Trials" (1913), §§ 55–81.

§ 131. [1] 1858, State *v.* Wentworth, 37 N. H. 196, 211 (indictment for placing an obstruction, viz. two stones, on a railroad track; evidence of the placing of iron rails on the track by the defendant not far away and within two hours of the placing in issue, admitted to show that the defendant was "in a situation to place the obstructions on the track").

For the authorities upon the general principle that the incidental use of other crimes is immaterial, see *post*, § 216.

one of a few only, or the sole person, having the opportunity. In other words, while the proponent need not, he *may* always show exclusive opportunity.[2]

§ 132. **Explaining away; Equal Opportunity for others.** If A is shown to have been in a building when a murder was committed, he immediately becomes — so to speak — an eligible person for the charge; he *may* have done the deed. If, now, admitting this fact, *i.e.* Opportunity, he seeks to diminish its probative significance, an effective and usual way will be to show that there were in the same building, at the same time, two or ten or five hundred other persons. In so doing, he has pointed out the possibility of two or ten or five hundred other hypotheses, equally possible with that charged against him. The equal strength of these other hypotheses (as noted *ante*, § 34, in dealing with the logical theory of relevancy) takes away the significance of the fact of his opportunity, just in proportion to the number and degree of naturalness of the other hypotheses, *i.e.* the hypotheses that each of the other persons had an equal opportunity. Such is the principle of explaining away Opportunity. Moreover, as counter-explanations which equally satisfy the evidentiary fact may always be offered, and without limit, there is no restriction on proving the presence of other persons having the same or approximate opportunities, — a principle will be seen (*post*, § 139) to be of much consequence. The practical employment of this method of weakening the proponent's evidence of Opportunity is frequent enough; but it seldom calls for judicial ruling.[1]

§ 133. **Same: Other Intercourse with Complainant in Bastardy, Seduction, or Rape.** On this principle it is permissible to show, in a *filiation* suit or *bastardy* prosecution, that the mother had *intercourse with another man* about the time designated by the period of gestation, for this predicates an equal

[2] 1897, People *v.* Van Horn, 119 Cal. 323, 51 Pac. 538 (murder by an officer of an arrested person; defence, that a mob took the man from the defendant and killed him; the region being sparsely settled, the prosecution was allowed to show, in disproving the mob-story, that various persons living in the region were not near the place at the time in question); 1866, Miller *v.* People, 39 Ill. 466 (the prosecution showed that no other persons of the description of the robbers, except the defendants, were in the neighborhood at the time in question).

The following ruling seems to ignore this perfectly accepted principle: 1878, State *v.* England, 78 N. C. 552 (evidence that tracks did not fit the defendant's brother's foot, excluded; "A did *not* commit the offence, therefore B *did*", held an unsound argument; misled by the rulings of the same Court cited *post*, § 142).

§ 132. [1] 1847, Pollard *v.* Lively, 4 Gratt. Va. 73, 77 (to show that there was a second person in existence named B. P., a deed executed by one B. P. and probated was received).

The *feasibility of self-infliction* of harm seems to come under this principle: 1895, State *v.* Lee, 65 Conn. 265, 280, 30 Atl. 1110 (a showing that wound could have been self-inflicted, allowed); 1875, Hitchcock *v.* Burgett, 38 Mich. 504 (explaining a renewed injury by the plaintiff's negligent abandonment of splints and crutches, instead of the defendant's careless surgery).

Sundry analogous cases: 1885, Quinn *v.* Higgins, 60 Wis. 667, 24 N. W. 482 (the non-union of bones in a fracture having been charged to the defendant's unskilful setting, evidence was admitted of non-union occurring through other causes than improper setting); 1852, Lush *v.* McDaniel, 13 Ired. N. C. 487 (to show that a warranty of soundness in a slave was not broken, evidence that the venereal disease affecting her was not known to exist in the region of the vendor's plantation but did exist in the region of the vendee's, 75 miles distant).

possibility of conception through some one else's act.[1] It would seem that the mere fact of intimate association, or at least of improper familiarities, would be admissible, because this makes at least possible the agency of some specific other man.[2] The *time* of the other intercourse should not

§ 133. [1] *Federal:* 1809, U. S. *v.* Collins, 1 Cr. C. C. 592 (admissible, if "not more than twelve months nor less than six months before the birth of the child"); *Alabama:* 1915, Smith *v.* State, 13 Ala. App. 411, 69 So. 406 (excluded, when not within the period); *Arizona:* 1922, Fuller *v.* State, — Ariz. —, 205 Pac. 324 (rape under age; other intercourse about the time of conception, admissible, a child having been born and attributed to the defendant); *Arkansas:* 1910, Adams *v.* State, 93 Ark. 260, 124 S. W. 766 (seduction; admitted, but only on the principle of § 1007, *post*); 1910, Belford *v.* State, 96 Ark. 274, 131 S. W. 953 (here admitted when appropriate to the time of conception); *California:* 1910, Gird's Estate, 157 Cal. 534, 108 Pac. 499; *Illinois:* 1874, White *v.* Murtland, 71 Ill. 250, 261 (seduction; loss of service through pregnancy; intercourse with others admissible to show the defendant not the cause of the pregnancy); *Indiana:* 1841, Walker *v.* State, 16 Blackf. ("about the time" of begetting); 1853, Hill *v.* State, 4 Ind. 112 (same); 1859, Townsend *v.* State, 13 Ind. 357 ("a period of time that would render it not improbable"); 1880, Whitman *v.* State, 69 Ind. 448 (extended to the woman's action for seduction, where pregnancy by the defendant would enter into the damages); 1883, Benham *v.* Richardson, 91 Ind. 82 (admitted); 1905, Walker *v.* State, 165 Ind. 94, 74 N. E. 614 (bastardy; admitted); *Iowa:* 1895, State *v.* Wickliff, 95 Ia. 386, 64 N. W. 283 (admitted); 1899, State *v.* Scevers, 108 Ia. 738, 78 N. W. 705 (admissible if relating to period of gestation); 1906, Kesselring *v.* Hummer, 130 Ia. 145, 106 N. W. 501 (seduction, with birth of a child as aggravation; intercourse with a third person within the period, admitted); *Kentucky:* 1824, Ginn *v.* Com., 5 Litt. 300 ("about the same time she charges him"); *Maryland:* 1918, Jones *v.* State, 132 Md. 142, 103 Atl. 459 (bastardy in 1915; complainant's prior pregnancy by another man in January, 1915, excluded); *Massachusetts:* 1862, Eddy *v.* Gray, 4 All. 435, 439 (excluded, if "at any point of time more than ten calender months before the birth of the child"; unless gestation is shown to have been unusually protracted); 1875, Sabins *v.* Jones, 119 Mass. 167, 170 (excluded, because not within the proper period); 1877, Force *v.* Martin, 122 Mass. 5 (excluding the evidence because no time was stated); 1879, Ronan *v.* Dugan, 126 Mass. 176 (same); *Mississippi:* 1859, Anon., 37 Miss. 54, 58 (admitted); *Nebraska:* 1895, Stoppert *v.* Nierle, 45 Nebr. 105, 63 N. W. 382 ("at or near the time"); 1901, Erickson *v.* Schmill, 62 Nebr. 368, 87 N. W. 166 (similar); 1903, Gatzemeyer *v.* Peterson, 68 Nebr. 832, 94 N. W. 974 (cross-examination as to keeping company with other men, held not improperly excluded on the facts); 1914, Koepke *v.* Delfs, 95 Nebr. 619, 146 N. W. 962; *New York:* 1890, Young *v.* Johnson, 123 N. Y. 226, 25 N. E. 363 (admitted; here the action was a civil one for rape, but pregnancy was laid as damage and proved as a fact); *North Carolina:* 1876, State *v.* Bennett, 75 N. C. 305 (excluded, Rodman, J.: "It would only tend to prove the psychological fact that two men may have connexion with a woman about the same time, and one of them get her with child; it would not tend to rebut the presumption that the defendant was the one"); 1878, State *v.* Britt, 78 N. C. 439, 442 (admitted, questioning the preceding case, but distinguishing it because here the defendant totally denied his own intercourse with the woman); 1880, State *v.* Parish, 83 N. C. 613 (without other evidence, "insufficient to overcome the statutory presumption [of the woman's oath], and by itself incompetent"); 1899, State *v.* Warren, 124 N. C. 807, 32 S. E. 552 (intercourse with the mother by a third person about the time of begetting, admissible; conflict of previous cases examined); *Porto Rico:* 1913, Rivera *v.* Diaz, 19 P. R. 525 (admitted); 1914, Rico *v.* Lopez, 21 P. R. 201, 208 (affirming Rivera *v.* Diaz); *South Dakota:* 1916, State ex rel. Kühl *v.* Chambers, 37 S. D. 555, 159 N. W. 113 (C. C. P. § 809 held not to enlarge the rule to admit other acts of unchastity for any other purpose); *Utah:* 1915, State *v.* Hammond, 46 Utah 249, 148 Pac. 420 (bastardy; distinguishing the principle of § 398, *post*); *Vermont:* 1856, State *v.* Johnson, 28 Vt. 512, 517, 523 (admitted); *Virginia:* 1811, Fall *v.* Overseers, 3 Munf. 495, 502, 505 (admissible, per Roane, J.; yet excluded, per Brook, J., since the defendant had admitted his own intercourse, — a clearly unsound ruling); *Wisconsin:* 1891, Humphrey *v.* State, 78 Wis. 571, 47 N. W. 836 (admitted); 1906, Busse *v.* State, 129 Wis. 171, 108 N. W. 64.

[2] *Accord:* 1902, Kelly *v.* State, 133 Ala. 195, 32 So. 56; 1890, Maynard *v.* People, 135 Ill. 416, 433, 25 N. E. 740 (bastardy; that the woman was "out late at night with men and boys" about the time in question, admissible); 1905, Walker *v.* State, 165 Ind. 94, 74 N. E. 614 (with other evidence); 1895, State *v.* Wickliff, 96 Ia. 386, 64 N. W. 283; 1918, De Mund *v.* State, 167 Wis. 40, 166 N. W. 328.

Contra: 1877, Rawles *v.* Ford, 56 Ind. 433 (bastardy; the complainant's declarations of preference for another man, at the time of

be reckoned by any fixed rule; nor have the Courts attempted rigidly to prescribe one.[3]

But the issue of *paternity* must be involved. This is necessarily true of a filiation suit or bastardy prosecution, and also of a father's action for *seduction* where pregnancy is alleged as the cause of loss of service.[4] In a prosecution, however, for *rape*, *incest*, *rape under age*, or *adultery*, paternity not being in issue, but merely the defendant's act of intercourse, the paternity and therefore the intercourse of another man is immaterial; [5] unless, indeed, the prose-

alleged intercourse, excluded); 1882, Houser *v.* State, 86 Ind. 231 (bastardy; that the complainant kept company with other men about the alleged time of intercourse, excluded).

Occasionally, a statute has enlarged the scope of the evidence to include *unchastity* in general: *S. D.* Rev. C. 1919, § 2983 (bastardy proceedings; "previous unchastity of the female", admissible).

[3] See the quotations in the note *supra;* the following case contains the best statement: Benham *v.* Richardson, Ind., *supra*, n. 1, Best, C. ("The limit within which this enquiry may be made, is not, however, settled. This must necessarily depend upon the circumstances of each particular case. If conception is claimed to occur from a single act of coition the date of which is fixed, there is but little difficulty in determining the period within which this enquiry may be made; but if it follows three or four different acts of sexual intercourse occurring at different times, and a fully developed child is born less than nine months thereafter, the enquiry ought to embrace a greater period of time, especially before the alleged acts of intercourse").

[4] Cases cited *supra*, n. 1.

Compare State *v.* Hendrick, N. J. L. (1903), and other cases cited *ante*, § 68, nn. 1, 2, 3.

[5] *Accord: Eng.* 1913, R. *v.* Cargill, 2 K. B. 271 (rape under age; extrinsic evidence of intercourse of others with the girl, excluded, even though the prosecution had without objection introduced evidence of her virginity); UNITED STATES: *Fed.* 1917, Rose *v.* U. S., 9th C. C. A., 240 Fed. 685 (carnal knowledge under age; cross-examination of prosecutrix to prior lascivious conduct, excluded): *Ala.* 1921, Bryan *v.* State, — Ala. App. —, 89 So. 893 (rape under age; the female's "relationship with other men", excluded); *Ariz.* 1921, Sage *v.* State, 22 Ariz. 151, 195 Pac. 534 (statutory rape; cross-examination to former acts of unchastity and living in house of prostitution, not allowable); *Conn.* 1909, State *v.* Rivers, 82 Conn. 454, 74 Atl. 757 (rape under age; inadmissible, except to impeach the witness); *D. Col.* 1912, Kidwell *v.* U. S., 38 D. C. App. 566 (rape under age; cross-examination to acts of intercourse with others, held allowable, the prosecutrix here being pregnant); 1913, Sacks *v.* U. S., 41 D. C. App. 34 (rape under age; unchaste conduct of the woman, excluded; citing a Missouri case and ignoring Kidwell *v.* U. S.); *Ida.* 1921, State *v.* Farmer, 34 Ida. 370, 201 Pac. 33 (rape under age; the girl's improper conduct with other men, excluded); *Ind.* 1910, Heath *v.* State, 173 Ind. 296, 90 N. E. 310 (rape under age; excluded); 1916, Harper *v.* State, 185 Ind. 322, 114 N. E. 4 (rape followed by pregnancy; intercourse with another man at the appropriate time, admitted); 1918, Barker *v.* State, 188 Ind. 263, 120 N. E. 593; *Md.* 1919, Ran *v.* State, 133 Md. 613, 105 Atl. 867 (statutory rape; prior intercourse with another man, excluded); *Mass.* 1875, Com. *v.* O'Connor, 107 Mass. 219; *Me.* 1881, State *v.* Witham, 72 Me. 531, 535; *Minn.* 1921, State *v.* McPadden, 150 Minn. 62, 184 N. W. 568; 1922, State *v.* Perry, — Minn. —, 186 N. W. 311 (rape under age; illicit relations with other men, excluded); *N. H.* 1915, State *v.* Tetrault, 78 N. H. 14, 95 Atl. 669 (rape under age; the female's absence from home with other men, excluded); *N. Dak.* 1913, State *v.* Apley, 25 N. D. 298, 141 N. W. 740 (rape under age; undecided; sensible opinion by Goss, J.; here held admissible to explain medical testimony to physical condition, as in Note 6, *infra*); *Oh.* 1915, Angeloff *v.* State, 91 Oh. 361, 110 N. E. 936 (rape under age; result of a physical examination in jail submitted to without objection is admissible); *S. Dak.* State *v.* Rash, 27 S. D. 185, 130 N. W. 91 (rape under age; prosecutrix' unchaste conduct, excluded); *Wash.* 1914, State *v.* Gay, 82 Wash. 423, 144 Pac. 711 (rape under age; intercourse with another man, excluded).

Contra: 1917, State *v.* Brooks, 181 Ia. 874, 165 N. W. 194 (where force in fact is charged); 1906, State *v.* Gerike, 74 Kan. 196, 87 Pac. 759 (rape under age, with pregnancy; the woman's intimate association at night with other men, admitted; no precise rule stated); 1911, State *v.* Swindall, 129 La. 760, 56 So. 702 (incest); 1906, State *v.* Mobley, 44 Wash. 549, 87 Pac. 815 (rape under age, with pregnancy; the woman's habit of staying away from home till after midnight, received).

This view may be justified, and is perhaps preferable to that stated above in the text, on the ground that, though paternity is not in issue, yet, since there must have been intercourse with some one, it is more likely that it

cution by inviting the issue, makes counter-evidence admissible (on the principle of § 15, *ante*).[6]

Certain other evidential uses of similar facts are here to be distinguished, such as the use of other acts of intercourse by a *complainant in rape*, to indicate her disposition or *motive to consent* (*post*, §§ 200, 402), and the use of particular instances of unchaste conduct to *impeach the credit* of a woman-witness (*post*, § 987); for both of these uses have their peculiar limitations, which may or may not in a given case be more favorable to admissibility than the present principle. In view of the danger to innocent men from the fabrications of a certain pathological type of feminine nature, well-known to psychologists,[7] it seems desirable to give liberal opportunity for placing before the jury the entire facts as to the complaining witness' chastity, in all issues of this kind; and this from the point of view of weighing her credit (*post*, § 987), without regard to relevancy under the present principle.

§ 134. **Same: Adultery to show Illegitimacy.** On the same principle, in an issue of illegitimacy, the *wife's adultery* would be evidential to show the paternity of her child to be her paramour's. But this is forbidden, except on certain conditions, by the so-called presumption of legitimacy (*post*, § 2527). The reason is that this fact does not actually prove the illegitimate paternity, but merely makes it possible or probable; and such an uncertainty of conclusion would be practically undesirable where an issue of inheritance is involved, especially in a country like England, where the interests of landed estates and the system of primogeniture were so important; while the paternity of an unmarried woman's child involves no such weighty considerations of general policy. Accordingly, the presumption of legitimacy forbids any investigation into the illegitimate paternity of a child born after marriage, except where the husband's non-access (*post*, § 137) during the period of gestation makes his paternity impossible, and thus the identity of the real father becomes a minor and corroborative fact only.

B. ESSENTIAL INCONSISTENCY

§ 135. **General Principle.** It has been already pointed out (*ante*, § 130) that there is a negative form of the Concomitant inference, which is indeed, if

was exclusively with some other person, on the principle of §§ 400, 402, par. (1) (*a*), *post*.

So also the same considerations apply in *abortion:* 1913, Meno *v.* State, 117 Md. 435, 83 Atl. 759 (cited more fully *post*, § 390 n.).

[6] 1881, State *v.* Witham, *supra;* 1903, Knowles *v.* State, 44 Tex. Cr. 322, 72 S. W. 398 (admitted on a charge of rape under the age of consent, when offered to contradict the prosecutrix' testimony that the defendant was the father of her child; Brooks, J., diss.).

Occasionally some *other issue* makes it relevant: 1850, Nugent *v.* State, 18 Ala. 521 (abuse of a child S. by an attempt to know carnally; the existence in S. of venereal disease and of bruises being shown, the defendant was allowed to offer evidence of intercourse with S. by others, as showing the possibility of others being the cause); 1904, State *v.* Bebb, 125 Ia. 494, 101 N. W. 189 (like People *v.* Craig, Mich.); 1898, People *v.* Craig, 116 Mich. 388, 74 N. W. 528 (carnal knowledge of minor while a member of family; intercourse of prosecutrix with others, admitted to account for pregnancy proved); 1921, State *v.* McPadden, 150 Minn. 62, 184 N. W. 568.

[7] William Healy, Pathological Lying, etc., The Individual Delinquent, *passim*, cited *post*, § 875.

not the more common, at least the more effective one. It may be termed the argument from Essential Inconsistency.

Its usual theory is that a certain fact cannot coexist with the doing of the act in question, and, therefore, that if that fact is true of a person of whom the act is alleged, it is impossible that he should have done the act. The form sometimes varies from this statement; but its nature is the same in all forms. The inconsistency, to be conclusive in proof, must be *essential, i.e.* absolute and universal; but since, in offering evidence, we are not required to furnish demonstration but only fair ground for inference (*ante*, §§ 32, 38), the fact offered need not have this essential or absolute inconsistency, but merely a probable or presumable inconsistency; and its evidentiary strength will increase with its approach to absolute or essential inconsistency.

There are five common cases of this form of the argument (though more are conceivable): 1. The absence of the person charged in another place (Alibi); 2. The absence of a husband (non-access) — a variety of the preceding; 3. The survival of an alleged deceased person after the supposed time of death; 4. The doing of a crime by a third person; and, 5. The self-infliction of the harm alleged, — resting on the same principle as the preceding instance.

§ 136. **Alibi.** The theory of an alibi is that the fact of presence elsewhere is essentially inconsistent with presence at the place and time alleged, and therefore with personal participation in the act. Thus, the evidentiary fact is a new affirmative proposition, considered as a 'factum probandum', though its logical operation is a negative one:

Ante 1726, GILBERT, C. B., Evidence, 145: "[The proof of an opponent] is not properly the proof of a negative, but the proof of the same proposition totally inconsistent with what is affirmed; . . . as if the defendant be charged with a trespass, . . . and if the fact be proved, he can only prove a proposition inconsistent with the charge, and that he was at another place at the time when the fact is supposed to be done, or the like."

1762, FOSTER, J., Crown Law, 3d ed. 368: "If it [alibi] appeareth to be founded in truth, it is the best negative evidence that can be offered. It is really positive evidence which in the nature of things necessarily implieth a negative."

1850, SHAW, C. J., in *Com.* v. *Webster*, 5 Cush. 295, 318; Bemis' Rep., 369: "When a fact has occurred, with a series of circumstances preceding, accompanying, and following it, we know that these must all have been once consistent with each other; otherwise the fact would not have been possible. Therefore, if any one fact necessary to the conclusion is wholly inconsistent with the hypothesis of the guilt of the accused, it breaks the chain of circumstantial evidence, upon which the inference depends; and, however plausible or apparently conclusive the other circumstances may be, the charge must fail. Of this character is the defence usually called an *alibi;* that is, that the accused was *elsewhere* at the time the offence is alleged to have been committed. If this is true, it being impossible that the accused could be in two places at the same time, it is a fact inconsistent with that sought to be proved, and excludes its possibility." [1]

It is obvious that the alibi argument is relevant only for disproving personal participation (in a broad sense) in the act, and does not affect an alleged co-

§ 136. [1] Compare also Bentham, Rationale of Judicial Evidence, b. V, c. XVI, § 11 (Bowring's ed. vol. VII, p. 112).

operation as principal ordering the act elsewhere by an agent. Just what modifications might be necessary in the alibi argument where action is predicated at a distance without an agent but through thought-transference, may be left for determination until the practicability of such action is judicially accepted.

The only question of a rule of admissibility that seems to arise is whether the alibi must be such as absolutely to *preclude the possibility of presence* at the alleged time and place of the act. It is sometimes said that this much must be shown.[2] Such expressions, however, seem in truth to refer only to the weight of the alibi argument, by pointing out that it falls short of complete proof except on those conditions. If they were intended to mean anything more, they are clearly unsound,[3] and would exclude nine alibi arguments out of ten. Even as affecting the weight of the argument (with which we have in this place no concern), such statements seem erroneous; for an alibi may not involve absolute impossibility, but only high improbability, and yet be convincing. The matter may be thus demonstrated. Suppose we are to argue that X's footprint near the house of a murder is evidentiary of his presence; no one would contend that in proving this fact as a 'factum probandum' complete proof is necessary; any evidence that it is probably his footprint would be admissible. So, when the fact of X's presence elsewhere is offered in disproof of his participation any evidence rendering this fact probable is receivable.[4] There is no reason why, in proving the subsidiary fact of alibi, any different rule should be applied than is applied to the proof of other subsidiary facts. Thus, if X was at the other place one hour before the act, we argue that probably he was still there at the exact time, and hence that he could not have been at the place charged.[5]

It may be added that the argument of alibi is not in theory confined to criminal acts, but may be equally applied to the disproof of *civil acts*, such as the execution of a deed.[6]

Distinguish, as involving other principles, the evidential effect of the *fabrication of an alibi* (*post*, § 279), and the question of the *burden of proving an alibi* (*post*, § 2512).

§ 137. **Non-access of Husband to show Illegitimacy.** Since legitimacy of offspring implies a begetting by the husband, it would be relevant, in dis-

[2] 1873, Agnew, J., in Briceland *v.* Com., 74 Pa. 463, 469 ("When a defence rests on proof of an alibi, it must cover the time when the offence is shown to have been committed, so as to preclude the possibility of the prisoner's presence at the place of the murder; . . . for if it be possible that he could have been at both places, the proof of the alibi is valueless)."

[3] *Accord:* 1879, Stuart *v.* People, 42 Mich. 255, 260, 3 N. W. 863; 1898, Ford *v.* State, 101 Tenn. 545, 47 S. W. 703.

[4] Thus all facts tending to show his presence elsewhere are admissible: 1894, State *v.* Delaney, 92 Ia. 467, 61 N. W. 189 (the defendant was in a room in a house; evidence admitted of the impossibility of passing to the street without waking other inmates).

[5] The full logical effect of an alibi, however, arises only when by ordinary exertion the person could not have changed his place in season: 1898, Peyton *v.* State, 54 Nebr. 188, 74 N. W. 597 (instruction held too strict in requirements).

[6] 1897, Brown *v.* Tourtelotte, 24 Colo. 204, 50 Pac. 195 (signing of a note); 1867, Doe *v.* Stevens, 36 Ga. 463, 473 (execution of deed); 1884, Nash *v.* Hoxie, 59 Wis. 384, 386, 18 N. W. 408 (contract).

proving legitimacy, to use his *absence from the wife* at the probable time of begetting as showing the impossibility of the act of begetting. For reasons of policy, however (already noted in § 134), it was long forbidden to employ this mode of proof, except in a very restricted form, namely, that the husband was not at the time 'infra quattuor maria.' This doctrine has in modern times been much relaxed, if not entirely abandoned, so that the argument from non-access is now fully available. The scope of the doctrine is dealt with in connection with the presumption of legitimacy (*post*, § 2527).

§ 138. **Survival of the alleged Deceased.** Where the 'corpus delicti' is disputed, and, for example, in a charge of homicide the alleged deceased is claimed by the defendant not to have been killed, the argument is obviously available that he is still alive, or was alive after the time of the supposed death, for this would be absolutely inconsistent with his death as supposed:

1762, FOSTER, J., Crown Law, 3d ed., 367: "A is convicted upon circumstantial evidence, strong as that sort of evidence can be, of the murder of B. C is afterwards indicted as accessory to this murder; and it cometh out upon the trial by incontestable evidence that B is still living. Lord Hale somewhere mentioneth a case of this kind. Is C to be convicted or acquitted? The case is too plain to admit of a doubt."

1850, SHAW, C. J., in *Com.* v. *Webster*, 5 Cush. 295; Bemis' Rep. 269, 295, 475: "It may be as well to consider now as at any other time that ground of defence on the part of the prisoner which has been denominated — not perhaps with precise legal accuracy — an alibi; that is, that the deceased was seen elsewhere out of the Medical College after the time when (by the theory of the proof on the part of the prosecution) he is supposed to have lost his life at the Medical College. It is like the case of an alibi in this respect, that it proposes to prove a fact which is repugnant to and inconsistent with the facts constituting the evidence on the other side. . . . Although the time alleged in the indictment is not material, and the act done at another time would sustain it, yet in point of evidence it may become material; and, in the present case, as all the circumstances shown on the other side, and relied upon as proof, tend to the conclusion that Dr. Parkman was last seen entering the Medical College, and that he lost his life therein, if at all, the fact of his being seen elsewhere afterwards would be so inconsistent with that allegation that (if made out by satisfactory proof) we think it would be conclusive in favor of the defendant."[1]

§ 139. **Commission of Crime by a Third Person.** If X is charged with homicide, committed by himself alone, and it is shown in disproof that Y did the killing, X is clearly exonerated; for the fact that Y has done it is inconsistent with and exclusive of X's guilt:

1833, GASTON, J., in *State* v. *May*, 4 Dev. 328, 338 (larceny of a slave): "The criminal act imputed to the prisoner might as readily be committed by many as by one. . . . Both [W. M. and the defendant] might be guilty, or both might be innocent; and a common guilt or a common innocence was as presumable as the guilt of one only. . . . But proof that certain acts constituting a part of the criminal transaction itself were done by W. M. might have been of high importance to the prisoner by removing so much of the inference of guilt as would be raised were those acts brought home to him. . . . Proof that the taking was by other than the prisoner perhaps might repel this inference [of guilt], — not

§ 138. [1] In this case the prosecution were not allowed to show that the testimony of survival might be explained away by showing that there was another person in Boston easily mistakable for Dr. Parkman: a ruling which seems erroneous.

because the guilt of one shows the innocence of the other, but because proof that specific acts were done by one weakens or removes the presumption that the same acts were done by another."

There are, of course (as the preceding passage shows), cases in which X is by hypothesis in some way an accomplice of Y, either at a distance or as a personal sharer; and there is even the rare case of independent and double felonious acts upon the same object. To such cases the argument cannot apply. Apart from them, it is as cogent as an alibi. If the Man with the Iron Mask was the Duc de Vermandois, he could not have been the Général de Bulonde; and if the Tichborne claimant was Arthur Orton, he could not have been Roger Tichborne.

The question that arises, from the point of view of the rules of Evidence, is whether, in evidencing this doing by a third person as a fact of disproof, any unusual requirements should be made as to the strength of the evidence before it can be admitted. Thus, to prove A guilty of murder, evidence of his threats (*i.e.* a design) to commit it are always admissible (*ante*, § 105); now, if the fact to be proved is that B committed the murder (as inconsistent with A's guilt), why should not B's threats be admitted, without further restriction, as A's are? It is true that evidence of B's threats alone would not go far towards proving B's commission; but it is not a question of absolute proof nor even of strong probability, but only of raising a reasonable doubt as to A's commission; and for this purpose the slightest likelihood of B's commission may suffice or at least assist. The evidence of B's threats, to be sure, may, in a given instance, be too slight to be worth considering: but it seems unsound as a general rule to hold that mere threats, or mere evidentiary facts of any one sort, are to be rejected if unaccompanied by additional facts pointing towards B as the doer. Nevertheless, most Courts have shown an inclination to make some such restriction, and to insist that two or more kinds of evidentiary facts pointing towards B must be offered, and that one kind alone will not be received. It is difficult to see the object of this restriction, because if the evidence is really of no appreciable value, no harm is done in admitting it; while if it is in truth calculated to cause the jury to doubt, the Court should not attempt to decide for the jury that this doubt is purely speculative and fantastic, but should afford the accused every opportunity to create that doubt. A contrary rule is unfair to a really innocent accused.

§ 140. **Same: Threats by a Third Person.** *Threats* are perhaps the commonest kind of evidence offered for this purpose. The rulings differ widely in their effect; but in general a wholly unnecessary strictness is shown, and the illiberal attitude of some Courts in this respect towards accused persons is in singular contrast with the maudlin tenderness otherwise often exhibited.[1]

§ 140. [1] *Federal:* 1891, Alexander *v.* U. S., 138 U. S. 353, 355, 11 Sup. 350 (the defendant and the deceased were seen together just before the latter's disappearance; evidence of threats by H. against the deceased, H. then being in search of the deceased, who was supposed to have eloped with H.'s wife, held admissible, subject to a certain discretion in the trial Court as to remoteness); 1892, Worth *v.* R. Co., 51 Fed. 171 (action by a passenger in-

§ 141. **Same: Motive of a Third Person.** A *motive* as evidence is perhaps not of such value as a threat; yet Courts seem more inclined to receive it.[1] There is no reason for requiring that it be coupled with other evidence in order to be admissible.

jured by the derailment of a car; evidence of the design of outsiders to wreck the train by derailment was admitted, no conditions being laid down, but other evidence being presented of the existence of a motive in certain outsiders, and of the presence of suspicious persons at the place); *Alabama:* 1914, Spicer *v.* State, 188 Ala. 9, 65 So. 972 (threats of a third person, admitted); *Arkansas:* 1911, McElroy *v.* State, 100 Ark. 301, 140 S. W. 8 (threats by third persons, excluded, no other evidence of their complicity being offered); *California:* 1861, People *v.* Williams, 18 Cal. 193 (threats to kill, by a third person, admitted); *Connecticut:* 1885, State *v.* Beaudet, 53 Conn. 543, 4 Atl. 237 (unspecified threats of a third person against the assaulted party, excluded; partly because too vague, partly because hearsay, partly because not accompanied by other evidence of the third person's guilt; opinion inconclusive and unsound); *Illinois:* 1886, Schoolcraft *v.* People, 117 Ill. 271, 277, 17 N. E. 649 (murder; the deceased's statement that certain third persons, "whose wives he had been running after, would kill him some day", excluded); 1894, Carlton *v.* People, 150 Ill. 181, 188, 37 N. E. 244 (arson; threats of third person to burn all the property of the injured person, excluded); 1916, People *v.* King, 276 Ill. 138, 114 N. E. 601 (murder of a police officer, the issue being the identity of the slayer; threats of F., made some time previous, against the officer, excluded); *Indiana:* 1901, Keith *v.* State, 157 Ind. 376, 61 N. E. 716 ("isolated threats by third parties is not admissible"); *Kentucky:* 1878, Morgan *v.* Com., 14 Bush 106, 112 (murder; threats against the deceased's life, by a third person present at the affray, admitted, the third person being first shown present and thus by possibility connected with the act); *Massachusetts:* 1916, Bradford *v.* Boston & M. R. Co., 225 Mass. 129, 113 N. E. 1042 (fire set by the defendant to the T. factory and spreading to the plaintiff's house; defendant contended that the fire started in the T. factory; D. the treasurer of the T. Co. was a witness for plaintiff, and there was evidence of his starting the fire; the fact that the T. plant had also burned the year previous was admitted, "as explaining the motive and intent of D."; this is sensible, but is not consistent with Noyes *v.* Boston & M. R. Co., *post*, § 199*a*; *Missouri:* 1889, State *v.* Crawford, 99 Mo. 74, 80, 12 S. W. 354 (arson; threats of burning by a third person, rejected as 'res inter alios', — as if the law of judgments had any connection with the process of drawing an inference; this ground of decision is absurd, for it would exclude the whole process of proof that another was the guilty person); 1896, State *v.* Taylor, 136 Mo. 66, 37 S. W. 907 (burglary; threats by another person to commit such a burglary, excluded, unless perhaps an overt act, etc., had followed); *North Carolina:* 1846, State *v.* Duncan, 6 Ired. 236, 239; 1877, State *v.* Davis, 77 Ired. 483 (for these two cases, see *post*, § 142); *Oregon:* 1893, State *v.* Fletcher, 24 Or. 295, 300, 33 Pac. 575 (threats, etc., by a third person, excluded; there must be "some appropriate evidence directly connecting that person with the *corpus delicti*"); *Pennsylvania:* 1919, Com. *v.* Bednorciki, 264 Pa. 124, 107 Atl. 666 (third person's threats excluded, because no other evidence, except opportunity, was offered); *Texas:* 1881, Dubose *v.* State, 10 Tex. App. 246 (homicide; third person's "motive, threats, and opportunity to kill", admissible); 1920, Taylor *v.* State, 87 Tex. Cr. 330, 221 S. W. 611 (homicide; the mere fact of animus by third persons against the deceased, without showing also threats and opportunity, excluded); *Washington:* 1906, State *v.* McLain, 43 Wash. 267, 86 Pac. 390 (arson; mere threats of a third person, excluded); *West Virginia:* 1871, Crookham *v.* State, 5 W. Va. 510, 513 (prior threats to kill, and subsequent immediate flight, of a third person, excluded as "not pertinent"); *Wisconsin:* 1899, Buel *v.* State, 104 Wis. 132, 80 N. W. 78 (murder; threats of third persons against the deceased, excluded).

Compare § 68, *ante* (*character* of a third person).

The following case is peculiar: 1910, R. *v.* McNulty, 22 Ont. L. R. 350 (murder by defendant man of illegitimate child of M. by him; the paternity being in issue as a motive, defendant's calling of third persons to prove their intercourse with M., who on cross-examination had denied it, excluded; grounds obscure; unsound).

§ **141.** [1] *Federal:* 1918, Griffin *v.* U. S., 1st C. C. A., 248 Fed. 6 (mailing obscene letters; the motive of the third persons to mail such letters to the addressee, held not improperly excluded in discretion); *Alabama:* 1902, Tatum *v.* State, 131 Ala. 32, 31 So. 369 (deceased's declarations of a difficulty with R., and facts indicating a motive in R., held inadmissible); 1904, Bowen *v.* State, 140 Ala. 65, 37 So. 233 (murder; facts showing a motive in third persons, excluded); 1904, Walker *v.* State, 139 Ala. 56, 35 So. 1011 (murder; a third person's motive, without other connecting evidence, excluded); 1910, McDonald *v.* State, 165 Ala. 85, 51 So. 629 (evidence of third person's motive, with evidence of bloodhound's trailing of him, ad-

§ 142. **Same: Miscellaneous Facts.** Of the other kinds of evidence indicating a third person as the doer of the act, it can only be said that the inclination should always be to admit any one of them, unless totally without probative suggestion.[1] In particular, the *conviction of another person* for the

mitted); *Georgia:* 1852, Crawford *v.* State, 12 Ga. 142, 145 (murder; the identity of the assailant not being directly testified to, evidence was admitted that just previously the deceased had had a quarrel with third persons); 1896, McElhannon *v.* State, 99 Ga. 672, 26 S. E. 501 (malicious mischief; motive in the prosecuting witness, admitted); *Illinois:* 1912, People *v.* Pezutto, 255 Ill. 583, 99 N. E. 677 (murder; quarrels, etc., of deceased with third persons, held properly limited by the trial Court in its discretion); *Louisiana:* 1854, State *v.* D'Angelo, 9 La. An. 46 (murder; that the deceased "had innumerable enemies", excluded as too vague; a showing that one or more designated enemies were present at the time of the killing would perhaps be admitted); 1878, State *v.* Johnson, 30 La. An. 921 (murder, no eye-witnesses being present; evidence received, on the peculiar circumstances, of quarrels by the deceased, shortly previous, with other persons who had "more reason for committing the murder than the accused"); *Massachusetts:* 1881, Com. *v.* Abbott, 130 Mass. 475 (murder of a woman; evidence was offered, to fix the murder on a third person, that her husband had quarrelled with her, and that a stranger was seen near the place on the day of the killing; Colt, J.: "The existence of ill-feeling as a motive for the commission of crime will not alone justify submitting to a jury the question of the guilt of a person entertaining such a feeling. It becomes material only when offered in connection with other evidence, proper to be submitted, showing that the person charged with such ill-feeling was in fact implicated in the commission of the crime. . . . The mere claim made by counsel that there are circumstances which tend to implicate the person charged is not enough; there must be proof of such circumstances, or an offer to prove. The evidence that a stranger was in town at the time of the murder does not alone implicate the husband"); *Missouri:* 1906, State *v.* Barrington, 198 Mo. 23, 95 S. W. 235 (murder; certain threats by third persons against the deceased, excluded); *Oklahoma:* 1915, Irvin *v.* State, 11 Okl. Cr. 301, 146 Pac. 453 (murder; evidence which "casts a bare suspicion upon another" is inadmissible); 1922, Phillips *v.* State, — Okl. Cr. —, 203 Pac. 902 (murder; ill-feeling in the neighborhood, not designating any particular person, excluded); *South Carolina:* 1905, State *v.* Gaylord, 70 S. C. 415, 50 S. E. 20 (threats, etc., of a third person received; here, to show that the third person, not the defendant, was the aggressor; compare § 112, *n.* 6, *ante*); *Texas:* 1906, Porch *v.* State, 50 Tex. Cr. 335, 99 S. W. 102 ("there must be something more than mere motive" evidenced against the third person); 1917, Taylor *v.* State, 81 Tex. Cr. 359, 195 S. W. 1147 (murder; motive of members of deceased's own family, admitted); *Vermont:* 1922, State *v.* Long, — Vt. —, 115 Atl. 734 (murder; the deceased's husband's criminal intimacy with another woman, as evidencing his motive to be the slayer, not admitted, there being no other evidence as to his being the slayer); *Washington:* 1920, Sound Timber Co. *v.* Danaher Lumber Co., 112 Wash. 314, 192 Pac. 941 (damage by fire; rule applied); *Wyoming:* 1903, Horn *v.* State, 12 Wyo. 80, 73 Pac. 705 (motive and opportunity of a third person; "much must depend on the circumstances of each case"; here excluded).

§ **142.** [1] ENGLAND: 1890, R. *v.* Dytche, 17 Cox Cr. 39 (felonious wounding; evidence that other persons, already convicted for the offence, were present and made the assault, and not the now defendants, admitted).

UNITED STATES: *Alabama:* 1846, Smith *v.* State, 9 Ala. 990, 995 (conduct of another to be admitted in rare cases only; Goldthwaite, J., dissenting); 1875, Levison *v.* State, 54 Ala. 519, 527 ("The evidence of the guilt must relate to the 'res gesta', and not to the declarations or conduct of the party on whom it is attempted to cast suspicion, subsequent to and having no immediate connection with the crime"; here excluding the flight of a third person); 1895, Whitaker *v.* State, 106 Ala. 30, 17 So. 456 (unexplained flight of a third person, excluded); 1895, Crawford *v.* State, 112 Ala. 1, 20, 21 So. 214 (murder; W.'s concealment of himself, held irrelevant on the facts, the defendant's actual deed of shooting being uncontroverted); 1911, McGehee *v.* State, 171 Ala. 19, 55 So. 159 (inculpatory conduct of a third person, excluded); 1915, Terry *v.* State, 13 Ala. App. 115, 69 So. 370 (murder; the flight of one H., with other evidence as to his guilt, admitted on the facts); *Georgia:* 1862, Phillips *v.* State, 33 Ga. 281, 287 (larceny; pleased conduct of a third person upon the discovery of the article on the defendant's premises, the third person having been present at the time of the theft, admitted); *Indiana:* 1900, Green *v.* State, 154 Ind. 655, 57 N. E. 637 (a dying declaration naming B., and not the defendant, as the murderer, B.'s threats, motive, and doings were admitted to prove B. the murderer, though not B.'s subsequent admissions of guilt); 1910, Stout *v.* State, 174 Ind. 395, 92 N. E. 161 (murder; that one B. had bought a revolver of similar calibre, and that bloodhounds had trailed him after the

same crime (assuming that it is predicated as the deed of one person, not of joint actors) should be received;[2] no technicality of the law of judgments should stand in the way; indeed, it is difficult to see why such a judgment should not be pleaded in bar. Certainly, the law must in some manner avoid the absurdity of convicting two persons for the same crime committable by one only. This same singular and inexcusable attitude of the Courts is seen also in the exclusion of a *third person's confession of guilt* under the exception to the Hearsay rule (*post*, § 1476), and of a *suicide's declarations* (*post*, § 143).

murder, not admitted, no offer of other evidence against B. being promised); *Iowa:* 1885, McPherrin *v.* Jennings, 66 Ia. 626, 24 N. W. 242 (death by unknown cause was rejected as an explanation of the plaintiff's horse's death); 1922, State *v.* Banoch, — Ia. —, 186 N. W. 436 (larceny; mere presence and departure of an unknown third person, excluded); *Kentucky:* 1813, Logan *v.* Steele, 3 Bibb 230 (trespass by burning a barn and killing horses: the plaintiff having proved threats by the defendant, the defendant was allowed to prove that other enemies of the plaintiff "had also threatened to injure his property"); 1908, Etly *v.* Com., 130 Ky. 723, 113 S. W. 896 (wife-murder; sundry evidence pointing to another person, held improperly excluded); *Massachusetts:* 1881, Com. *v.* Abbott, 130 Mass. 475 (cited *ante*, § 142); *Michigan:* 1913, People *v.* Emmons, 178 Mich. 126, 144 N. W. 479 (sale of fermented cider; evidence that other persons had the means of adulterating the cider sold, held admissible); *Missouri:* 1897, State *v.* Hack, 118 Mo. 92, 23 S. W. 1089 (third person's admissions of the larceny, excluded); *North Carolina:* 1833, State *v.* May, 4 Dev. 328, 331 (stealing a slave; evidence that another person, who lived near the slave, while the defendant lived at a distance, had been included in the original warrant for arrest, but had then fled the State, confessing himself guilty, excluded; but "direct evidence connecting W. with the 'corpus delicti' would certainly have been admissible"; the offered evidence, if not followed by evidence of an "overt act", was merely 'res inter alios acta'); 1846, State *v.* Duncan, 6 Ired. 236, 239 (accessory to murder; threats and arrest of other persons, excluded); 1873, State *v.* White, 68 N. C. 158 (larceny; suspicious conduct, and flight from the State, of a third person, excluded); 1874, State *v.* Haynes, 71 N. C. 79 (conduct of another person, before and after the crime, admitted); 1875, State *v.* Bishop, 73 N. C. 44, 46 (larceny; the familiarity of a third person with the premises, and his suspicious conduct on the night of the larceny, excluded); 1877, State *v.* Davis, 77 N. C. 483 (murder; threats of a third person, and his departure for the deceased's house, excluded, on the reasoning of State *v.* May); 1880, State *v.* Baxter, 82 N. C. 602 (larceny; another person's suspicious conduct, excluded); 1912, State *v.* Millican, 158 N. C. 617, 74 S. E. 107 (arson; the defendant's offer to show that during the time after their imprisonment other fires occurred in the same town; unsound; the offer here may have been defective in form, but the opinion's reasoning on the relevancy of such evidence shows a singular ignorance of the facts of crime and of the elements of logic); *South Carolina:* 1895, State *v.* Wallace, 44 S. C. 357, 22 S. E. 411 (a prosecuting witness was said to be the real thief, and other receipts of stolen property by him were admitted); *Vermont:* 1864, State *v.* Barron, 37 Vt. 57, 60 (illegal sale of liquor; a habit of "gentlemen in travelling about the country to carry spirituous liquors in bottles with them", not admitted to explain the source of bottles found in the defendant's public-house); 1883, Lewis *v.* Barker, 55 Vt. 23 (that a clerk in defendant's store had refused to work for him the day after it was burned; not admitted to show that the clerk had burned it); 1900, State *v.* Totten, 72 Vt. 71, 47 Atl. 105 (robbery; certain conduct of a third person indicating his guilt, excluded); *Virginia:* 1820, Rowt's Adm'r *v.* Kile's Adm'r, Gilmer, Va. 202 (action on an instrument of defendant; evidence of its forgery by the son of the payee, admissible; after "the agency of that person" in the forgery is made out, then that person's skill in imitating the hand in question would be admissible); *West Virginia:* 1871, Crookham *v.* State, 5 W. Va. 510, 513 (stabbing; threats and flight of another person, excluded).

[2] *Contra:* 1898, Chamberlain *v.* Pierson, 31 C. C. A. 157, 87 Fed. 420 (injury by derailment; to exonerate the defendant's employees, a conviction of third persons for causing the derailment was excluded); 1897, State *v.* Smarr, 121 N. C. 669, 28 S. E. 549 (that another had been convicted of the burglary charged, inadmissible).

But of course mere *suspicion* is nothing: 1899, Brown *v.* State, 120 Ala. 342, 25 So. 182 (merely showing that another was suspected, excluded).

Nor can the prosecution show that another person was *acquitted*, because this leaves still open the defendant's share in the act (except for the purpose mentioned in note 4, *infra*): 1893, People *v.* Mitchell, 100 Cal. 328, 334, 34 Pac. 698.

The general principle is applicable, it may be noted, equally to *civil cases*, such as the trespasses of animals.[3] Moreover, on the principle noticed already for the argument of opportunity (*ante*, § 132) the prosecution may in advance negative the argument by showing that other possible persons *did not do* the act.[4]

The fact of *mistaken identity* seems also to be relevant in this connection; the argument is that a third person, not the one charged, was really involved, and the fact of the existence of a third person capable of being mistaken for the one charged is some evidence that he possibly or probably did the things attributed to the person charged.[5]

§ 143. **Suicide, or other Self-Infliction of Harm; Suicidal Plans.** If the deceased, with whose death the defendant is charged, committed suicide, obviously the defendant could not have killed the deceased. There ought to be no doubt about the admissibility of *plans or desires to commit suicide*, even where no other evidence of its particular probability or feasibility is offered. Its improbability or non-feasibility should be matter for rebuttal, and should not exclude the evidence of its probability. That the evidence may be manufactured is no reason for its exclusion; for it may also *not* be manufactured, and if not, it is most cogent. The distance in time ought not to exclude the evidence of plans; for it does not exclude evidence of a defendant's threats (*ante*, § 108). That the deceased's hearsay statements of plan are admissible under an exception to the Hearsay rule, is plain (*post*, § 1725).

The relevancy of plans of suicide has been well expounded in the following passage:

1892, FIELD, C. J., in *Com.* v. *Trefethen*, 157 Mass. 180, 31 N. E. 961: "The nature of the case proved by the Commonwealth was such that it was not impossible that she had committed suicide. If it could be shown that she actually had an intention to commit suicide, it would be more probable that she did in fact commit it than if she had no such intention. . . . It may be true that an unmarried woman pregnant with child, if she has an intention to commit suicide, does not always carry that intention into effect, although she have an opportunity; but it is impossible to say that the actual existence of such an intention does not tend to throw some light upon the cause of death of such a woman when found dead under circumstances not inconsistent with the theory of suicide. . . . If it could be shown that during the week before her death she had actually attempted to drown herself, and had been prevented from doing so, it seems manifest that this fact, according to the general experience of mankind, would have some tendency to show that she might have made a second attempt."

[3] 1895, Green *v.* Skoqvist, 57 N. J. L. 617, 31 Atl. 228 (trespass by cattle; the trespassers of other persons' cattle, admitted);

Contra, but wrong: 1898, Dover *v.* Winchester, 70 Vt. 418, 41 Atl. 445 (sheep-killing; killing of other sheep by other dogs, not admissible to negative the guilt of defendant's dogs).

[4] 1897, Bram *v.* U. S., 168 U. S. 532, 18 Sup. 182 (where the probabilities lay between three persons).

[5] The argument is of course a common one, and only seldom has a ruling upon it been necessary: 1882, White *v.* Com., 80 Ky. 484 (mistaken identity allowed to be shown); 1881, State *v.* Witham, 72 Me. 531, 536 (adultery; testimony by a neighbor that the defendant had several times talked with the woman at her gate in the evenings of certain months; counter-testimony was admitted by a nearer neighbor that a person, not the defendant, had talked there during the same time; Peters, J., "Of course, both statements cannot be true; still it cannot reasonably be said that the truth of the one would not lessen the probability of the truth of the other").

Such evidence has constantly been admitted, as the annals of celebrated trials illustrate; until the squeamish doubtings of modern times, hesitating to accept the suggestions of natural logic, and not happening to be provided with justifying authority, furnished a few instances of rejection; but such rulings are without support from any point of view.[1]

§ 144. **Same: Motive for Suicide.** For the same reason, an emotion or feeling impelling to suicide is relevant; and facts tending to show the existence of such an emotion — either events, *e.g.* the pregnancy of a seduced woman, or conduct, *e.g.* exhibitions of melancholy or despair (two kinds of evidence dealt with *post*, §§ 391, 394) — should be received to show it. Contrary facts tending to show emotions averse to suicide would be equally admissible.[1]

§ **143.** [1] ENGLAND: 1699, Spencer Cowper's Trial, 13 How. St. Tr. 1166 (murder, the issue being whether the deceased had committed suicide or was killed; evidence was received of her being melancholy and depressed; "she said her distemper lay in her mind, . . . and the sooner it did kill her the better; . . . she neglected herself in doing those things that were necessary for her health, in hopes it would carry her off, and often wished herself dead").

UNITED STATES: *Federal:* 1917, Brawner *v.* Royal Indemnity Co., 5th C. C. A., 246 Fed. 637 (life policy, issue of suicide; deceased's expressions of inclination to suicide, admitted); *Florida:* 1917, Kersey *v.* State, 73 Fla. 832, 74 So. 983 (murder of wife by shooting; deceased's statements of having taken poison with suicidal intent, excluded, because the death was by gunshot and the shooting could not have been done by herself; unsound); *Illinois:* 1859, Jumpertz *v.* People, 21 Ill. 408 (intention to commit suicide, and consistency of the mode of death with suicide, admitted); 1892, Siebert *v.* People, 143 Ill. 571, 584, 32 N. E. 431 (statements of suicidal intent excluded; no ruling on the question of relevancy); 1917, People *v.* Ahrling, 279 Ill. 70, 116 N. E. 764 (cited *post*, § 1726); *Indiana:* 1909, Carter *v.* State, 172 Ind. 227, 87 N. E. 1081 (cited more fully *post*, § 238, n. 6); *Iowa:* 1912, State *v.* Beeson, 155 Ia. 355, 136 N. W. 317 (cited more fully *post*, § 1725, n. 1); *Kansas:* 1896, State *v.* Asbell, 57 Kan. 398, 46 Pac. 770 (admitted, there being a possibility of suicide); *Louisiana:* 1851, Preston, J., in State *v.* Bradley, 6 La. An. 559 (putting as admissible the supposed fact of a letter being found on the person of the deceased declaring an intention to commit suicide); *Massachusetts:* 1882, Com. *v.* Felch, 132 Mass. 32 (abortion; to show a self-abortion by the deceased, her "purpose and intent" "would be if known a material aid in coming to a correct conclusion"; but her declarations of purpose were excluded); 1892, Com. *v.* Trefethen, 157 Mass. 180 (intention to commit suicide, the defendant being the deceased's seducer, admitted; overruling Com. *v.* Felch; see quotation *supra*); *Minnesota:* 1896, Hale *v.* Life Co., 65 Minn. 548, 68 N. W. 182 (insurance policy; the deceased's threat to commit suicide, not admitted to show suicide, because made two years before); *Missouri:* 1894, State *v.* Punshon, 124 Mo. 448, 457, 27 S. W. 1111 (threats of deceased wife to kill herself, excluded, on the ground of hearsay); 1896, State *v.* Punshon, same decision affirmed on second trial, 133 Mo. 44, 34 S. W. 25; 1895, State *v.* Fitzgerald, 130 Mo. 407, 32 S. W. 1113 (excluded, unless accompanied by an attempt to execute them; overruling State *v.* Ludwig, 70 Mo. 412); 1915, State *v.* Ilgenfritz, 263 Mo. 615, 173 S. W. 1041 (murder; deceased's threats of suicide, held admissible; overruling State *v.* Punshon and State *v.* Fitzgerald); *New York:* 1890, Smith *v.* Benef. Soc., 123 N. Y. 85, 25 N. E. 197 (suicide as a defence to an insurance policy; the deceased's design to commit suicide before taking out the policy, admitted); *Ohio:* 1872, Blackburn *v.* State, 23 Oh. St. 146, 149, 165 (intention more than six years before, admitted); *Tennessee:* 1884, Boyd *v.* State, 14 Lea 161, 177 (a disposition and intention to commit suicide, held admissible, "as there is no direct testimony as to the fact of the homicide"); *Vermont:* 1896, State *v.* Fournier, 68 Vt. 262, 35 Atl. 178 (question left undecided); 1898, State *v.* Marsh, 70 Vt. 288, 40 Atl. 836 (deceased's declarations that he was giving his horse arsenic as medicine, offered to show that he had it and might have used it himself, excluded).

Compare the citations *post*, § 1725 (declarations of intention to suicide).

§ **144.** [1] 1699, Spencer Cowper's Trial, Eng. (see citation *ante*, § 143); 1904, State *v.* Kelly, 77 Conn. 266, 58 Atl. 705 (deceased's despondency several months before, excluded; unsound); 1859, Jumpertz *v.* People, 21 Ill. 408 (evidence admitted of mental condition of cheerfulness, or the contrary, pointing towards or against suicide); 1896, State *v.* Punshon, 133 Mo. 44, 34 S. W. 25 (the deceased's "disordered condition of mind",

excluded); 1872, Blackburn *v.* State, 23 Oh. St. 165 (a previous melancholy disposition, tending to suicide, admitted; the interval between the death and the time testified to affecting only the weight of the evidence); 1884, Boyd *v.* State, 14 Lea Tenn. 161, 177 (melancholy or despondent disposition relevant on the question whether suicide was committed; Deaderick, C. J.: "The conditions and surroundings at the time of death may be looked into if of a character likely to impel suicide"); 1899, Morrison *v.* State, 40 Tex. Cr. 473, 51 S. W. 358 (deceased's cheerful behavior up to time of death, admitted to disprove suicide); 1898, State *v.* Marsh, 70 Vt. 288, 40 Atl. 837 (state of health of deceased, considered).

Compare the citations *post*, § 391 (motive for suicide).

SUB-TITLE I (*continued*): EVIDENCE TO PROVE A HUMAN ACT

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

CHAPTER VIII.

§ 148. **General Principle.** The convenience has already been explained (*ante*, § 43) of grouping the various kinds of evidentiary facts according as they come, in time, before, at, or after, the act to be proved. There have now been considered the various kinds of evidentiary facts in the first two groups, *i.e.* facts having Prospectant and Concomitant indications; there remains the third group, namely, facts having a *Restrospectant* indication.

The inference here *looks backward from the evidentiary fact to the alleged act; i.e.* taking our stand at the fact offered, we infer from it that at *some previous time the act was or was not done.*

The common feature of this group of evidentiary facts is that they are all open to a similar source of weakness, and thus offer to the opponent a general

mode of explaining away (*ante*, § 34) their force. Thus, if, to show that A on January 1 stole a bicycle, there is offered the fact of his possession of the bicycle on June 1, the probative force of this fact rests on the assumption that the hypothesis that will explain his possession is that he obtained the bicycle by stealing it. But there are also in truth other possible hypotheses, for example, that it was given or sold to him by the thief or by a purchaser from the thief, or that he found it. The question of admissibility is whether the hypothesis of his stealing is, among all hypotheses, 'prima facie' sufficiently prominent to make the fact admissible (on the general theory of Relevancy, *ante*, § 31); and, if it is admissible, the opponent may show that one of the other hypotheses is in truth a much more probable explanation (on the theory of Explanation, *ante*, § 34). So, if in proving the doing of an act by A as a mark of his former existence as B, there is offered (as in the Tichborne case) the fact that A has a recollection of the event, or if, to disprove it, we offer the fact that A has no recollection of it, the opponent may show, in the first instance, that the recollection has come, not from having done the act, but from having heard or read about it; and, in the second instance, that the lack of recollection is due, not to not having done the act, but to the natural fading of memory.

In short, the tests of Relevancy and the opportunities of Explanation are of the same general nature in this group of evidentiary facts. The general argument runs: Is the trace one whose possession (or lack of possession) by the person charged could be explained by the operation of other causes than the doing (or not doing) of the act in question?[1]

The kinds of facts may best be roughly subdivided according to the mode in which such causes might operate, *i.e.* according as the connection between the evidentiary trace and the act in question is *mechanical*, *organic*, or *mental*. The typical case of the first is the possession of stolen goods; of the second sort, corporal resemblance of child to parent; of the third sort, consciousness of guilt.

a. MECHANICAL TRACES

§ 149. **Miscellaneous Instances in Criminal Cases; Identity-Evidence distinguished.** The presence upon the person or premises of articles, fragments, stains, tools, or any other resulting circumstance, is constantly employed as the basis of an inference that the person did an act with which these circumstances are associated. In general, however, few questions of relevancy arise.[1] There are innumerable instances in the records of celebrated

§ 148. [1] From the point of view of logic and psychology as applicable to argument before the jury (not the rules of Admissibility), see the materials collected in the present author's "Principles of Judicial Proof, as given by Logic, Psychology, and General Experience, and illustrated in Judicial Trials" (1913), §§ 138–155.

§ 149. [1] *Federal:* 1909, Sorenson *v.* U. S., 8th C. C. A., 168 Fed. 785 (burglary; possession of revolver, nitroglycerine, etc., 18 days later, excluded on the facts); *Ala.* 1892, Gilmore *v.* State, 99 Ala. 154, 159, 13 So. 536 (boot-tracks); 1897, Thornton *v.* State, 113 Ala. 43, 21 So. 356 (book and pencil); 1909, Phillips *v.* State, 162 Ala. 14, 50 So. 194 (human

trials; but their relevancy is so patent that no occasion is given for rulings of law:

> "Who finds the heifer dead and bleeding fresh,
> And sees, fast by, a butcher with an axe,
> But will suspect 'twas he that made the slaughter?"
>
> *William Shakspeare*, Henry VI., Pt. II, III, 2.

1850, Mr. *W. Wills*, Circumstantial Evidence, 3d ed., 96: "In a case of burglary, the thief had gained admittance to the house by means of a penknife, which was broken in the attempt, and part left in the window-frame; the broken knife was found in the pocket of the prisoner, and perfectly corresponded with the fragment. . . . In another case, identification was established by the correspondence of the wadding of fire-arms with part of a torn letter found in the prisoner's possession; and in a case on the Northern circuit, where a man had been shot by a ball, the wadding of the pistol, which stuck in the wound, was found to be part of a ballad, which corresponded with another part found in the pocket of the prisoner."

(1) The few rulings recorded are merely the occasional instances in which such questions have been (usually quite without necessity) pushed to a decision in the higher Court.

(2) It is to be noted that (on the principle of § 34, *ante*) the opponent may always *explain away* the indication by showing other hypotheses for the presence of the trace, — as where, on a charge of murder, the presence of blood-stains is explained by the killing of a chicken, or the presence of a weapon by the owner's previous loan of it to another person. It is also to be noted that an argument may be based *negatively* on such traces, — as where it is shown, on a charge of murder, that the murderer must have been stained with blood, while the accused bears no blood-stains and therefore could not have done the killing. To this also there is a counter-argument (of Explanation) that the absence of such traces can be accounted for by their intervening destruction.

(3) The question may be asked, What is the distinction between evidence of *Traces* and evidence of *Identity?* For example, to prove a murder, evidence

tracks); *Fla.* 1893, Whetston *v.* State, 31 Fla. 240, 250, 12 So. 661 (shoe-tracks excluded, because having no marked peculiarities); *Iowa:* 1907, State *v.* Kehr, 133 Ia. 35, 110 N. W. 149 (burglary while armed with a revolver; the possession of a revolver when arrested two months later, excluded; this is finical); *Kan.* 1905, State *v.* McAnarney, 70 Kan. 679, 79 Pac. 137 (blood-stains on trousers; excluded here, because the trousers had been placed in contact with the deceased's bloody clothing before chemical testing); *Ky.* 1900, Ireland *v.* Com., — Ky. —, 57 S. W. 616 (slungshot, excluded on the facts); *Me.* 1870, State *v.* Kingsbury, 58 Me. 238, 243 (fire set by kerosene; presence of kerosene stains on a shirt admitted); *Mass.* 1850, Webster's Trial, 5 Cush. 295, 318, Barnes' Rep., 84 (the lower jaw of the deceased, etc., found on the defendant's premises); *Mo.* 1898, State *v.* Miller, 144 Mo. 26, 45 S. W. 1104 (pistols); *N. Y.* 1908, People *v.* Del Vermo, 192 N. Y. 470, 85 N. E. 690 (knife like that with which a killing was done); *N. Dak.* 1897, State *v.* Campbell, 7 N. D. 58, 72 N. W. 935 (burglary; various tools, etc., admitted); *S. Dak.* 1898, State *v.* Garrington, 11 S. D. 178, 76 N. W. 326 (sack of defendant found on premises the next day, admitted); *Tex.* 1899, Pike *v.* State, 40 Tex. Cr. 613, 51 S. W. 395 (the fact of the sale of some liquor being admitted, the presence of drunken men about the defendant's store was admitted to show that the liquor was intoxicating; compare R. *v.* Burton, cited *post*, § 152 and the cases in § 153); *Utah:* 1906, State *v.* Freshwater, 30 Utah 442, 85 Pac. 447 (defective typewriter showing the mark on a letter); *Va.* 1898, McBride *v.* Com., 95 Va. 818, 30 S. E. 454 (certain traces held inadmissible).

is offered that a gun found in the defendant's possession is exactly fitted by the bullet found in the body of the deceased; what kind of evidence is this? The truth is that this evidentiary fact is really double and involves both kinds of inferences. The nature of the argument to prove Identity (*post*, § 411) is that a certain fact offered is an essential mark of sameness of person, — in this instance, that the fit of the bullet is a necessary and unique mark of the slayer. The weakness of this type of argument is that the mark may not be necessarily associated with one person but may be common to a number of persons; and hence the mode of dealing with such evidence is to show that other persons also have the same mark, — here, that other persons in the neighborhood possessed guns of the same bore. Now the argument from Traces assumes that the argument to identity has been settled and accepted, *i.e.* here it assumes that the use of the gun in question is an essential or sufficient mark of the murderer, and it then sets about to prove that the accused possessed that mark, *i.e.* used that gun; and to do this it offers the fact of its subsequent finding in the accused's possession. Here the weakness of the argument is an entirely new and different one, namely, the trace of subsequent possession does not necessarily indicate a use at the time of the murder, since the gun may be one which the accused has recently borrowed, or it may be his own gun which was lent to another person at the time of the murder. Thus, there are two wholly different evidentiary questions involved in the use of this evidence, — first, the question of Identity, whether this individual gun is a necessary mark of the slayer; and secondly, the question of Traces, whether its subsequent possession evidences its use at the time of the murder. The present type of argument, then, — the argument from Traces to a former act, — is a distinct argument from that of Identity. Although in some instances the same circumstance offered may give rise to both arguments, this is by no means necessary or usual, and there is no essential connection between the two kinds of arguments.

§ 150. **Brands on Animals and Timber.** When an animal is found in B's possession, and the animal bears a brand or other mark, and one of the issues is whether A is the owner of the animal, it is a natural and immediate inference that the animal belongs to the person whose brand it bears, and, if that brand is A's, then to A. This inference, however, while sufficiently probable in the light of practical experience, is in truth a composite one, made up of two steps: (1) first, the inference, from the presence of A's usual mark, that A placed this particular mark, — a genuine argument under the present principle, from a trace to the source of the trace; and (2) secondly, the inference from the fact that A placed it there, to the fact of his ownership of the animal. The latter step of inference is the vital one; it is perhaps not less natural than the former, but it is more serious in its effect. Its real probative foundation is that of the well-established presumption of ownership from possession (*post*, § 2515).

Courts have usually held, when the question was raised, that the inference

of *ownership* may be drawn, as a matter of common law;[1] and it has been universally conceded that the presence of the brand is evidence of *identity* (*i.e.* of the animal being one of those originally branded by the brand-user) even though not of ownership. The larger scope of the evidence has been generally confirmed by legislation. In most of the stock-raising communities, the *brand on animals* is made evidence of ownership; though in order to encourage registration and thus prevent confusion, the rule is applied only to brands duly registered by law.[2]

§ 150. [1] 1900, R. *v.* Forsythe, 4 N. W. Terr. Can. 398 (a brand is on common law principles evidence of ownership; Rouleau, J., diss.; best opinion on the subject, by McGuire, J.); 1886, People *v.* Bollinger, 71 Cal. 17, 11 Pac. 799; (larceny; "an earmark used by the alleged owners of the hogs was some evidence of ownership"); 1907, State *v.* Wolfley, 75 Kan. 403, 89 Pac. 1016 (on common-law principles a brand may be evidence of ownership as well as of identity); 1865, Plummer *v.* Newdigate, 2 Duv. Ky. 1 (a brand "U. S." is admissible as evidence of ownership, but is not 'per se' sufficient evidence); 1886, State *v.* Cardelli, 19 Nev. 319, 10 Pac. 433, *semble* (at common law a cattle-brand may be some evidence of ownership); 1888, Stewart *v.* Hunter, 16 Or. 62, 16 Pac. 876 ("Branding stock furnishes evidence of its ownership").

Contra: 1872, Peoples *v.* Devault, 11 Heisk. 431 (a "U. S." brand is not evidence of ownership unless shown to have been put on by U. S. officers).

For the use of an unrecorded brand as indicating a *scheme to suppress evidence of larceny*, see *post*, § 278.

[2] It should be remembered that some of the ensuing decisions interpret earlier statutes which may have been changed in the interval: CANADA: *Dom.* R. S. 1906, c. 146, Crim. C. § 989, (in criminal cases, the presence upon cattle of a duly recorded brand or mark is to be evidence of ownership); *Alta.* St. 1913, 2d sess., c. 24, § 5 (brand not vented shall be evidence of ownership by registered brand-owner); *Br. C.* St. 1914, 4 Geo. V, c. 9, § 5 (stock-brand not vented to be evidence of ownership, if recorded and uncancelled); *Man.* R. S. 1913, c. 25, § 8 (cattle-brand duly allotted shall be evidence of ownership, where title to cattle is involved); *N. W. Terr.* Cons. Ord. 1898, c. 76, § 5, St. 1900, c. 22, § 5 ("the presence of a recorded brand on any stock" shall be evidence of the ownership of the animal); *Ontario:* St. 1919, c. 70, Brand Act, § 4 (certificate of recorded brand of stock shall be evidence of "the ownership of such certificate" with further proof of authenticity); *Saskatchewan:* R. S. 1920, c. 123, § 5 (duly recorded brand shall be "'prima facie' evidence of the ownership by the owner of such brand of the animal bearing the same").

UNITED STATES: *Arizona:* Rev. St. 1913, Civ. c. § 3760 (on trial for violation of the stock laws, the presence of brand or earmark "claimed by the accused to be his brand or mark", though not recorded, is evidence of conversion; and the ownership of live-stock from a foreign State, etc., "may be shown by the marks or brands thereupon" though not recorded); § 3757 (official record of live-stock brands, proved by certified copy, is 'prima facie' evidence of all the facts required to be entered in said book", and of the rights of the person named, or of the assignee on proof of assignment, "to use said brand", etc.); § 3758 (brand or earmark duly recorded is prima facie evidence that the animal "is the property of the owner of such brand and earmark", except when the animal is one seized pursuant to this law, and except for fresh brands upon mavericks, etc.); 1901, Brill *v.* Christy, 7 Ariz. 217, 63 Pac. 757 (statute held not to make the recorded brand evidence of ownership); 1914, Marley *v.* State, 15 Ariz. 495, 140 Pac. 215 (St. 1905, c. 51, §§ 66, 67, and St. 1912, c. 4, p. 13, as to brand evidence of ownership, considered); *California:* Pol. C. 1872, § 3168 (county recorder's certified copy of recorded cattle brand or mark is evidence "as to the ownership of all animals legally marked or branded"); § 3172 (in action to recover possession, "the mark or brand is prima facie evidence that the animal belongs to the owner of the mark or brand"); *Colorado:* Comp. St. 1921, § 3119 (earmarks may be used in evidence "in connection with the owner's recorded brand"); § 3126 (in all suits or criminal proceedings involving the title to animals, a certified copy of the record of a brand shall be "prima facie evidence of the ownership of such animal"); 1895, Chesnut *v.* People, 21 Colo. 512, 523, 42 Pac. 656 (recorded brand, admissible "merely as a mark of identification"); 1897, Brooke *v.* People, 23 Colo. 375; 48 Pac. 502 (unrecorded brand; same);
Idaho: Comp. St. 1919, §§ 1920, 1924, 1927 (in all proceedings where title or right of possession is involved, the brand on an animal, if duly recorded, shall be 'prima facie' evidence that "the animal belongs to" the brand-owner and that the latter has the right of possession at the time of action; "no evidence of ownership of stock by brands or for the purpose of identification shall be permitted"

unless the brand is recorded; the State recorder's certified copy of the record, or the original certificate, shall be evidence of the right to use the brand; "parol evidence shall be inadmissible to prove the ownership of a brand"); § 1944 (brandbook, recording animals to be removed from State, to be "evidence of the facts recited therein"); 1907, State *v.* Dunn, 13 Ida. 9, 88 Pac. 235 (under the statute oral evidence of the ownership of a brand is inadmissible; since the statute, "still the brand itself may serve as the means to the owner himself for the identification of the animal"; compare § 1639, *post*); 1920, State *v.* Grimmett, 33 Ida. 203, 193 Pac. 380 (larceny; unrecorded brand admissible to evidence identity, though not ownership, under St. 1913, c. 171, p. 543, amending Rev. C. 1908, § 1228);

Illinois: Rev. St. 1874, c. 88, § 3 (county clerk's record of stock brands and marks, admissible);

Missouri: Rev. St. 1919, § 4251 ("If any dispute shall arise about the question of whose any particular mark or brand may be, it shall be decided by the record of the clerk [of the county court]"; an interesting specimen of primitive legislative modes of expression);

Nebraska: § 90 (ownership of cattle, horses, mules, and swine in issue; the recorded brand to be 'prima facie' evidence of "ownership of the person whose brand it may be"); § 106 (on trial of offences concerning cattle running at large, etc., "proof of brand shall be deemed 'prima facie' evidence of ownership of such stock)";

Nevada: Rev. L. 1912, § 7172 (on trial of offences concerning animals running at large upon a range, "the brand and other marks upon such animal shall be prima facie evidence of ownership"); § 2237 (on trial of actions for possession of any animal marked or branded as provided by statute, "the mark and brand" shall be primary evidence of ownership); § 2234 (certified copy by recorder under seal of recorded mark and brand, to be evidence of ownership in "any action" of all animals legally marked and branded); 1886, State *v.* Cardelli, 19 Nev. 319, 10 Pac. 433 (an unrecorded brand may be evidence of ownership)

New Mexico: Annot. St. 1915, § 118 (no brand not lawfully recorded "shall be recognized as evidence of ownership of the horses", etc.); § 122 (in prosecutions for cattle-offences, certified copy of the registered brand "shall be sufficient to identify all horses" etc., and "shall be prima facie proof that the person owning the recorded brand is the owner of the animal branded with such brand"); 1891, Pryor *v.* Portsmouth C. Co., 6 N. Mex. 44, 27 Pac. 327 (instruction under the statute construed); 1892, Terr. *v.* Chavez, 6 N. Mex. 455, 30 Pac. 902 (the brand is evidence equally for an assignee of it); 1901, Gale *v.* Salas, 11 N. Mex. 211, 66 Pac. 520 (statute applied); 1909, Terr. *v.* Valles, 15 N. Mex. 228, 103 Pac. 984 (larceny; unrecorded brand is evidence of identity);

North Dakota: Comp. L. 1913, § 2596 (certificate of record of brand or mark of stock by commissioner of agriculture and labor, to be "evidence of ownership"); § 2597 (vent-brand to be "prima facie evidence of the sale or transfer of such stock"); § 2605 (where a certificate of brand or mark is lost or destroyed, "the original brand records only shall be prima facie evidence of ownership, except where a fact can otherwise be established");

Oklahoma: Comp. St. 1921, § 4028 (recorded brand on stock, to be evidence of ownership); 1906, Hurst *v.* Terr., 16 Okl. 600, 86 Pac. 280 (larceny of cattle; an unrecorded brand is evidence of ownership; the statutory rule merely provides an additional, not an exclusive sort of evidence, Texas rulings distinguished);

Oregon: Laws 1920, § 9162, as amended by St. 1921, Feb. 21, c. 151 ("No evidence of ownership of stock by brand, or for the purpose of identification, shall be permitted" unless the brand is recorded: except as in § 1968); § 1968 (for animals other than sheep, goats, or hogs, earmarks "shall be taken in evidence in connection with the owner's recorded brand", when title is in issue; for sheep, hogs, and goats, earmarks as well as brands etc. "shall be considered in evidence" when title is in issue, even though not recorded); 1899, State *v.* Hanna, 35 Or. 195, 57 Pac. 629; State *v.* Morse, 35 Or. 462, 57 Pac. 631; 1914, State *v.* Henderson, 72 Or. 201, 143 Pac. 627 (unrecorded brand is admissible to identify); 1920, State *v.* Moss, 95 Or. 616, 188 Pac. 702 (where two brands are found, one older than the other, the presumption of ownership attaches to the earlier brand); 1917, State *v.* Randolph, 85 Or. 172, 166 Pac. 555 (under St. 1915, c. 33, an unrecorded braad cannot be used to evidence either identity or ownership; history of the legislation examined); 1919, State *v.* Warner, 91 Or. 11, 178 Pac. 221 (larceny; under St. 1915, c. 33, § 3, all evidence of ownership or identification founded on an unrecorded brand is excluded; Bean, J., diss. because here there was other evidence than the unrecorded brand);

South Dakota: Rev. C. 1919, § 8135 (in civil action involving title, recorded brand on animal is "prima facie evidence of the ownership of the person whose brand it may be"; and "proof of the right of any person to use any brand shall be made by a copy of the record of the same", etc.);

Texas: (recorded brand on stock is evidence of ownership); Rev. Civ. St. § 7160 ("No brands except such as are recorded by the officers named in this chapter shall be recognized in law as any evidence of ownership of the cattle, horses, or mules upon which the same may be used"); St. 1913, c. 69, p. 129 (amend-

The same policy has led, in timber-producing communities, to similar legislation for *marks on logs* and *timber*.[3]

ing Rev. Civ. St. § 7160, by providing "that this shall not apply in criminal cases"); 1898, Turner *v.* State, 39 Tex. Cr. 327, 45 S. W. 1020 (larceny; brand recorded after the date of the alleged taking is not evidence of ownership under the statute; moreover, as evidence of identity it is unnecessary; prior cases on the latter point disapproved); 1900, Welch *v.* State, 42 Tex. Cr. 338, S. W. 46 (preceding case approved, but treated as holding that the unrecorded or subsequently recorded brand is at least evidence of identity); 1899, Chowning *v.* State, 41 Tex. Cr. 81, 51 S. W. 946 (like Welch *v.* State; repudiating Tittle *v.* State, 30 Tex. App. 597); 1900, Walton *v.* State, 41 Tex. Cr. 454, 55 S. W. 566 (recorded brand is evidence of ownership, even in a county other than where recorded); 1903, Swan *v.* State, — Tex. Cr. —, 76 S. W. 464 (Turner case cited, but held not to exclude but merely to limit the purpose of a multiple brand as evidence); 1903, Sapp *v.* State, — Tex. Cr. —, 77 S. W. 456 (Turner and Welch Cases, *supra*, both approved).

Utah: Comp. L. 1917, § 211 (State livestock board secretary's record of marks and brands; certified copy "shall be deemed evidence in law");

Washington: R. & B. Code 1909, § 3158 (recorded stock-brand, to be evidence of ownership of animal);

Wyoming: Comp. St. 1920, § 7474 (on any indictment, "proof of the brand thereon shall be sufficient to identify all classes of live-stock, and proof of the ownership of such brand shall by prima facie evidence of the ownership of such live stock"); (live-stock brands; § 3095 certified copy of recorded brand to be "prima facie evidence" of the ownership of such animal by the party whose brand or mark it might be, and shall be taken as evidence of ownership in all civil or criminal proceedings "when the title to the animal is involved or proper to be proved, when such claim is sustained and corroborated with other evidence"); 1916, Harris *v.* State, 23 Wyo. 487, 153 Pac. 881 (larceny; certified copy of recorded brand, admitted, under St. 1913, c. 126, and Comp. St. 1910, § 6177).

Distinguish here the inference of *larceny* of cattle from the *possession of stock misbranded* with the defendant's brand placed over another brand. Here the inference is from the act of misbranding the stock to the act of stealing, *i.e.* the inference from defendant's conduct in fabricating evidence of his ownership so as to conceal the evidence of actual ownership by another. This inference belongs therefore under the principle of § 278, *post* (fabrication of evidence as an implied admission). But it rests on the additional assumption that the defendant himself effected or was privy to the misbranding, and not merely on the fact of the misbranding or of the finding of such stock in defendant's possession. Hence the ruling in State *v.* Moss, 95 Or. 616, 188 Pac. 702 (1920), cited *post*, § 278, n. 6.

[3] CANADA: R. S. 1906, c. 146, Crim. C. § 990 (in trials for certain offences concerning timber, a duly registered timber-mark shall be evidence of ownership of the timber).

UNITED STATES: *Ark.* Dig. 1919, § 8407 (logs and timber "having any such recorded mark impressed or fixed thereon shall be presumed to belong" to the person recorded for that mark); *Fla.* Rev. G. S. 1919, § 2396 ("Any log found" bearing recorded brand "shall be deemed prima facie to be the property of such person"): § 3903 (official stamp "appearing upon timber or lumber adrift", to be evidence of ownership); *Minn.* Gen. St. 1913, § 5471 (recorded log-mark on logs to be evidence of ownership); *Mo.* Rev. St. 1919, § 10322 (recorded mark on logs, lumber, etc., to be evidence of ownership); § 5727 (recorder of deeds' record of flour-brands, provable by certified copy); *N. Mex.* Annot. St. 1915, § 3377 (log-brands; "the certificate of the recorded brand and the proof of the brand upon any such product shall be prima facie evidence of the ownership thereof"); *N. Y.* Com. L. 1909, Navigation, § 73 (presence of recorded mark on floating logs or timber, presumptive evidence of ownership of party recording); *North Carolina:* Con. St. 1919, § 3989 (timber marked with registered trade-mark is presumed to be "the property of the proprietor of such trademark"); *Oh.* Gen. Code Ann. 1921, § 6232 (registered trade-mark on timber, to be prima facie evidence of trade-mark proprietor's ownership of timber); *Or.* Laws 1920, § 7651 (recorded mark on log or timber, to be evidence of ownership); *Philippine Islands:* Admin. C. 1917, § 517 (registered brand of animals; the copy issued to the owner is to be "a certificate of ownership, which certificate shall be 'prima facie' evidence that the animal is the property of the person therein named as owner"); 1908, Catabian *v.* Tungcul, 11 P. I. 49; *Wash.* R. & B. Code 1909, § 7094 (recorded mark on logs or timber afloat, to be evidence of ownership); *W. Va.* Code 1914, c. 62E, § 16, St. 1882, c. 119 (trade-mark on timber; the timber presumed to be "the property of the proprietor of such trade-mark"); *Wisconsin:* Stats. 1919, § 1739 (recorded mark on logs or timber afloat, raises presumption of ownership).

Distinguish the question whether the *official register* of brands or marks is admissible to show a person to be entitled to use the brand recorded as his; this is usually dealt with in the same legislation, but it falls under another principle (*post*, § 1647).

§ 150*a*. **Tags, Signs, and Number-Plates on Automobiles, Railroad Cars, Ships, and other Vehicles and Premises.** The foregoing principle is equally applicable to other marks on property, provided only in common experience the particular kind of mark is associated with ownership or control of the person signified by the mark. Thus, the name or number marked on a *shop*, a *ship*, a *railroad car*, or other chattel or structure, may be admissible to show that person's ownership or control.[1] In particular, the number-plate borne on an *automobile* is admissible to show that the person who originally registered that number as owner is the owner of the car bearing that number-plate.[2] This would be plain on principle at common law; yet only a few

§ **150***a*. [1] *Canada:* 1921, R. *v.* Hayton, 57 D. L. R. 532, Ont. (keeping liquor; the brand "liquor" on a box, held not sufficient evidence of contents); *Illinois:* 1903, Chicago City R. Co. *v.* Carroll, 206 Ill. 318, 68 N. E. 1087 (injury by defendant's railroad car; that the cars running on the line where the plaintiff was injured bore the inscription "Chicago City R. Co.", admitted); 1895, Pittsburgh, F. W. & C. R. Co. *v.* Callaghan, 157 Ill. 406, 41 N. E. 909 (lettering on locomotive cab, held to be evidence of ownership by purporting owner); *Iowa:* 1913, Howell *v.* Mandelbaum & Sons, 160 Ia. 119, 140 N. W. 397 (name on a wagon, held evidence of ownership; cases collected); *Kansas:* 1907, State *v.* Ford, 76 Kan. 424, 91 Pac. 1056 (keeping a place for illegal sale of liquor; bills of sale of liquor found in the defendant's cash register, naming him as vendee, admitted, as analogous to the circumstantial evidence of tags on goods); *Mass.* 1859: Stearns *v.* Doe, 12 Gray 482, 486 (port-name on stern of vessel); 1883, Com. *v.* Collier, 134 Mass. 203, 205 (label on barrel); 1900, Ingraham *v.* Chapman, 177 Mass. 123, 58 N. E. 171 (presence of name on a dog's collar is some evidence of the person's ownership; "it is like the case of a brand or mark upon cattle"); 1916, Robinson *v.* Doe, 224 Mass. 319, 112 N. E. 1007 (battery by a man alleged to be an agent of the deft circus-owner; the signs on wagons, etc., and the men's uniforms, etc., held to be sufficient evidence of defendant's identity as owner and employer); 1922, Eshenwald *v.* Suffolk Brewing Co., — Mass. —, 134 N. E. 642 (personal injury caused by defendant's wagon; the marked name on the wagon, etc., admitted as evidence of ownership); *Mich.* 1918, Theisen *v.* Detroit T. & T. Co., 200 Mich. 136, 166 N. W. 901 (agency evidenced by defendant's letterhead bearing agent's name); *N. Y.* 1910, People *v.* Hill, 198 N. Y. 64, 91 N. E. 272 (murder; keys with tag bearing defendant's name found at the place; held doubtful; this case shows how different a man the judge is when reasoning about his own affairs at home and reasoning in the judicial strait-jacket; suppose he had forbidden a certain young man to court his daughter and then one morning found on the parlor floor by the sofa a bunch of keys with the tabooed young man's name; would he hold that "there was some doubt whether the evidence was properly admitted"?); *Or.* Laws 1920, § 8776 (fraudulent use of food container; stamped name on container, presumed to be that of the owner); *W. Va.* Code 1914, c. 62E, § 22, St. 1897, c. 15 (bottle bearing trademark, presumed to be the property of trademark owner).

[2] *Conn.* St. 1921, c. 400, § 45 (motor-vehicles; "proof of the registration number of any motor vehicle therein concerned [*i.e.* violation of law] shall be prima facie evidence in any criminal case that the owner was the operator thereof"); *Mass.* 1910, Trombley *v.* Stevens-Duryea Co., 206 Mass. 516, 92 N. E. 764 (an automobile, occupied by the driver only, injured the plaintiff; held (1) that the number borne on the car with the certificate of registration of the defendant, who was not the driver, were sufficient evidence of the defendant's ownership or right to possession; (2) that the driver's possession of the automobile was no evidence that he was the agent or servant of the owner; the Court's opinion is on the latter point, inconsistent, for after first stating the question to be "whether there was evidence for the jury", it proceeds to rule that "there is no presumption"; whichever ruling the Court meant to make, it is unsound as a matter of practical experience, which is the basis of all presumptions); *Mich.* 1918, Hatter *v.* Dodge Bros., 202 Mich. 97, 167 N. W. 935 ("a proof of the license number upon an automobile . . . identifies both vehicle and ownership"); *Minn.* Gen. St. 1913, § 2643 (in proceedings against the registered owner of a

of the elaborate motor-vehicle statutes expressly so declare. But the apparent caution exercised by watchful devotees of automobilist interests in keeping such a provision out of the statutes should not permit the common-law principle to be ignored by the courts; for it is a dictate of common sense.

The principle of Explanation (*ante*, § 149, 34) leaves the opponent free to point out any facts which in the case in hand weaken the inference from general experience.

But a caution is necessary in extending the analogy of these brand and mark cases to the use of *tags*, *labels*, *bills of sale*, and other documents.[3] The basis of the inference in the brand cases is the known custom that *only the owner ordinarily* imprints a brand or mark of his initials, name, etc. But when *e.g.* a bill of sale for liquor sold by Roe to J. S. is found on J. S.'s premises, the inscription to J. S. is by custom the statement of the vendor, hence is (even when authenticated) no more than the vendor's hearsay statement; hence, its only available status, prima facie, is that of an *admission* of J. S.; to bring it to this point, the principles of §§ 260 and 1073, *post*, must be invoked and satisfied.

§ 151. **Postmarks on Envelopes.** The postmark on an envelope is, upon the same principle, admissible to show that the envelope bearing it had *passed through the hands of the postal officials* at the time and place indicated. Here, however, the question separates itself more distinctly into two others, — first, whether the postmark may be assumed genuine, without more evidence (*post*, § 2152), and if so, whether the postmark, regarded as a statement of the postal official, may be admitted under the Hearsay exception for official statements (*post*, § 1674). This analysis might be applicable equally to the brands of stock and timber; but it seems not to have been made, and its recognition for postmarks only is due to the course of early English rulings.

§ 151*a*. **Fingerprints; Footmarks.** (1) The inference from *fingerprints*, in its present aspect, is no different from the inference from any other Trace, *e.g.* a paint-smear or a torn coat. The peculiar strength of this evidence

motor-vehicle, "the fact that such motor-vehicle has upon it the registration-number assigned to such owner under this Act shall be prima facie evidence that such motor-vehicle belonged to such registered owner"); *N. Mex.* St. 1912, c. 28, § 4 ("in any controversy respecting the identity or ownership or control of an automobile, the number borne by it shall be prima facie evidence that it was owned and operated by the person to whom the license therefor was issued"); *N. D.* Comp. L. 1913, § 2976 (in actions against registered owner of motor-vehicle, the presence on the vehicle of the registration number assigned under the statute is evidence "that such motor-vehicle belonged to such registered owner"); *Pa.* St. 1919, June 30, § 30, Dig. 1920, § 995, automobiles (motor vehicles; "the registration number displayed on such motor vehicle shall be prima facie evidence that the owner of such vehicle was then operating the same"; with detailed rule for overcoming the presumption); *Wyo.* Comp. St. 1920, § 3484 ("in any controversy respecting the identity or ownership or control of any motor vehicle, the number borne by it shall be prima facie evidence that it was owned and operated by the person to whom the certificate of registration therefor was issued").

Distinguish the question whether the *ownership* of the car is evidence of the *agency of the driver* (*post*, § 2509).

[3] As applied in State *v.* Ford, Kan., *supra*, n. 1.

lies rather in the Identity inference; for the use of all evidence from Traces involves commonly both inferences at the same time (as noted *ante*, § 149). Fingerprints as evidence can therefore better be considered under Identity (*post*, § 413*a*).[1]

(2) The inference from *footmarks* is also no different, in its present aspect, from the inference from other Traces. Here, too, the Identity inference plays an important part, in that the Identity inference (in contrast to the use of fingerprints) is apt to be specially weak, because open to special dangers. It is therefore considered under Identity (*post*, § 413*b*).

§ 152. **Possession of Stolen Chattels.** On a charge of taking goods, the fact that A was found, subsequently to the taking, in possession of the goods taken is relevant to show that he was the taker. It is true that several other hypotheses are conceivable as explaining the fact of his possession; nevertheless the hypothesis that he was the taker is a sufficiently natural one to allow the fact of his possession to be considered as evidentiary. There has never been any question of this:

1866, POLLOCK, C. B., in *R.* v. *Exall*, 4 F. & F. 922 (burglary; the three accused were seen near the place on the night in question, and the next morning the watch was found on Exall): "The law is that if, recently after the commission of the crime, a person is found in possession of the stolen goods, that person is called upon to account for the possession, — that is, to give an explanation of it which is not unreasonable or improbable. The strength of the presumption which arises from such possession is in proportion to the shortness of the interval which has elapsed. If the interval has been only an hour or two, not half a day, the presumption is so strong that it almost amounts to proof, because the reasonable inference is that the person must have stolen the property; in the ordinary affairs of life, it is not probable that the person could have got possession of the property in any other way. . . . Such evidence is, no doubt, not conclusive. As an illustration of this, I may mention that I remember hearing the late Baron Gurney say that he once picked up something lying in the road and observed, 'Now if this has been stolen and I am found with it, I might be charged with the robbery.' The other circumstances in the case, however, will always aid or rebut the presumption, and it is not the less evidence because it is not conclusive evidence. It is *some* evidence, if its weight depends upon the circumstances, and especially on the nature of the possession, whether it is open and avowed or secret and concealed, and what is the nature of the account given of it. What the jury have to consider in each case is, what is the fair inference to be drawn from all the circumstances before them, and whether they believe the account given by the prisoner is under the circumstances reasonable and probable or otherwise."

The use of this sort of evidence goes back as far as any in our law; for in the earlier system of Germanic law the possession of goods stolen gave rise to a peculiar and particularly speedy mode of procedure unfavorable to the accused. In modern times the fact of recent possession is also given a procedural effect, in that it casts upon the defendant the duty of producing an explanation, in default of which the case may be closed adversely to him.

151a. [1] Whether the object — door, table, etc. — on which the fingerprints were impressed *must be produced* in proving them, depends upon the general principle as to the production of chattels (*post*, § 1182).

This effect of the evidence as a *presumption* or as *sufficient* ('prima facie') *evidence* is dealt with elsewhere (*post*, § 2513).

The inquiry is here as to the admissibility of the evidence, and only one or two questions capable of dispute have ever been suggested. The *time* of the subsequent possession is immaterial; the lapse of a long interval opens a greater possibility of innocent explanations, and may prevent the raising of a presumption of law, but does not alter the relevancy of the fact.[1] Possession by a *husband* can probably not be used against the wife, unless the husband is shown to be ignorant of the presence of the articles.[2] The possession of goods of the *same kind* as the general class of goods from which the taking was done is receivable, even though the specific quantity or any quantity of the general mass cannot be identified or discovered or shown to be missing.[3] But these and other questions are almost invariably discussed in judicial opinions from the point of view of the legal presumption to be attached to the evidence (*post*, § 2513), and not as involving a question of admissibility. Where a presumption is held to be created, the admissibility of the evidence is of course conceded; but where the presumption is refused, it is sometimes difficult to say whether the inadmissibility of the evidence is also intended to be declared.

§ 153. **Possession of Chattels as indicating other Crimes than Larceny.** Wherever goods have been taken as a part of the criminal act, the fact of the subsequent possession is some indication that the possessor was the taker, and therefore the doer of the whole crime. Thus such possession is receivable to prove the commission of other acts than the simple crime of larceny. It is receivable to show the commission of a *burglary*,[1] a *forgery*,[2] a *counter-*

§ **152.** [1] 1862, R. *v.* Wilson, 2 F. & F. 123, Bramwell, B. (said to be "strong evidence", if "shortly after" the stealing; here seventeen months after; yet the evidence was used); 1846, Com. *v.* Montgomery, 11 Metc. 534, 537 ("at a period somewhat distant", sufficient).

[2] See *post*, § 2513.

[3] *England:* 1854, R. *v.* Burton, Dears. Cr. C. 282 (larceny of pepper; the defendant was found coming out of the warehouse with pepper in his pockets of a sort similar to that on the next floor above in the warehouse, but it could not be shown that any pepper was missing; Maule, J., admitting the evidence: "If a man go into the London Docks sober without means of getting drunk, and comes out of one of the cellars very drunk wherein are a million gallons of wine, I think that would be reasonable evidence that he had stolen some of the wine in that cellar, though you could not prove that any wine was stolen or any wine was missed"); 1881, Sartin *v.* State, 7 Lea Tenn. 679 (stealing M's horse; the defendant when found was riding M's mule, and evidence was received of the stealing of M's mule on a day subsequent to that charged, in company with C, who when found was riding M's horse charged to have been stolen by the defendant); 1898, Parker *v.* U. S., 1 Ind. Terr. 592, 43 S. W. 858 (larceny of cattle; defendant's possession of other stolen cattle not received to identify those charged, because not taken from the same place).

For other cases concerning the *possession of stolen goods* as evidence of crime on other evidential principles, see *post*, §§ 218, 414.

§ **153.** [1] 1904, McCormick *v.* State, 141 Ala. 75, 37 So. 377 (watch); 1905, Flanagan *v.* People, 214 Ill. 170, 73 N. E. 347; and cases cited *post*, § 2513, n. 8; 1878, Short *v.* State, 63 Ind. 376, 380; 1804, Com. *v.* Millard, 1 Mass. 6; 1922, State *v.* Crawford, — Utah —, 206 Pac. 717 (robbery; revolver found in defendant's room 40 days later, excluded on the facts).

[2] 1861, Com. *v.* Talbot, 2 All. Mass. 161 (possession of a forged document by one claiming a benefit under it, admitted, to show forgery); 1885, State *v.* Yerger, 86 Mo. 33, 39 (possession of forged instrument is evidence of forgery of it).

feiting,[3] a *murder*,[4] a *liquor-selling*,[5] or any other crime in which either a chief or a subordinate result might be the possession of a material article. For the same reason, the possession of *burglar's tools* is relevant to show that the possessor committed burglary, provided it first appears that the burglary was committed with such tools.[6]

§ 154. **Possession of Money to evidence Larceny, etc.** The mere possession of *money* is in itself no indication that the possessor was the taker of money charged as taken, because in general all money of the same denomination and material is alike, and the hypothesis that the money found is the same as the money taken is too forced and extraordinary to be receivable. Where the denominations of the money found and the money taken correspond in a fairly close way, the fact of the finding of that specific money would have probative value and be relevant, because the money found is fairly marked as identical with the money taken.

Another mode, however, of making the fact of money-possession relevant is to show its *sudden possession*, *i.e.* to show that before the time of taking the person was without money, while immediately after that time he had a great deal; this reduces the hypotheses to such as involve sudden acquisition, and a dishonest acquisition thus becomes a natural and prominent hypothesis. On such conditions the possession of unidentified money becomes relevant.[1]

[3] 1815, R. *v.* Fuller, R. & R. 308, by all the Judges (admitted to show a procuring with intent to utter).

[4] 1905, People *v.* Jackson, 182 N. Y. 66, 74 N. E. 565 (murder; the defendant's possession of the deceased's watch and pocket-book, admitted); 1857, Williams *v.* Com., 29 Pa. 102, 103, 106 (murder; possession of money and watch of the deceased, admitted; "possession of the fruits of crime is of great weight in establishing the proof of murder, where that crime has been accomplished with robbery").

[5] Going into a place sober and coming out drunk evidences the *obtaining of liquor* therein: 1854, Maule, J., in R. *v.* Burton, Dears. Cr. C. 282 (quoted *ante*, § 152); 1859, Com. *v.* Taylor, 14 Gray Mass. 26; 1867, Com. *v.* Kennedy, 97 Mass. 224; 1889, Com. *v.* Finnerty, 148 Mass. 165, 19 N. E. 215; 1893, Com. *v.* Hurley, 158 Mass. 159, 33 N. E. 342.

The following rulings probably depend upon the same principle: 1860, Com. *v.* Maloney, 16 Gray Mass. 20 (goings in and comings out of numbers of persons with jugs, etc., admitted to show liquor-selling); 1889, Com. *v.* Finnerty, 148 Mass. 165, 19 N. E. 215 (admitting the mere fact of frequent goings in and comings out, as under certain circumstances indicating the sale of liquor within); 1893, Com. *v.* Brothers, 158 Mass. 206, 33 N. E. 386 (same); 1899, Pike *v.* State, 40 Tex. Cr. 613, 51 S. W. 395 (cited *ante*, § 149).

[6] 1865, People *v.* Winters, 29 Cal. 658 (but first it must be shown that a burglary was committed, and by the aid of such tools; otherwise "there is no connection, probable or possible, between it and an offence confessedly committed without the aid of such tools"); 1882, People *v.* Hope, 62 Cal. 291, 295 (same in substance); 1890, People *v.* Sansome, 84 Cal. 449, 453, 24 Pac. 143 (same principle applied); 1879, State *v.* Morris, 47 Conn. 179, 181 (burglary while armed; the possession of arms after emerging from the house admitted as evidence of their possession while in it); 1884, State *v.* Franks, 64 Ia. 39, 42, 19 N. W. 832; 1866, State *v.* Harrold, 38 Mo. 496, 498 (burglary; the finding of the goods stolen, and of the burglar's tools, admitted); 1872, State *v.* Dubois, 49 Mo. 573 (finding of burglars' tools, admitted).

Distinguish the admission of burglar's tools, possessed *before the act*, to show a design (*post*, § 238, *ante*, § 88).

§ 154. [1] CANADA: 1914, R. *v.* Minchin, 15 D. L. R. 792, Alta. (theft of public moneys; the accused's deposits and withdrawals of amounts in bank account, admitted, though in themselves "absolutely immaterial", to show that the money went into his possession and not that of fellow-employees; Beck, J., diss.; Stuart, J., concurring, said: "The case [of Williams *v.* U. S., *infra*] is criticised severely and perhaps with justice in W. on Evidence, § 154, in a note; the criticism is apparently very sound, but the authority of the Supreme Court of the United States is impressive"); 1918, R. *v.* Minchin, 18 D. L. R. 340, Can.

§ 155. **Same: Discriminations as to Stolen Chattels and Money.** The use of possession of stolen goods to show their stealing must be distinguished from the use of possession of *other stolen goods* to show a *knowing receipt* of stolen goods, the object there being to show knowledge or intent (*post*, § 323). The relevancy of lack of money to show a *motive for stealing* (*post*, § 392) or to show *incapacity* to pay or to lend (*ante*, § 89) involves also different questions. Whether a person may be *tried under the same indictment* for stealing and for knowing receipt of stolen goods, and be found guilty as an accessory of the theft, raises questions of criminal pleading.

§ 156. **Possession of Receipt or Instruments of Debt, to show Payment.** The payee of money naturally leaves behind him in the hands of the payor some document by way of receipt or evidence of payment. (1) Where this document is a *signed acknowledgment*, — in the strict sense, a receipt, — it is receivable as an Admission.[1] (2) Where this document is merely the *instrument of liability itself*, customarily surrendered to the obligor upon satisfaction made, — *e.g.* a promissory note, a bond, — the possession of the instrument by the obligor may be relevant to show a past transaction of discharge. The circumstances in each case, however, must determine; for

Sup. (stealing money while an official; bank-book of defendant showing an unexplained excess of deposits, held not erroneously admitted; but the judges differed in their reasoning; no authority on this point cited).

UNITED STATES: *Federal:* 1897, Williams *v.* U. S., 168 U. S. 382, 18 Sup. 92 (extortion; large bank deposits by the defendant, about the times of the alleged offence, and in excess of his salary, held improperly submitted to the jury as evidence of dishonest acquisition, because there was no necessary connection between this excess and the alleged extorted sums; the Court treats the question as though the jury had been told that this proved guilt, though the trial Court merely said "you are at liberty to infer" an unfavorable explanation; the opinion is valueless and illustrates this Court's frequent confusion of the admissibility of evidence and its effect as a presumption); *Alabama:* 1897, Leonard *v.* State, 115 Ala. 80, 22 So. 564 (possession of money after a larceny, admitted); 1900, Turner *v.* State, 124 Ala. 59, 27 So. 272 (possession of money after a larceny, excluded on the facts); 1901, Leath *v.* State, 132 Ala. 26, 31 So. 108 (forgery; mere possession of a smaller sum of money, held inadmissible; a strained ruling); *Illinois:* 1853, Gates *v.* People, 14 Ill. 433, 438 (that the defendant before a murder and robbery had no money, but after it had some resembling that taken, admitted); *Kansas:* 1877, State *v.* Grebe, 17 Kan. 458, 460 (larceny; possession of money by one who had been poor, admitted); *Massachusetts:* 1846, Com. *v.* Montgomery, 11 Metc. 534, 537 (larceny of bank bills and checks; principle applied); 1854, Boston & W. R. Co. *v.* Dana, 1 Gray 101 (embezzlement; insolvency before entering the employment and subsequent possession of property far exceeding his earnings in the employment, admitted; leading opinion); 1898, Com. *v.* Mulrey, 170 Mass. 103, 49 N. E. 91 (false pretences by a city official having a salary of $1,200; deposits in bank at the time charged too large to be accounted for by his salary, received); 1902, Com. *v.* Devaney, 182 Mass. 33, 64 N. E. 402 (robbery); 1905, Com. *v.* Tucker, 189 Mass. 457, 76 N. E. 127 (murder; the accused's lack of money before the crime and possession of it afterwards, and the loss of money from the house of the victim, admitted); 1911, Com. *v.* Richmond, 207 Mass. 240, 93 N. E. 816; *New York:* 1886, New York & B. F. Co. *v.* Moore, 102 N. Y. 667, 6 N. E. 293 (civil action for embezzlement by an employee); 1905, People *v.* Gaffey, 182 N. Y. 257, 74 N. E. 836 (forgery; the defendant's small salary and large deposits, admitted to show the probable mode of disposition of the cash-stealings covered by the forged notes; the Court seems to err in calling this "evidence of motive"); *Washington:* 1898, State *v.* Burns, 19 Wash. 52, 52 Pac. 316 (possession of any money when arrested, admitted).

Distinguish the use of *lack of money* to show *motive* (*post*, § 392).

§ **156.** [1] For admissions in general as open to explanations, see *post*, § 1058.

For receipt as not conclusive but open to denial by *parol evidence*, see *post*, § 2432.

For a receipt in *unproved handwriting*, as presumptively authenticated, see *post*, § 2148.

For a receipt of a *third person*, as not admissible without calling him to the stand, see *post*, § 1456.

the party offering the evidence must be one who would naturally have received the instrument from the party now seeking for payment.[2] *Counter-explanations* may be shown by circumstances explaining the possession otherwise, as where the debtor has access to the place of custody of the instrument. But in judicial opinions few questions here arise except upon the propriety of creating a *presumption of payment* (*post*, § 2518), for this requires a much stronger quality of probative value than mere admissibility.[3]

§ 157. **Possession or Existence of a Document, to show Execution, Delivery, or Seisin.** The possession or existence of a document is connected with a number of inferences, most of them resting on the present principle, but some of them requiring for convenience to be treated elsewhere in connection with other principles.

(1) The *existence of a document* purporting to be *signed* by A is under all circumstances some evidence of A's *genuine execution* of it. But the question which has naturally arisen is whether under certain circumstances it is sufficient evidence of A's execution. That it is sufficient, in combination with one or more circumstances, is well recognized in a few classes of cases. The *age* of the document, together with its custody, and (if it is a deed of land) with the fact of possession of the land, suffices for its authentication (*post*, § 2137); the *official custody* of a purporting official document equally suffices (*post*, § 2158); the imprint of an *official seal* will often suffice to authenticate (*post*, § 2161); and the course of the mails may suffice for a *reply-letter* (*post*, § 2153). All these rules, however, are auxiliary rules of sufficiency, not rules of admissibility. It is necessary here merely to note that the rules are founded on an inference applying the present principle.

(2) The *existence of a document* in a certain *kind of place* — such as the grantee's custody or office of registry — may be sufficient evidence of the *delivery* of the document, so far as its delivery may be material. Here the usual question is not of the admissibility of the fact (which is conceded), but of its sufficiency to raise a presumption of law (*post*, § 2520).

(3) The *existence of a document in the house or among the goods* of A may be offered as evidence that A has had *possession* of it, or has otherwise dealt with it.[1] Here the question is genuinely one of mere admissibility; and it is

[2] Instances of the use of this evidence: 1800, Egg *v.* Barnett, 3 Esp. 196 (possession of a bill of exchange, bearing the plaintiff's indorsement as payee and the defendant's name as drawer); 1809, Sluby *v.* Champlin, 4 Johns N. Y. 461, 468 (possession by surety of a bond for duties and of the collector's receipt).

[3] This explains the apparent illiberality of the following ruling: 1810, Lord Ellenborough, C. J., in Pfial *v.* Vanbatenberg, 2 Camp. 439 (excluding the mere bill of exchange, when offered by the acceptor against the drawer to prove payment; "Show that the bills were once in circulation after being accepted, and I will presume that they got back to the acceptor's hands by his having paid them. But when he merely produces them, how do I know that they were ever in the hands of the payee, or any indorsee, with his name upon them as acceptor? It is very possible that when they were left for acceptance he refused to deliver them back, and, having detained them ever since, now produces them as evidence of a loan of money").

§ 157. [1] 1843, R. *v.* O'Connor, 4 State Tr. N. S. 935, 1045 (sedition; Rolfe, B.: "If time elapses between the apprehension of the party and his being taken away, and you find documents afterward in his possession, 'non constat' but they came there afterwards"); 1848, R. *v.* O'Brien, 7 State Tr. 1, 100, 193 (documents found in a portmanteau of the defendant after

usually answered by holding that the fact of the document's discovery in that condition is admissible, provided the place was actually in A's control and provided the lapse of time has not made too probable the hypothesis of other persons' intrusion:

1581, *Campion's Trial*, 1 How. St. Tr. 1050, 1061; Campion the Jesuit being charged with treason in seducing subjects to take an oath of obedience to the Pope, *Anderson*, Queen's counsel, said: "These papers, thus found in houses where you were, show that for ministering such oaths you are a traitor. . . . For if a poor man and a rich man come both to one house, and after their departure a bag of gold be found hidden, forasmuch as the poor man had no such plenty and therefore could leave no such bag behind him, by common presumption it is to be intended that the rich man only, and no other, did hide it. So you, a professed papist, coming to a house, and there such reliques found after your departure, how can it otherwise be implied than that you did both bring them and leave them there; so it is flat they came there by means of a papist, 'ergo' by your means." *Campion:* "Your conclusion had been necessary if you had also showed that none came into the house, of my profession, but I."

From the foregoing inference must be distinguished the inference, from the existence of a document in A's possession, to his *knowledge of its contents* (*post*, § 260) or, still further, to his *approval of the contents* as his admission (*post*, § 1073).

(4) The *existence of a document of ownership of land* (a deed, lease, or license) may be evidence that the *maker of the document had possession of the land* at the time of making it. This doctrine, now well settled in English law, is applicable in proof of title by *adverse possession in prior generations*, where no evidence has survived except the documents themselves which embodied acts of claim of ownership.[2] It used to be said occasionally that the

he had been arrested and others had had access to it, received); 1897, State *v.* Shive, 58 Kan. 783, 51 Pac. 274 (robbery; near the place was found an envelope addressed to one defendant bearing the return-request of the other; excluded, because no possession of the envelope by either was shown).

[2] The line of cases is as follows: ENGLAND: 1783, Clarkson *v.* Woodhouse, 5 T. R. 412, 3 Doug. 189 (a custom to hold land exempt from common right; to show prescriptive exercise, leases of 71 and 123 years of age were received; Lord Mansfield, C. J.: "They are so old that nobody can speak to possession under them"); 1808, Rogers *v.* Allen, 1 Camp. 309 (alleged licenses of fishing and dredging, dated from 1661 to the end of that century, were objected to because no rent appeared to have been paid under them; Heath, J., thought this not necessary, "as they were of such an ancient date that it could not reasonably be supposed that evidence of such payments was still preserved; however, to give any weight" to them, the receipt of payment, or other acts of ownership, must be shown "in later times"); 1809, Doe *v.* Askew, 10 East 520 (to prove a custom of a widow's holding during chaste viduity, entries in the manor book of successions to estates so described were admitted, although no instances of the acting upon the custom by forfeiture for unchastity were testified to); 1829, Coombs *v.* Coether, M. & M. 398, *semble* (old lease-copies; possession not necessary for chapter-house leases, which were like public records); 1842, Doe *v.* Pulman, 3 Q. B. 622 (a counterpart of a lease, admitted, as equivalent to it, without accounting for the original lease or showing possession); 1862, Malcomson *v.* O'Dea, 10 H. L. C. 593, 614 (Willes, J.: "Ancient documents . . . purporting on the face of them to show exercise of ownership, such as a lease or a license, may be given in evidence without proof of possession or payment of rent under them, as being in themselves acts of ownership and proof of possession; this rule is sometimes stated with the qualification, provided that possession is proved to have followed similar documents, or that there is some proof of actual enjoyment in accordance with the title to which the documents relate"); 1878, Bristow *v.* Cormican, L. R. App. Cas. 641, 653 (see quotation *supra*); 1899, Blandy-Jenkins *v.* Dunraven, 2 Ch. 121 (ancient agreement in settlement of litigation

deed was itself an act of possession; but this is incorrect; it is merely evidence of possession, in the nature of a trace or mark such as only a possessor is likely to have. The limitations of the doctrine are thus expounded:

1878, CAIRNS, L. C., in *Bristow* v. *Cormican*, L. R. 3 App. Cas. 641, 653, 668: "Old leases have always been considered to be admissible as being evidence facts of ownership. . . . [The circumstances of giving and taking them] are real transactions between man and man not intelligible except on the footing of title, or at least an honest belief in title." Lord BLACKBURN: "Inasmuch as after long time all the witnesses who could prove such possession are dead, the law permits ancient documents, either with or without evidence of ancient payment of rent, to be given as evidence from which the jury may properly draw an inference that there was such possession. For in the ordinary course of things men do not make leases unless they act on them, and lessees do not pay rent unless they are in possession, so that the ancient payment of rent adds weight to the ancient indenture."

1847, COLLIER, C. J., in *Doe* v. *Eslava*, 11 Ala. 1028, 1039: "Ancient documents, it is said, are allowed to support ancient possession, though these documents are not proved to be part of any 'res gesta.' They are admitted in such cases as forming a part of every legal transfer of title and possession by act of parties. . . . Care is first taken to ascertain their genuineness; and this is shown prima facie by proof that the document comes from the proper custody or by otherwise accounting for it."

This doctrine is in itself simple, and the only difficulty has arisen in distinguishing it from two superficially related principles which usually come into application in the same sort of litigation. (*a*) One of these is the doctrine (referred to *supra*, par. 1) of presuming the *genuineness of ancient deeds*. As a part of that doctrine it has in some Courts been laid down that possession of the land must have been enjoyed by the grantee before his alleged ancient deed can be presumed genuine (*post*, § 2142); in that rule, then, it is the land-possession which is evidence of the document's genuineness; while in the present rule it is the document which is evidence of the land-possession. Moreover, in that rule it is the grantee's possession which is material, while in the present rule it is the lessor's or grantor's. Thus the two rules are really

for trespass, admitted as "evidence of an act of possession"; following Malcomson *v.* O'Dea);

CANADA: 1885, Esterbrooks *v.* Towse, 24 N. Br. 387, 398 (defendant claimed under the son of C, who had been in possession, presumably under a purchase from B, who had a power of attorney to sell, given by the administrator of A, the original grantee; all the parties prior to defendant being deceased, B's indorsement on the original grant to A, which was in C's possession, that B had sold the land to C, was held admissible, though on varying grounds; Wetmore, J., diss.).

UNITED STATES: *Federal:* 1889, Baeder *v.* Jennings, 40 Fed. 199 (certain old documents of title admitted as evidence of possession); 1918, Virginia & W. Va. Coal Co. *v.* Charles, D. C. W. D. Va., 251 Fed. 83, 122 (ancient land-titles: "the English doctrine referred to in W. on Evidence, § 157, does not seem to be at all applicable to the situation before us"); *Massachusetts:* 1870, Boston *v.* Richardson, 105 Mass. 351 (licenses, etc. of the city made 67 and more years ago, to use certain land, objected to because "no acts were proved to have been done under them"; the licenses were received, "at least when taken in connection with the evidence of the subsequent occupation", because "it would be impossible to supply the proof required"); 1905, Murphy *v.* Com., 187 Mass. 361, 73 N. E. 524 (boundary of town land; certain leases, town votes, and treasurer's entries, not all ancient, admitted to show "actual possession by the town, through its lessees, under a claim of title"); *Texas:* 1904, State *v.* Bruni, 37 Tex. Civ. App. 2, 83 S. W. 209 (ancient deeds admitted to show possession and other acts of ownership).

Whether *payment of taxes* (as evidenced by tax-receipts) is evidence of possession of the land, has been a large question; see the following opinion, and cases cited: 1904, Chastang *v.* Chastang, 141 Ala. 451, 37 So. 799.

concerned with different evidential purposes, and rest on independent grounds. (*b*) The other principle is that of using deeds, or other land-documents, ancient or modern, as verbal acts accompanying an act of possession and signifying the *scope of the claim of possession* (*post*, § 1778). Here the possessor may be grantee or grantor; his possession is, with reference to the document, neither evidence of it nor evidenced by it; the document's genuineness or validity is immaterial; it merely colors and defines his claim, as a verbal part of his act of adverse possession.

(5) Finally, the reverse of the preceding inference (4) may be made; *i.e.* from the present *possession of land* the inference that there once *existed a deed* of it, now lost, may be made:

1844, GILCHRIST, J., in *New Boston* v. *Dunbarton*, 15 N. H. 201, 205: "The jury may find, from the facts in a case, that a certain deed once existed, although there be no direct evidence of its execution. Where parties have occupied land and have conducted themselves precisely as they would have done if a deed had been made, it may be left to the jury to say whether a deed under which one of the parties claims ever had an existence. . . . Whether a fact which is unknown is to be presumed from its usual connection with other facts which are known would seem to be properly in all cases a question for the jury."

This is the logical foundation of the *presumption of a lost grant*, which after long service has finally degenerated into a mere rule of substantive law (*post*, § 2522), although the living principle of the original inference is still occasionally open to application.[3] It may be noted here that this inference, of a document's execution from the fact of land-possession, has no relation to the inference of *possession of the whole* of a piece of land from possession of a part (*post*, § 378).

§ 158. **Negative Traces**: (1) **Lack of News, to show Death or Loss.** Where certain results would have followed if an act or an event had occurred (or not occurred), the absence of those results is some indication that the act or event has not occurred (or occurred).

A common class of evidence of this sort is that of *lack of news* to show probable *death* of a person or the probable *loss* of a ship; for as it is usual for living persons to be heard from directly or indirectly, by persons having an interest in knowing, and for ships' officers to leave word of their journey at the ports they touch or with the other ships they pass, the lack of any such news indicates their non-existence. Such evidence has always been received.[1] It

[3] 1869, Goodell *v.* Labadie, 19 Mich. 88 (agreement to exchange lands; deed performing this agreement by one party admitted to show probable performance by the other also); 1844, Downing *v.* Pickering, 15 N. H. 344, 350 (possession, plus an agreement to make the deeds, sufficient on the facts to go to the jury).

§ 158. [1] A good example of such evidence in its various possibilities will be found in the Tichborne Case, R. *v.* Castro, Charge of C. J. Cockburn, *passim*. Other examples are as follows: 1763, Rowe *v.* Hasland, 1 W. Bl. 404, Lord Mansfield, C. J. (that a person "has not been heard of for many years", admissible to show death; here the person had lived in Liverpool); 1815, Watson *v.* King, 1 Stark. 121 (loss of a ship; evidence admitted that she had been last seen in a tempest in March, 1814, and never since heard from; Lord Ellenborough, C. J., "observed that this was the kind of proof usually given in actions against insurers, where the vessel is proved to have sailed and has not been heard of for two or three years").

Compare the cases cited *post*, § 664 (negative testimony).

is usually discussed, however, with reference to the legal *presumption of death*, founded on this evidence (*post*, § 2531). The fact of lack of news is admissible without regard to the time elapsed, and is not limited by the seven-year-period required for the presumption. In counter-explanation (*ante*, § 34) such facts as the infrequency of communication from the place the person went to, the fixed determination of the person to give up all connection with his former home, and the like, may of course be used to explain away the force of the fact of lack of news.[2]

So, too, *fictitious nature* of a name, or the *non-existence* of an alleged person of a certain name and residence, may be evidenced by the failure to find any such person after diligent search.[3]

§ 159. **Same: (2) Lapse of Time, to show Payment.** It is a natural propensity of creditors to *seek to* realize their claims, when left unsatisfied, by process of law, within a fair space of time. When it is found, after some time, that a creditor has not resorted to law for the realization of his claim, there is a natural inference that this failure was due to the lack of right and necessity to resort to law, *i.e.* that the claim had been satisfied by payment. The fact may be explained away by showing a more probable hypothesis (*ante*, § 34), for example, the insolvency of the debtor, his absence, or other circumstance likely to prevent the creditor from proceeding even though the claim was unpaid. The general evidentiary fact, however — lapse of time — is also the foundation of a legal *presumption of payment* (*post*, § 2517), and plays very little part in the theory of admissibility.

§ 160. **Same: (3) Lost Will; Lost Documents in general; Debtor's Fraud in Possession; Sundry Instances.** There are various other situations in which a retrospectant inference is permissible from the absence of certain results to the absence of certain causes. Most of these raise no doubt of admissibility and are commonly of importance only in the rules of presumption or elsewhere; the chief of these are the inference, from the *non-discovery of a will* once existing, to the testator's *revocatory destruction* of it (*post*, § 2523), the inference from the non-discovery of *any document* and the lapse of time, to the *loss of the document* (*post*, §§ 1195, 2522), and the inference, from a *debtor's continued possession of property*, after its mortgage or sale, of his fraudulent intent to defraud creditors by the transfer (*post*, §§ 336, 1082, 1779). In

[2] That the evidence of inability to find a person is not hearsay, see *post*, § 1789.

[3] 1907, Phelps *v.* Nazworthy, 226 Ill. 254, 80 N. E. 756 (whether a deed-grantee was a fictitious person; that no person by that name had ever lived in the township, admitted); 1858, State *v.* Wentworth, 37 N. H. 217; and cases cited *post*, §§ 1313, 1725, 1789, and 2531, n. 7.

Contra: 1906, Taylor *v.* State, 50 Tex. Cr. 381, 97 S. W. 474 (forgery of names of persons said to be fictitious; the sheriff's returns of "not found" on subpœnas issued in various countries for these persons as witnesses, excluded; such a ruling may be a suitable part of some little esoteric game of quibbles; but it is so vast a distance sundered from the world of common sense as to create a suspicion that the Court is under some mistake as to the nature of the objective, called Truth, which it was placed there to ascertain).

That a *voter*, alleged to have voted illegally as a *non-resident*, cannot be found or heard of on diligent search in the district, is another example of the principle; but some Courts are pedantically strict in their application of it: 1905, State *v.* Rosenthal, 123 Wis. 442, 102 N. W. 49.

general, that a certain effect was not seen or heard by those who would naturally have seen or heard it had its cause occurred is some evidence of the non-occurrence.[1] But, though this situation can thus be treated as permitting an inference from circumstantial evidence, it is usually more natural to treat it as involving testimonial evidence; *i.e.* the argument is that witness A is qualified to testify that act X was not done by B, because A would have seen or heard it if it had been done; A's statement that it was not done is therefore receivable; thus, the principle of testimonial knowledge is here the controlling one (*post*, § 671).

b. Organic Traces

Next are to be considered those retrospectant inferences which rest for their validity, not upon mechanical associations of effect and cause, but upon the working of organic natural laws, and usually upon some physiological principle. The fact offered as evidence is traced back to its cause through some physiological process to the originating act.

§ 163. **Birth during Marriage, to show Legitimacy.** When a child X is born to a wife A married to a husband B, it is natural to infer that the intercourse which begot the child was the intercourse of the husband B, *i.e.* that the *child is legitimate*. It is true that this inference is less strong where the birth occurs very shortly after marriage; but even here the likelihood that the pre-marital intercourse was B's is greater than that it was another man's. It is also true that, even where the birth occurs a year or more after the marriage, it is possible that the begetting intercourse was another man's; but it is still exceedingly more likely that it was that of B the husband. Upon this likelihood is founded a rule of procedure, namely, the presumption of legitimacy (*post*, § 2527). No controversy of admissibility arises.

§ 164. **Same: Adultery of the Mother, to show Illegitimacy.** A birth during marriage having been shown by the proponent of legitimacy, the opponent, according to the theory of explanation (*ante*, § 34), would ordinarily be allowed to show that the birth could be accounted for otherwise than by the husband's begetting, *i.e.* could show the mother's intercourse with another man, about the probable time of conception, as accounting for the birth. In the same way, a person charged as the father of an unmarried woman's child might explain away the evidentiary fact of the birth of a child by showing the fact of her intercourse with other men about the time. This form of argument, however, seems more correctly to fall under the theory of multiple

§ **160.** [1] 1805, R. *v.* Long Buckby, 7 East 45 (the fact that a document required to be stamped and sealed is not found recorded as so treated, admissible to show that it was not stamped); 1894, State *v.* Delaney, 92 Ia. 467, 61 N. W. 189 (to show that a person could not have left the house during the night, the fact admitted that other inmates were so situated that they must have been awakened, but were not); 1920, Davin *v.* Isman, 228 N. Y. 1, 126 N. E. 257 (whether a deceased mortgagor had received no consideration therefor, the deed reciting the receipt of $6500; absence of any record of receipt of such a sum in the records of the banks used by the mortgagor, excluded; unsound).

opportunity, and the rule of law accordingly is examined under that head (*ante*, §§ 133, 134).

§ 165. **Physiological and Mental Traits, as evidencing Ancestry by reason of Heredity.** If by heredity a physiological or mental trait is transmitted so as to be perceptible and identifiable, then the presence of that trait in a given person will be some evidence of a specific ancestry; and, conversely, a given ancestry will be evidence of the recurrence of the trait in a specific descendant.

In a few classes of cases, where the traits are marked and easily identifiable, general popular experience has found that such an inference, resting on hereditary transmission, is worth considering. Thus far the only ones so recognized are the inferences as to *longevity* (*post*, § 223), *paternity*, indicated by external corporal features (*post*, § 166), *race*, indicated in like manner (*post*, § 167), and *insanity* (*post*, § 231). The inference of transmissible *moral character* (*post*, § 190) has not been recognized. This sanction or denial of such an inference has thus far, of course, been based solely on general popular experience.

But the progress of science has shown, in the field of heredity, that the transmission takes place more or less according to definite principles, and also that the traits transmitted include minute and normal elements, and not merely grossly obvious or abnormal features. Hence, it may become possible by analysis to determine the evidential significance of a great variety of physiological elements, and thus in general to make inferences as to ancestry:

1921, Dr. *Charles B. Davenport*, "Heredity" (Proceedings of International Eugenics Conference, N. Y., 1921; Eugenics Record Office, N. Y.): "Some of the results of analytical study of these eugenical data are fairly well established. A few clearly simple Mendelian traits have been found. Such is eye color in which brown is dominant over its absence. It is possible that in some cases additional factors may be present, but the rule serves as a first approximation. Dominant, also, appears to be curliness of the hair as contrasted with recessive straight. And there are various diseases and defects that appear either as simple dominants or recessives, such as abnormalities in number and form of fingers and toes, which are mostly dominant over the normal condition; various defects of the eyes such as cataract, certain types of congenital deafness, various abnormalities of skin, and hair and nails.

"Other, and probably many other, traits are due to multiple factors — so often this is true as to suggest the hypothesis that in mammals, as contrasted with insects, traits are genetically relatively complex. Thus stature and build and proportions of parts and pigmentation of hair and skin are dependent on multiple factors. Indeed, there seems to be evidence that negro skin color is dependent upon two pairs of factors which merely reinforce each other.

"Other traits are associated with sex in the remarkable fashion called sex-linked. That is, they are usually found only in the male sex and are inherited through the mother, though she, herself, is not affected. In such cases one usually finds male relatives of the mother who are affected. Such are color blindness, hemophilia and atrophy of the optic nerve. The facts of sex-linked heredity bring home, even to the layman, the lesson that heredity is a matter of the gametes; and that bodily appearance often gives no hint of the nature of the particular germ-cells carried and, in so far, of what the inheritance shall be. The parents of an albino may have pigmented hair and skin, but both carry gametes which lack the capacity of forming pigment.

"Our knowledge of the inheritance of these physical traits is sufficiently precise to be applied practically in cases of doubtful parentage. If the child, the known mother and both of the putative fathers can be seen, and some inquiry be made as to family stock of the three adults, a decision can generally be rendered with a high degree of certainty ranging from 75 to 99 per cent. For usually, there will not be one critical trait merely, but several traits whose combined evidence will be overwhelming. Already the Eugenics Record Office has been asked to answer certain questions about the inheritance of traits in a case of a claimant who maintained that he was the son of a wealthy man who died without known heirs. As lawyers get more used to the idea of utilizing the advances of knowledge for evidence, it is probable that eugenical knowledge will be more and more called upon."

It is, however, necessary to point out, to scientists as well as to Courts, the danger of hasty use of such supposed discoveries in judicial inquiries of fact. In the first place, the data for exact observation hitherto have been found chiefly in the vegetable and animal world, and not in human beings. In the next place, the scope of observation has been inadequate for determining veritable laws in so complex a subject. In the third place, the scientist's "laws" represent the general truths averaged from a mass of instances, and do not represent the invariable result in individual instances; *i.e.* in one thousand cases, a "law" might be discernible, and yet in fifty or a hundred of those instances it might not operate because of counteracting and unknown considerations; hence, a scientific generalization is seldom to be treated as a certain indication for the individual case.

For these reasons, Science must show that it has attained definite and dependable results, accepted in general consensus, before it can expect Law to rely upon its discoveries.[1]

§ 166. **Resemblance of Child, to show Paternity.** If the corporal traits of the progenitor are or may be transmitted to the progeny, then a specific corporal trait of the progeny may point back to a person of similar trait as

§ 165. [1] For example, the accomplished scientist from whose essay the above quotation is made, has stated to the present writer that the data whence those generalizations are drawn are as yet unpublished, and yet he advances publicly the claim that "a decision can generally be rendered [in certain conditions] with a high degree of certainty, ranging from 75 to 99 per cent." To expect that so extraordinary a discovery, in a field of knowledge hitherto dark and undecipherable, will be accepted for any practical purpose without making a complete disclosure of the entire data and thus enabling others to test the logic of the generalizations, is of course out of the question.

The following newspaper dispatch illustrates the risks of premature reliance upon promising scientific enthusiasms: "San Francisco, Sept. 1, 1921: — Science, art and the law are one in declaring Julius B. Sorine the father of the third child of his divorced wife, despite the woman's assertion to the contrary, but the court's ruling, handed down today, denied his petition for custody of the child. Dr. Albert Abrams reported to the court that a test of the blood of father and son provided positive proof, in his opinion, that the child was Sorine's. Haig Patigian, a sculptor, by a series of facial sketches similar to those used in the famous Singsby case in England, told the court the child resembled Sorine. In the decision of Judge Graham today the court declared that irrespective of these tests, the child was born during the lawful wedlock of the parties, but ruled the child should remain in the mother's care."

In the following article will found an account of a case in Argentina where the judge was presented with expert opinions as to the physiological traits of identity in a filiation proceeding, and declared them insufficient in the present state of knowledge; Quesada, "La prueba scientifica de la filiacion natural" (Revista de criminologia psiquiatria y medicina legale, 1919, nos. 31, 34, 35).

the progenitor, on the condition that the person so charged as progenitor is within the number of those who by association and opportunity may have had intercourse; for otherwise the possible number of similar persons would leave open too many hypotheses. The propriety of the inference rests on the supposed physiological fact that bodily traits may be transmitted by procreation. The validity of this physiological principle, and therefore the propriety of the inference, is and always has been a matter of common knowledge and general action thereon:

1598, *William Shakspeare*, King John, Act I, Scene 1 (the king hears a lawsuit between Philip Faulconbridge, the supposed Bastard son of Sir Robert Faulconbridge's wife by Richard the Lion-hearted, and Robert Faulconbridge, his younger brother, who claims the estates):

Bastard: "But that I am as well begot, my liege, . . .
Compare our faces and be judge yourself
If old Sir Robert did beget us both
And were our father and this son like him."
Elinor (queen-mother of Richard): "He hath a trick of Cœur-de-Lion's face;
The accent of his tongue affecteth him.
Do you not read some tokens of my son
In the large composition of this man?"
Bastard (who is more interested in proving himself Richard's son): "Sir Robert could do well; marry, to confess,
Could he get me? Sir Robert could not do it;
We know his handiwork. Therefore, good mother,
To whom am I beholding for these limbs?
Sir Robert never holp to make this leg." [1]

1769, Lord MANSFIELD, C. J., in the *Douglas Peerage Case*, 2 Hargr. Collect. Jurid. 402: "I have always considered likeness as an argument of a child's being the son of a parent; and the rather as the distinction between individuals in the human species is more discernible than in other animals. A man may survey ten thousand people before he sees two faces perfectly alike; and in an army of an hundred thousand men every one may be known from another. If there should be a likeness of features, there may be a discriminancy of voice, a difference in the gesture, the smile, and various other things; whereas a family-likeness generally runs through all these; for in everything there is a resemblance, as of features, size, attitude, and action. . . . If Sir John Stewart, the most artless of mankind, was actor in the enlevement of Mignon and Sanry's [the supposed parents'] children, he did in a few days what the acutest genius could not accomplish for years. He found two children, the one the finished model of himself, and the other the exact picture in miniature of Lady Jane. It seems nature had implanted in the children what is not in the parents; for it appears in proof that in size, complexion, stature, attitude, color of the hair and eyes, nay and in every other thing, Mignon and his wife, and Sanry and his spouse, were 'toto cœlo' different from and unlike to Sir John Stewart and Lady Jane Douglas. Among eleven black rabbits, there will scarce be found one to produce a white one."

1859, FOWLER, J., in *Gilmanton* v. *Ham*, 38 N. H. 108, 113: "The practice of bringing before the jury, on trials for bastardy, the child whose paternity is sought to be established, when living, has been almost universal in this State, from the earliest recollection of the oldest practitioners. . . . If the child were referred to at all, its general appearance, its

§ 166. [1] So also in Richard the Second, IV, 2; Henry the Fourth, part one, II, 5; Winter's Tale, II, 5.

complexion and features, might properly be commented upon; and we think, under the well-established physiological law that like begets like, and that generally there is a striking resemblance, more or less strong and striking, between the parent and his child, it was a fair matter of argument before the jury, by the counsel on both sides, whether or not there had been anything in the complexion, appearance, and features of the child which the witness had produced and identified before them, tending to indicate its other parent."

The English practice seems always to have admitted this evidence without question.[2] In the United States the early practice was probably the same; but as the chief use of the evidence was found in filiation proceedings, to charge the defendant with the paternity of a bastard, the possible abuses of the evidence led to an unfortunate questioning of its validity under any circumstances:

1888, Foster, J., in *Clark* v. *Bradstreet*, 80 Me. 454, 456, 15 Atl. 56: "While it may be a well-known physiological fact that peculiarities of form, feature, and personal traits are oftentimes transmitted from parent to child, yet it is equally true as a matter of common knowledge that during the first few weeks, or even months, of a child's existence, it has that peculiar immaturity of features which characterize it as an infant, and that it changes often and very much in looks and appearance during that period. Resemblance can then be readily imagined. . . . And in a trial in bastardy proceedings the mere fact that a resemblance is claimed would be too likely to lead captive the imagination of the jury, and they would fancy they could see points of resemblance between the child and the putative father."

Now it must be noted that this opinion (which is representative of others) does not dispute the validity of the inference from resemblance of features to paternity; its quarrel is with the difficulty of establishing the fact which is the foundation of the inference, namely, the resemblance. The answers to this objection are several: (1) The fanciful acceptance of a resemblance — which is the danger feared — is only likely where the child is so young as to have no decidedly marked features; and it is both proper and feasible to obviate this objection by excluding the evidence where the child is too young, either by leaving the matter to the trial Court's discretion, or by fixing a

[2] *England:* 16—, Piercy's Case, 12 How. St. Tr. 1199 ("This James Piercy was a truck-maker in the Strand; . . . one of his arguments to make you believe him a true descendant of the Piercys was that he was born with a mole on his body, as other of the Piercys had been, like a half-moon; the crescent being the crest of the Piercys earls of Northumberland"); 1743, Annesley *v.* Anglesea, 17 How. St. Tr. 1139, 1318, 1324; 1769, Douglas Peerage Case (quoted *supra*); 1797, Day *v.* Day, Trial, 3d ed., 327, quoted in Nicolas, Adulterine Bastardy, 140, and Hubback, Succession, 384 (Heath, J., received "evidence that the defendant bore a strong resemblance to his supposed father", and in summing up "admitted that resemblance was frequently fanciful, and therefore the jury should be well convinced that it did exist; but if they were so convinced, it was impossible to have stronger evidence"; this latter part of the remark of Mr. J. Heath has sometimes been omitted, when the former part was quoted, by Courts opposed to the use of the evidence, *e.g.* in Jones *v.* Jones, *infra*; Heath, J.'s ruling is also given in the abridged report of the case in Craik's English Causes Célèbres, 215, 223); 1837, Andrews *v.* Askey, 8 C. & P. 7, 9 (used without objection); 1827, 1836, Morris *v.* Davis, 3 C. & P. 214, 5 Cl. & F. 163 (legitimacy; "the defendant's counsel much relied . . . on the circumstance of personal resemblance that was proved by several witnesses to exist" between the plaintiff and the mother's paramour; on appeal, similar evidence was admitted on both sides without question).

Canada: 1853, Doe *v.* Marr, 3 U. C. C. P. 36, 51 (inheritance; to show the defendant a bastard, his resemblance to S. and not to the husband M. was held admissible, as "auxiliary evidence").

specific minimum age. (2) The physiological principle being perfectly well settled, it is poor policy to exclude invariably a piece of evidence that will usually be useful merely because it may occasionally be abused. (3) The Opinion rule cannot avail to exclude testimony to resemblance, because matters of identity, similarity, and the like are well settled to be not obnoxious to that rule (*post*, § 1974).

1916, ELLIS, J., in *Flores* v. *State*, 72 Fla. 302, 73 So. 234 (holding that the exhibition of a child not yet 3 months old, on an issue of paternity, was erroneous): "The sound rule is to admit the fact of similarity of specific traits, however presented, provided the child is in the opinion of the trial court old enough to possess settled features or other corporal indications. . . . [Thus] the objection to the evidence on account of its inherent weakness and unreliability would be largely, if not entirely, removed. In the first place, the trial Court would have passed upon the question as to whether the child possessed features or other corporal indications of sufficient development to permit a comparison between them and those of the defendant. In the second place, the particular features or other corporal traits claimed to be possessed by the child would be by the adoption of the rule brought specifically to the jurors' attention, and the comparison made with reference only to such features or corporal traits. It seems to us that to permit an issue of such grave consequences to be determined against a defendant in a bastardy proceeding upon the imaginary, fancied, or notional general resemblance between a child of a week old, or even a few months old, and the defendant in such proceedings, would be to place the defendant at a disadvantage which he could not possibly overcome."

Some Courts in the United States now exclude this kind of evidence, partly through misunderstanding the precedents in its favor, partly for the reasons above quoted.[3] Moreover, by a curious contrariety of views, in some in-

[3] The rulings in the various jurisdictions are as follows: *Federal:* 1809, U. S. *v.* Collins, 1 Cr. C. C. 592 (excluded, from witnesses);
Alabama: 1875, Paulk *v.* State, 52 Ala. 427, 429 (lack of resemblance to the defendant, or resemblance to another man who had opportunities of intercourse, admissible; but not resemblance to the children of the other man, because they might have their features from their mother; *semble*, also that resemblance may not be shown by testimony); 1902, Kelly *v.* State, 133 Ala. 195, 32 So. 56 (bastardy; child about a year old, allowed to be shown to the jury); 1913, Watts *v.* State, 8 Ala. App. 264, 63 So. 18 (seduction; exhibition of child, and testimony to its paternity allowed); 1920, Tarver *v.* State, 17 Ala. App. 424, 85 So. 855 (seduction; child exhibited to jury);
Arkansas: 1910, Adams *v.* State, 93 Ark. 260, 124 S. W. 766 (seduction; resemblance of a child a few months old, testified to);
California: 1889, *Re* Jessup, 81 Cal. 408, 417, 21 Pac. 976 (inheritance; resemblance, as shown by photographs, allowed to be used to show paternity; inspection in Court declared much more valuable; *semble*, the opinion of witnesses, inadmissible); 1911, People *v.* Richardson, 161 Cal. 552, 120 Pac. 20 (child 5½ months old, allowed to be exhibited as evidence of paternity);
Connecticut: 1905, Shailer *v.* Bullock, 78 Conn. 65, 61 Atl. 65 (bastardy; exhibition of the child — here 10 months old — allowed);
Florida: 1916, Flores *v.* State, 72 Fla. 302, 73 So. 234 (bastardy; a child "within a few days of being 3 months old", held improperly exhibited, as too young; citing the above text with approval);
Georgia: 1854, Wright *v.* Hicks, 15 Ga. 160, 172 (legitimacy; resemblance of the child to the alleged paramour, considered); 1904, McCalman *v.* State, 121 Ga. 491, 49 S. E. 609 (testimony to resemblance excluded; following Hanawalt *v.* State, Wis.; Chandler, J., diss.);
Indiana: 1862, Risk *v.* State, 19 Ind. 152 (age unstated; propriety of evidence doubted, because of the uncertainty of a mere infant's features, and because "it would involve the necessity of giving the alleged father in evidence"); 1870, Reitz *v.* State, 33 Ind. 187 (same);
Iowa: 1874, Stumm *v.* Hummel, 39 Ia. 478, 480 (criminal conversation; resemblance assumed to be relevant); 1878, State *v.* Danforth, 48 Ia. 43, 47 (child three months old; resemblance excluded, there being no corroborating evidence); 1880, State *v.* Smith, 54 Ia. 104, 6 N. W. 153 (child two years and one month old; resemblance allowed to be considered as a general principle, the child

stances, the evidentiary fact of resemblance is excluded only when offered through testimony of those who have seen the child; in other instances, only when offered by the presentation of the child in court. The partial exclusion of the former mode of evidence is based chiefly on the Opinion rule — the fallacy of which, in this application, needs no further exposition; and partly also on the ease with which a resemblance can be affirmed in general terms, but the simple correction for this danger is to require detailed statements of specific traits, for the force of the inference rests on these and not on a general resemblance. The partial exclusion of the other mode of evidence — presentation of the child in court — rests on no good reason what-

being of sufficient age); 1900, State *v.* Harvey, 112 Ia. 416, 84 N. W. 535 (exhibition of child under two years, held improper); 1911, State *v.* Nathoo, 152 Ia. 665, 133 N. W. 129 (rape; the child's resemblance to the Hindoo defendant; not decided);
Kansas: 1895, Shorten *v.* Judd, 56 Kan. 43, 42 Pac. 337 (admitted);
Maine: 1839, Keniston *v.* Rowe, 16 Me. 38 ("it was not the color or any peculiarity of conformation or form of features as matters of fact that were proposed to be proved; it was to prove a resemblance, which is matter of opinion", and therefore inadmissible); 1888, Clark *v.* Bradstreet, 80 Me. 454 (a child six weeks old; resemblance, whether by exhibition or by testimony held irrelevant, apparently irrespective of the child's age);
Maryland: 1876, Jones *v.* Jones, 45 Md. 144, 151 (inheritance; "When the parties are before the jury, and the latter can make the comparison for themselves, whatever resemblance is discovered may be a circumstance, in connection with others, to be considered"; but resemblance being "notional" and "fanciful", it cannot be shown by testimony);
Massachusetts: 1862, Eddy *v.* Gray, 4 All. 435, 438 (excluded; here offered by witnesses, and declared obnoxious to the Opinion rule); 1876, Finnegan *v.* Dugan, 14 All. 197 (admitted as relevant; here the child was shown to the jury; no authorities cited); 1869, Young *v.* Makepeace, 103 Mass. 50, 54 (child shown to the jury; but testimony to the dissimilarity between the child and a third person, not present, but alleged by the defendant to be the real father, excluded; reasons confused and exact rule left obscure; Finnegan *v.* Dugan not cited); 1894, Farrell *v.* Weitz, 160 Mass. 288, 35 N. E. 783 (likeness not allowed to be shown by photograph of third person alleged as the father by defendant; *semble*, comparison by actual presence allowable);
Michigan: 1884, People *v.* White, 53 Mich. 537 (resemblance of a young infant; "we do not well see how the jury could be prevented from noticing the child, which was properly enough in court"); 1896, People *v.* Wing, 115 Mich. 690, 74 N. W. 179 (bastardy; People *v.* White followed);
New Hampshire: 1859, Gilmanton *v.* Ham, 38 N. H. 108, 113 (resemblance allowed to be considered; here by exhibition); 1900, State *v.* Saidell, 70 N. H. 174, 46 Atl. 1083 (resemblance on exhibition to jury, allowed to be considered); 1905, State *v.* Danforth, 73 N. H. 215, 60 Atl. 839 (rape; rule of the foregoing cases confined; here the child was exhibited and its peculiarities pointed out; the rule as stated above in the text "appears reasonable");
New Jersey: 1888, Gaunt *v.* State, 50 N. J. L. 490, 495, 14 Atl. 600 (fornication; resemblance admissible, without any apparent limitations; "the illusory nature of such resemblances rather imposing a duty on the Court in conjunction with the admission of the proof, than militating against the relevancy of the inquiry"; resemblance to be available either by inspection or through witnesses);
North Carolina: 1872, State *v.* Woodruff, 67 N. C. 89, *semble* (admissible); 1878, State *v.* Britt, 78 N. C. 439, 442 (resemblance to a third person, the alleged father, admitted); 1888, State *v.* Horton, 100 N. C. 443, 6 S. E. 238 (State *v.* Woodruff followed);
Ohio: Crow *v.* Jordan, 49 Oh. St. 655, 32 N. E. 750 (child allowed to be exhibited);
Oregon: 1908, Anderson *v.* Aupperle, 51 Or. 556, 95 Pac. 330 (seduction; infant of less than 3 months, exhibited; State *v.* Danforth, N. H., followed); 1913, State *v.* Russell, 64 Or. 247, 129 Pac. 1051 (incest; child of 14 months allowed to be exhibited);
Tennessee: 1846, Cannon *v.* Cannon, 7 Humph. 410, 411 (distribution of estate; resemblance used to evidence illegitimacy);
Texas: 1892, Higginbotham *v.* State, — Tex. Cr. —, 20 S. W. 360 (admitted); 1899, Hilton *v.* State, 41 Tex. Cr. 190, 53 S. W. 113 (adultery; resemblance of child seven months old, excluded);
Utah: 1901, State *v.* Neel, 23 Utah 541, 65 Pac. 494 (illicit intercourse; child not allowed to be exhibited, following Hanawalt *v.* State *infra*);
Wisconsin: 1895, Hanawalt *v.* State, 64 Wis. 84, 24 N. W. 489 (excluded, where the child was less than a year old; but perhaps admissible for an adult; the jury's inspection disapproved).

ever, and is further considered under the principle involved (*post*, § 1160). The sound rule is to admit the fact of similarity of specific traits, however presented, provided the child is in the opinion of the trial Court old enough to possess settled features or other corporal indications.

It is to be noted that the evidence is relevant not merely in *bastardy* proceedings, but also in trying the *legitimacy* of a child *born during marriage*, whenever the presumption of legitimacy allows the issue to be raised (*post*, § 2527), as well as occasionally in other proceedings.

§ 167. **Corporal Traits, to show Race or Nationality.** A physiological principle, similar to the preceding one, but attended usually with more clearly marked results, tells us that the progeny of persons of one race receive from the progenitors certain corporal traits very different from the traits transmitted from a progenitor of another *race*. The presence of these peculiar traits of the race is therefore evidential to show a progenitor of the race bearing those traits. The admissibility of this evidence has never been doubted by Courts; though its use, since the abolition of slavery in this country, is now very rare, because the issues in which it is relevant can only be uncommon.[1] There seems no reason why similar evidence should not occasionally be usable to show *foreign birth* or origin from a foreign nation, even though from a people of the same race.[2]

§ 168. **Birthmarks, to show Events during Pregnancy; Venereal Disease, to show Adultery; Pregnancy, to show Intercourse.** There remain some other

§ 167. [1] CANADA: *B. C.* Rev. St. 1911, C. 78, § 23 (the Court or jury "may infer as a fact the nationality or race of the person in question from the appearance of such person"); U. S. *Federal:* 1904, U. S. *v.* Hung Chang, 134 Fed. 19, 23 (Chinese descent, evidenced by appearance); *Arkansas:* 1861, Daniel *v.* Guy, 23 Ark. 50, 51 (foot-formation, admitted as evidential of negro race); *Georgia:* 1856, Bryan *v.* Walton, 20 Ga. 480, 508 (complexion, etc., of alleged slaves, considered to prove ancestry); *Illinois:* 1916, People *v.* Kingcannon, 276 Ill. 251, 114 N. E. 508 (rape under age, followed by birth of a child; polydactylism of the child and of the defendant, with evidence that such a feature is heritable, held admissible to evidence paternity); *Indiana:* 1864, Nave's Adm'r *v.* Williams, 22 Ind. 370 (color and features, to show race, admitted); *Kentucky:* 1835, Gentry *v.* McGinnis, 3 Dana Ky. 382, 388 (white color of an alleged slave, received to show white ancestry; "a black or mulatto complexion is prima facie evidence" of slavery, black ancestors being necessarily slaves, and "one apparently a white person or an Indian", is prima facie free); 1839, Chancellor *v.* Milly, 9 Ky. 24 (appearance of an alleged slave, received to infer ancestry); *Maine:* 1888, Clark *v.* Bradstreet, 80 Me. 454, 457 (complexion, etc., admissible in determining race); *Missouri:* Rev. St. 1919, § 3513 (illegal mixed marriage; jury "may determine the proportion of negro blood in any party to such marriage from the appearance of such person"); *New Jersey:* 1826, Fox *v.* Lambson, 8 N. J. L. 275, 277 (black color raises a presumption of slavery); *North Carolina:* 1897, Warlick *v.* White, 76 N. C. 175, 178 (color of a child, to show black blood, and therefore illegitimacy, admitted); *South Carolina:* 1846, White *v.* Collector, 3 Rich. 138, 140 (color admissible to evidence race); *Virginia:* 1806, Hudgins *v.* Wrights, 1 Hen. & M. 134, 137 (long, straight, black hair, and copper complexion, for Indians, and flat nose, woolly hair, and color of complexion, for negroes, admissible to show ancestry); 1811, Hook *v.* Pagee, 2 Munf. 379, 383 (complexion of an alleged slave, admitted to show ancestry); 1827, Gregory *v.* Baugh, 4 Rand. 611, 613 (complexion, etc., assumed proper to determine Indian ancestry).

The same principle should apply to the resemblance of an *animal*, as evidence of its pedigree: 1904, Brady *v.* Shirley, 18 S. D. 608, 101 N. W. 886, *semble* (qualities of a horse, admitted on the question of its siring by a Hambletonian).

[2] 1856, Dennis *v.* Brewster, 7 Gray 351, 353 (foreign birth; arrival as a child on a ship, foreign appearance, speech, and gestures, dark complexion, etc., held sufficient).

common instances of this form of inference: (1) That a shock received by the mother during *pregnancy* may leave a mark upon the child has long been a popular belief. Should it ever receive scientific sanction in any defined terms, the child's corporal mark after birth may be taken as evidential of the act which produced it.[1]

(2) That the existence of *venereal disease* in a husband is some evidence of an act of adultery on his part has always been conceded;[2] it is merely a question of the strength of the explanatory circumstances.

(3) So, too, in prosecutions for *rape*, *rape under age*, and *seduction*, the pregnancy is admissible as evidence at least of the *intercourse;* the accused's identity being provable by other evidence.[3]

§ **168.** [1] Anon., cited by Irving Browne, Green Bag, 1892, V, 555 (Mercer Co., Pa.; the complainant charged an assault upon her two weeks before by the defendant in a lonely house; the defendant was held for trial, but three weeks before it occurred, the complainant was delivered of a child, and on the child's throat and wrist appeared marks of a thumb, etc., such as the complainant had alleged).

[2] 1794, Popkin *v.* Popkin, 1 Hagg. Eccl. 765, 767 ("Whether this disease is [sufficient] evidence of adultery may depend upon circumstances"); 1916, Sheffield *v.* Beckwith, 90 Conn. 93, 96 Atl. 316 (alienation of wife's affections; like Johnson *v.* Johnson, N. Y.); 1922, Riley *v.* State, — Ga. —, 111 S. E. 729 (rape under age; venereal disease in the defendant and then in the victim, admitted to evidence the act); 1835, Johnson *v.* Johnson, 14 Wend. N. Y. 637, 639, 641 (venereal disease contracted by a husband during the wife's absence is evidence of his adultery); 1912, U. S. *v.* Tan Teng, 23 P. I. 145, 153 (gonorrhea in the victim of a rape).

[3] *Accord: California:* 1904, People *v.* Tibbs, 143 Cal. 100, 76 Pac. 904 (seduction under promise of marriage; birth of a child as shown by its presence in court, admitted); 1909, People *v.* Soto, 11 Cal. App. 431, 105 Pac. 420 (pregnancy admissible to prove the act charged; but not, as here, the birth of a child from a prior act of intercourse used evidentially); *Colorado:* 1919, Laycock *v.* People, 66 Colo. 441, 182 Pac. 880 (rape under age; pregnancy, admitted, in connection with other acts); *Columbia* (Dist.): 1912, Kidwell *v.* U. S., 38 D. C. App. 566 (rape under age); 1920, Terr. *v.* Fong Yee, 25 Haw. 309 (seduction); *Idaho:* 1911, State *v.* Henderson, 19 Ida. 524, 114 Pac. 30 (rape under age; birth of a child, admitted); *Iowa:* 1906, State *v.* Dolan, 132 Ia. 196, 109 N. W. 609 (seduction; an obscure ruling, which finds fault with the trial court for not clearly instructing the jury; birth is said to be admissible as evidence of a seduction, but not of the defendant's being the seducer); 1907, State *v.* Nugent, 134 Ia. 237, 111 N. W. 927 (seduction; birth of a child, admitted); 1908, State *v.* Blackburn, 136 Ia. 743, 114 N. W. 531 (rape under age; birth of child, held to be not corroborative of woman's testimony; following State *v.* Coffman, 112 Ia. 8, but ignoring the above two cases); 1909, State *v.* Hunt, 144 Ia. 257, 122 N. W. 902 (seduction; birth of a child held "corroborative of the prosecutrix as to the corpus delicti", though not as connecting the defendant; Dolan and Nugent cases not cited); 1911, State *v.* Nathoo, 152 Ia. 665, 133 N. W. 129 (carnal knowledge of an insensible female; the fact of a birth was held admissible as corroborative, if intercourse was otherwise proved); *Kansas:* 1904, State *v.* Walke, 69 Kan. 183, 76 Pac. 468 (statutory rape); 1905, State *v.* Miller, 71 Kan. 200, 80 Pac. 51 (same); 1906, State *v.* Gereke, 74 Kan. 196, 86 Pac. 160, *semble* (rape under age; birth of a child, admitted); *Michigan:* 1905, People *v.* Stisson, 140 Mich. 216, 103 N. W. 542 (incest); *Missouri:* 1906, State *v.* Palmberg, 199 Mo. 233, 97 S. W. 566 (rape under age; birth of child, admitted); *Nebraska:* 1904, Woodruff *v.* State, 72 Nebr. 815, 101 N. W. 1114 (rape under age); *South Dakota:* 1912, State *v.* Holter, 30 S. D. 353, 138 N. W. 953 (seduction; plaintiff's pregnancy admitted); *Texas:* 1920, Klepper *v.* State, 87 Tex. Cr. 597, 223 S. W. 468 (seduction); *Utah:* 1906, State *v.* Thompson, 31 Utah 228, 87 Pac. 709 (adultery with a single woman; her pregnancy admitted as corroborating her, but not as connecting the defendant); *Washington:* 1903, State *v.* Fetterly, 33 Wash. 599, 74 Pac. 810 (rape under age; Fullerton, C. J.: "It conclusively proves her testimony to the effect that the crime charged was committed, and the truth of that lends credence to her testimony to the effect that the person she names is the guilty party"; said of the birth or miscarriage of a child); 1905, State *v.* Nelson, 39 Wash. 221, 81 Pac. 721 (adultery; birth of child twenty months after husband's absence, admitted); and some cases cited *post*, § 398; 1909, State *v.* McCool, 53 Wash. 486, 102 Pac. 422 (rape under age; admitted, but held not sufficient corroboration under the rule of § 2062, *post*).

Contra: 1906, Kevern *v.* People, 224 Ill. 170, 79 N. E. 574, *semble* (rape); 1918, Jordan

(4) So, also, a result of any *disease*, subsequent to a time in issue, may evidence its prior existence.[4]

c. MENTAL TRACES

§ 172. **General Principle.** The struggle of a victim for his life, and the act of taking his life, may leave upon the perpetrator indelible traces of blood, wounds, or rent clothing, which point back to the deed as done by him; these traces come from a mechanical contact with the body, weapons, and other things involved in the deed, and they remain upon him or are divested from him by a mechanical process. But a deed may also leave traces upon the doer through other than a mechanical process, *i.e.* through a *mental* or *moral*, *i.e. psychological* process. These traces may be as significant in their way as the others, — perhaps more so; and they may be equally relevant evidentially to show their bearer to be the doer of the act. These traces, like those of the other sorts, may be employed either *affirmatively* or *negatively*. The presence of such a trace may be used as indicating the doing of the act by the person bearing it; and the absence of the trace may be used as indicating the not doing it by the person not bearing the trace. The traces of this mental or psychological sort will be some form of a *mental condition*, — memory, belief, consciousness, knowledge, or whatever other name may be more usual and appropriate.

How to evidence this mental condition — by conduct or the like — is a different question. There is here evolved simply the question, When is memory, consciousness, and the like, relevant to show the doing of a past act? The evidencing of this mental condition raises different and more complicated questions as to the significance of conduct; hence a consideration of the state of the law upon the various uses of the present sort of evidence can best be made in connection with the rules of conduct-evidence. Those rules in their details are elsewhere examined (*post*, §§ 265–293). It is enough here to summarize the chief types of inference of the present sort, and thus to exhibit the place of this inference in the general doctrine of Relevancy.

§ 173. **Consciousness of Guilt.** The commission of a crime leaves usually upon the consciousness a moral impression which is characteristic. The innocent man is without it; the guilty man usually has it. Its evidential value has never been doubted. The inference from consciousness of guilt to "guilty" is always available in evidence. It is a most powerful one, because the only other hypothesis conceivable is the rare one that the person's consciousness is caused by a delusion, and not by the actual doing of the act. The difficulty in connection with this evidence is, not its own relevancy to

v. Com., 180 Ky. 379, 202 S. W. 896 (seduction); 1906, People *v.* Brown, 142 Mich. 622, 106 N. W. 149 (rape under age in June, 1904, the statutory age being reached on July 15, 1904; pregnancy in March and May, 1905, excluded; a queer decision, the present question not being distinguished from others involved).

[4] Cases cited *post*, § 225, n. 1.

show the doing of the act — that is universally conceded — but the mode of proving this consciousness of guilt in its turn by other evidence. There are two processes or inferences involved, — from conduct to consciousness of guilt, and then from consciousness of guilt to the guilty deed. The latter, belonging here, gives rise to no disputed questions of evidence. The former gives rise to many questions, due to the variety of conduct offerable in evidence. These questions are dealt with (*post*, §§ 273–291), in discussing evidence of consciousness or knowledge in general. It is worth while here to note this double step of inference involved; for it exhibits the true significance of the evidential use of conduct as indicating consciousness of guilt.

§ 174. **Consciousness of Innocence.** Just as the lack of mechanical or corporal traces may be used negatively (*ante*, § 158) to show the non-doing of an act, so the lack of guilty consciousness may be useful to show innocence of a crime. This lack of guilty consciousness — in other words, this consciousness of innocence — seems not to have been doubted by Courts as having in itself evidential value. But, assuming it to be relevant, a difficulty arises in the proof of it as a proposition, — the difficulty that the conduct offered to evidence it is so likely to be feigned and artificial. The disputed question, then, whether the conduct of an accused person is admissible in his favor, involves a doubt, not as to the evidential value of consciousness of innocence as indicating non-doing, but as to the evidential value of conduct as showing consciousness of innocence, — a problem elsewhere examined (*post*, § 293).

§ 175. **Belief or Recollection of Personal Doings, as Evidence of Identity.** All personal deeds are likely to leave some sort of a mark in the recollection or belief. The presence of that mark is some indication of the doing of the act recollected, and the absence of the mark is some evidence of the non-doing of the act. Where a person's identity is in issue, his recollection or non-recollection of experiences known to have occurred to the person with whom he is to be identified may often serve as useful evidence. For the reasons already stated, the rulings on this subject can best be examined elsewhere (*post*, § 270).

§ 176. **Same: Legitimacy, as evidenced by Parent's Conduct; Marriage, by "Habit"; Testamentary Execution, by the Deceased's Belief.** Among the most notable facts of life which are certain to leave marked traces on those into whose experience they enter are the facts of marriage, of the birth of children, and of the execution of a testament. Long tradition has recognized this, and has in these cases sanctioned the inference from subsequent belief or recollection to the prior act or experience. But the real difficulty lies in the inference from conduct to that belief, and, for the reason already noted, the details of the law can best be examined in another place, — the inference to Legitimacy, under § 269, to Marriage, under § 268, and to Testamentary Execution, under § 271.

§ 177. **Conduct of Animals, as evidencing a Human Act; Tracking by Bloodhounds.** If the instinct or habit of animals can in a given case be supposed to be sensitive to the dealings of men with them, it would seem that the conduct of an animal may be trusted evidentially as indicating the human act which would naturally have caused the animal's conduct.[1] Such indications may be of two kinds:

(1) The behavior of the animal may be a *trick* or other action *expressly taught* or *implicitly acquired* during his past association with a particular person; the possession of such a trick by a given animal will therefore serve to identify him as having been in that person's possession. This evidential use is well established in judicial practice, though it has seldom been brought before courts of appeal.[2]

(2) The behavior of the animal may be the result of an *impression* made on some *peculiarly strong sense* by a casual outward event or human act, incapable of being perceived by the human senses. The behavior of a horse in the vicinity of a concealed beast of prey is an instance of this. The custom, in certain of our communities, of *tracking fugitives by bloodhounds*, rests on a similar trait of those animals. It is conceded by most Courts that the fact that a well-trained and well-tested bloodhound of good breed, after smelling a shoe or other article belonging to the doer of a crime, has tracked definitely to the accused, is admissible to show that the accused was the doer of the criminal act.[3]

§ 177. [1] For animal's conduct as evidencing the character or *disposition of the animal*, see *post*, § 201.

[2] Circa 1530, More's "Life of Sir Thomas More", quoted in Campbell's "Lives of the Chancellors", II, 37 (story of the beggar-woman's little dog, who was bought from a thief by the Chancellor's wife; the Chancellor allowed her to prove property by the dog's recognition of her); 1800, Anon., in Twiss' Life of Lord Eldon, I, 354 (quoted *post*, § 1154); 1888, State *v.* Ward, 61 Vt. 185, 17 Atl. 483 (where a complicated set of turnings on different roads must have been followed by the incendiary, evidence was admitted that the defendant's horse shortly after took the same turning without guidance); 1894, Chicago *Herald*, May 31 (a German saloonkeeper in Chicago lost his parrot; in the possession of an American saloonkeeper a similar parrot was found; the ownership of this parrot was claimed by both parties, each affirming that he had possessed and trained the parrot for a long time, and that the parrot would show the effect of this training in his language; at the trial before Justice of the Peace Eberhardt, the parrot would not speak; he was therefore committed temporarily to the custody of a police-captain; "Captain Barcel will keep the bird in custody, and will keep his ears strained to catch either 'Set 'em up again', or 'Unser bier ist gut' "); 1900, Boston *Transcript*, Dec. 12 (in East Orange, N. J.; the larceny of a carrier pigeon by B. from E. was charged; the defendant claiming to be owner, the pigeon was released, and alighted later in E.'s barn); 1907, State *v.* Hunter, 143 N. C. 607, 56 S. E. 547 (Chief Justice Clark reminds us of "the classical incident of Ulysses, on his return from his memorable wanderings, being recognized by his dog Argos (who died from joy), when his family and his followers knew him not", and "the more modern incident of Aubry's dog of Montargis, who procured the confession of his master's murderer by his recognition of him").

Compare the following: 1905, Miller *v.* Terr., 9 Ariz. 123, 80 Pac. 321 (larceny of a colt; testimony from stockmen who had observed the animal's conduct that "the colt belonged to a certain mare which it had been following", admitted).

Compare the unsound ruling in State *v.* Landry, 29 Mont. 218, 74 Pac. 418 (1903), cited *post*, § 1163, n. 6.

[3] *Alabama:* 1890, Simpson *v.* State, 111 Ala. 6, 20 So. 572, *semble* (that bloodhounds had tracked the defendant from the place of the crime, admitted, the dog's habit being never to leave a human track once scented); 1892, Hodge *v.* State, 98 Ala. 10, 11, 13 So. 385 (murder; that a trained dog had followed the trail to the defendant's house, admitted, on the facts); 1905, Little *v.* State, 145 Ala. 662, 39 So. 674

Nevertheless, in actual usage, this evidence is apt to be highly misleading, to the danger of innocent men. Amidst the popular excitement attendant upon a murder and the chase of the suspect, all the facts upon which the trustworthiness of the inference rests are apt to be distorted in the testimony. Moreover, the very limited nature of the inference possible is apt to be overestimated, — a consequence dangerous when the jurors are moved by local

(the animal must be shown to have been trained to track human beings and to be able to do so accurately); 1906, Richardson *v.* State, 145 Ala. 46, 41 So. 82 (tracing by hounds; admitted); 1906, Hargrove *v.* State, 147 Ala. 97, 41 So. 972 (burglary; trailing of accused by bloodhounds, shown to be trained to the purpose, admitted); 1909, McDonald *v.* State, 165 Ala. 85, 51 So. 629 (admitted; here the uncertainty of the evidence was exhibited by the dogs' trailing of two different persons); *Arkansas:* 1916, Padgett *v.* State, 125 Ark. 471, 188 S. W. 1158 (assault; bloodhound evidence admitted); 1921, West *v.* State, 150 Ark. 555, 234 S. W. 997 (rape; tracing by trained dog, admitted); *Florida:* 1903, Davis *v.* State, 46 Fla. 137, 35 So. 76 (burglary; trailing by dogs is admissible, on certain conditions indicating "that reliance may reasonably be placed upon the accuracy of the trailing"); 1904, Davis *v.* State, 47 Fla. 26, 36 So. 170 (former opinion applied); *Georgia:* 1915, Fite *v.* State, 16 Ga. App. 22, 84 S. E. 485 (bloodhound trailing, held admissible, under strict conditions specified); 1915, Aiken *v.* State, 16 Ga. App. 848, 86 S. E. 1076 (burglary; as to bloodhound evidence, "we adopt the rule laid down in Pedigo's Case", Ky., *infra*); *Illinois:* 1914, People *v.* Pfanschmidt, 262 Ill. 411, 104 N. E. 804 (murder and arson, trailing by a bloodhound, by means of a horse-and-buggy scent, to the accused's camp, held not admissible, partly because the conditions here were too full of obstacles to make the trailing trustworthy, and also on the ground that "the trailing of either a man or an animal by a bloodhound should never be admitted in any case"); *Indiana:* 1910, Stout *v.* State, 174 Ind. 395, 92 N. E. 161 (trailing of another person than the accused; the present question not decided); 1917, Ruse *v.* State, 186 Ind. 237, 115 N. E. 778 (crime unspecified: the trailing by bloodhounds was held inadmissible; Sairy, C. J., and Myers, J., diss.); *Iowa:* 1904, McClurg *v.* Brenton, 123 Ia. 368, 98 N. W. 881 (where the defendant had trespassed on the plaintiff's premises, looking for stolen fowls, and led by bloodhounds, the Court disparaged such methods); *Kansas:* 1911, State *v.* Adams, 85 Kan. 435, 116 Pac. 608 (murder; tracking of accused by bloodhounds, held allowable, on a showing that the dogs are qualified by breed and training, and that "the person testifying is reliable"); 1914, State *v.* Mooney, 93 Kan. 353, 144 Pac. 228 (State *v.* Adams, followed); 1917, State *v.* Sweet, 101 Kan. 746, 168 Pac. 1112 (murder; "bloodhound evidence" admitted pursuant to the limitations of State *v.* Adams and State *v.* Mooney, *supra*); *Kentucky:* 1898, Pedigo *v.* Com., 103 Ky. 41, 44 S. W. 143 (admitted; DuRelle, J.: "It is difficult to lay down a general rule as to the introduction of testimony of this kind. . . . We think it may be safely laid down that, in order to make such testimony competent, even when it is shown that the dog is of pure blood, and of a stock characterized by acuteness of scent and power of discrimination, it must also be established that the dog in question is possessed of these qualities, and has been trained or tested in their exercise in the tracking of human beings, and that these facts must appear from the testimony of some person who has personal knowledge thereof. We think it must also appear that the dog so trained and tested was laid on the trail, whether visible or not, concerning which testimony has been admitted, at a point where the circumstances tend clearly to show that the guilty party had been, or upon a track which such circumstances indicated to have been made by him"; Guffy, J., diss., in an able opinion); 1904, Allen *v.* Com., — Ky. —, 82 S. W. 589 (rule of Pedigo *v.* Com. applied to exclude such evidence where the dog's qualities were not sufficiently shown); 1905, Denham *v.* Com., 119 Ky. 508, 84 S. W. 538 (Pedigo *v.* Com. followed); 1909, Sprouse *v.* Com., 132 Ky. 269, 116 S. W. 344 (trailing by hounds from a burned house to defendant's house; excluded, partly because the skill of the hounds was not sufficiently shown, and partly because due precautions for accuracy were not taken); 1916, Blair *v.* Com., 171 Ky. 319, 188 S. W. 390 (Pedigo *v.* Com. rule applied, here excluding the evidence); 1922, Meyers *v.* Com., — Ky. —, 240 S. W. 71 (arson; applying the rule of Pedigo *v.* Com., *supra*, but announcing that bloodhound evidence alone "would be insufficient to convict", *i.e.* to identify the accused; it seems odd that any court could deliberate one moment over such a preposterous assertion as the contrary); *Louisiana:* 1919, State *v.* King, 144 La. 430, 80 So. 615 (murder, bloodhound evidence admitted, on conditions showing reliability of the animal); *Minnesota:* 1921, Crosby *v.* Moriarty, 148 Minn. 201, 181 N. W. 199 (action for arson; conduct of bloodhounds in tracing the perpetrator, excluded on the facts); *Missouri:* 1912, State *v.* Rasco, 239 Mo. 535, 144 S. W. 449 (murder; trailing by bloodhounds, allowed on the testimony to

prejudice.[4] Hence Courts do well to insist on the strictest fulfilment of the above conditions of admissibility; and additional requirements are sometimes made. The hesitation shown in some Courts to the use of this evidence is due to the risks of its misuse by the jury; for in some regions of our country the mysteriously accurate operation of the dogs' senses has given rise to a superstitious faith in the dogs' inerrant inspiration, and this gross popular creed might in a jury mislead them into giving excessive credit to the evidence of the dogs' itinerary.

their habits and skill); *Nebraska:* 1903, Brott v. State, 70 Nebr. 395, 97 N. W. 593 (behavior of bloodhounds in trailing the defendant, held inadmissible on the facts; Sullivan, C. J.: "That the bloodhound is frequently wrong is a fact well attested by experience. . . . It is unsafe evidence, and both reason and instinct condemn it"); *North Carolina:* 1901, State v. Moore, 129 N. C. 494, 39 S. E. 626 (that a bloodhound trailed and pointed out the defendants, charged with larceny of meat and other things, was held inadmissible on the facts, without denying that it might be a "circumstance to be considered in connecting a person with an act"); 1907, State v. Hunter, 143 N. C. 607, 56 S. E. 547 (arson; trailing by a trained bloodhound, admitted); 1908, State v. Freeman, 146 N. C. 615, 60 S. E. 986 (burglary; a dog's trailing of the defendant, by shoe-scent, admitted); 1919, State v. Yearwood, 178 N. C. 813, 101 S. E. 513 (arson; trail by bloodhounds, admitted, after proof of their training and reputation); 1921, State v. Robinson, 181 N. C. 516, 106 S. E. 155 (assault; conduct of bloodhounds, admitted on the facts); *Ohio:* 1907, State v. Dickerson, 77 Oh. 34, 82 N. E. 969 (trailing of a murderer by a bloodhound held admissible, provided that the particular dog was trained in tracking human beings and had in experience been found reliable, this reliability being testified to from personal knowledge, and that the dog had been laid on the trail at a point or track clearly indicated as the guilty party's; the pedigree, etc., of the dog to be admissible in corroboration); *South Carolina:* 1916, State v. Brown, 103 S. C. 437, 88 S. E. 21 (arson; bloodhound evidence sanctioned, because Crim. Code § 945 authorizes the use of dogs for tracking lawbreakers; here held inadmissible because the dogs were not set on the track within the period of efficiency); *Texas:* 1904, Parker v. State, 46 Tex. Cr. 461, 80 S. W. 1008 (bloodhound's tracking of defendant admitted; rule of Pedigo v. Com., Ky., approved).

[4] The limitations are well stated by Mr. E. Austin Freeman, in one of the detective stories in his volume entitled "The Singing Bone" (London, 1914). This story, entitled "A Case of Premeditation", is quoted in part in the Illinois Law Review, IX, 192.

TITLE I (*continued*): CIRCUMSTANTIAL EVIDENCE

SUB-TITLE II: EVIDENCE TO PROVE A HUMAN QUALITY OR CONDITION

CHAPTER IX.

§ 190. **Nature of this Class of Evidence.** 1. The reasons for dividing into three groups the whole subject of Circumstantial Evidence have been already

stated (*ante*, § 43). The groups being distinguished according to the propositions to be proved, the second group is now to be considered, namely, Evidence to prove a *Human Quality, Condition*, or other attribute.

This group of propositions (*facta probanda*) separates itself from the first (Human Acts) with fair distinctness, first, because the circumstances available as evidence are usually distinct for the two groups, but chiefly because certain general considerations of Auxiliary Policy, as well as of Relevancy, run through the present group, constantly reappearing, and not only making various analogies useful, but rendering it impossible to understand the rules of Evidence for certain kinds of propositions without considering those for others. The distinction between the two groups is by no means an artificial one, but is fully in harmony with the attitude of the Courts towards the problems involved.

2. The various conceivable propositions to be proved may be reduced to the following well-defined sorts:

Moral Character or Disposition;	Motive or Emotion;
Physical and Mental Capacity;	Habit or Custom, and Possession;
Design or Plan, and Intent;	Traits of Handwriting;
Knowledge, Belief, or Consciousness;	Identity.

A different analysis and order of treatment is conceivable; but with reference to the usefulness of putting in proximity those matters which throw light upon each other, this division and this order seem the most practical.[1]

3. It will be understood that we are here *not concerned how the above human qualities come to be propositions* for proof (*ante*, § 2). We are concerned only to learn what facts will be admissible evidentially to prove the quality proposed for proof. For instance, Character may be in issue through the pleadings in a suit for slander on a plea of justification, or in an action for personal injury as an element of the defendant's liability for an incompetent servant; or it may be used, not as in issue under the pleadings, but as evidential, to prove a human act, for example, the good character of a defendant in a criminal case or his bad character in rebuttal. So, also, Knowledge may be in issue in a suit to set aside a purchase in fraud of creditors, or it may be evidential only, as when it is offered to prove the doing of a past act as a mark of identity (*post*, § 270). In all these instances the quality which is termed Character, Knowledge, or the like, has somehow come into the case as a proposition to be proved; and the question how to evidence it presents itself equally whether the 'factum probandum', when once proved, is going in turn to be used itself evidentially to show some other fact, or is one of the very ultimate propositions made material by the pleadings. It is true that by tradition or by policy the mode of proof available in the one case may sometimes

§ 190. [1] From the point of view of logic and psychology as applicable to argument before the jury (not the rules of Admissibility), see the materials collected in the present author's "Principles of Judicial Proof, as given by Logic, Psychology, and General Experience, and illustrated in Judicial Trials" (1913), §§ 28, 84–98.

not be available in the other; but this is only an incidental and not a necessary or common feature.

4. Three species of evidential facts are available to show a human quality or condition:

(1) *Conduct;* this is the expression, in outward behavior, of the quality or condition operating to produce those effects. These results are the traces by which we may infer the moving cause. In point of time, conduct is closely associated with the internal condition giving rise to it; nevertheless, the indication is strictly not a concomitant, but a retrospectant one (*ante,* § 43), because the argument is backwards from effect (conduct) to cause (internal condition).

(2) *External facts* (prospectant) pointing forward to the probable coming into existence of the quality; for example, the victim's gold, as pointing forward to the defendant's probable desire to rob him, or the reputation of A's insolvency, as pointing forward to B's probable receipt of knowledge of it. In using this evidence, we take our stand beforehand and argue that the evidential fact probably gave rise to the emotion, knowledge, or intent to be proved. The indication is thus prospectant; while that of conduct is retrospectant.

(3) There is also a third sort of fact, having either a prospectant or a retrospectant indication, and not exactly corresponding to either of the preceding sorts, namely, *prior or subsequent condition,* as showing condition at a given time. Thus, to prove insanity, we may offer (1) conduct as the effect illustrating its cause, mental aberration, (2) circumstances of unsuccessful business, domestic troubles, and the like, tending to bring on insanity; and (3) prior or subsequent insanity, pointing forwards or backwards to insanity at the time in question. So also, to show a husband's desire or motive to get rid of his wife, we may offer (1) his conduct exhibiting such a desire, (2) the existence of a paramour, tending to create such a desire, and (3) a prior desire, as pointing forward to its continued existence at the time in question. A similar general question presents itself in all evidence of this third sort, namely, how far before or after the time in question the survey may extend in considering the fact of prior or subsequent condition.

For some subjects, all three of these sorts of evidence are available, perhaps with equal frequency; for others only one or two of them are available, at least usually; thus, to evidence character, facts of the second sort do not come into play at all, — unless the principles of heredity one day become so clearly ascertainable as to offer a sure basis of argument from ancestry. It is enough to note that in taking up the different 'facta probanda' a convenient order of arrangement of the evidential facts may be based on this triple division.

5. The distinction between a pure principle of *Relevancy* and a doctrine of Auxiliary Policy (expounded *ante,* § 42) is in the present subject of constant importance. Our first question, for any kind of evidence, must be, Is it Rele-

vant, *i.e.* has it probative value enough to be considered? But even when it is relevant and would so far be admissible, it may still be shut out by some auxiliary policy forbidding confusion of issues, undue prejudice, or unfair surprise (*post*, § 1904). It is practically necessary to treat in one place the two sets of considerations, Relevancy and Auxiliary Policy, as applied to the same piece of evidence; but it must not be forgotten that the two are entirely distinct in function.

Topic I: EVIDENCE TO PROVE CHARACTER OR DISPOSITION

§ 191. **Kinds of Evidence.** It is here assumed that Moral Character or Disposition is somehow in the case to be proved, — either as material under the pleadings or as evidential to prove something else (*ante*, § 54). The question then here arises, What evidential facts may be used to prove it?

Of the three sorts of facts just described, the *second* sort (prospectant) is here wholly unavailable; there is no external fact from which we can argue forward that a person will have a certain character. Heredity, as a biological indication that an ancestor's trait will recur in a descendant, is as yet not accepted by science in any details available for judicial proof (*ante*, § 165). Only in the case of insanity (*post*, § 231), longevity (*post*, § 223), and of a few marked physiological traits (*ante*, §§ 166, 167), has such a use of heredity been given recognition. No doubt in juvenile court practice the family record is studied by the judge, but hardly for mere evidential purposes. Some day in this field a body of data will be accumulated from which evidential principles may be drawn.

The *third* sort of fact, *prior or subsequent character*, as indicating character at the time in question, is undoubtedly available evidence; but its use is so complicated with the question of using Reputation (under the Hearsay exception) at a prior or subsequent time, that both subjects can best be examined together; accordingly the use of prior or subsequent character, to evidence character at the time in question, is there dealt with (*post*, § 1617).

The material here to be considered, therefore, is the *first* sort of evidence, *i.e. conduct*, — the sort by far the commonest and the only one that raises questions of serious difficulty. Under what condition, then, is conduct admissible to evidence Character?

1. Conduct to show Character of a Defendant in a Criminal Case

§ 192. **Nature of the Inference; an Act is not evidential of another Act.** At the outset of this entire prospectant class of inferences, it must be noted that, where the doing of an act is the proposition to be proved, there can never be a direct inference from an act of former conduct to the act charged; there must always be a double step of inference of some sort, a 'tertium quid.' In other words, it cannot be argued: "Because A did an act X last year, therefore he probably did the act X as now charged." Human action being in-

finitely varied, there is no adequate probative connection between the two. A may do the act once, and may never do it again; and not only may he not do it again, but it is in no degree probable that he will do it again. The conceivable contingencies that may intervene are too numerous.

Thus, whenever resort is had to a person's past conduct or acts as the basis of inference to a subsequent act, it must always be done *intermediately through another inference*. It may be argued: "A once committed a robbery; (1) therefore he probably has a thieving disposition; (2) therefore he probably committed this robbery"; or "(1) therefore he had some general design to commit certain robberies; (2) therefore he probably carried out that design and committed this robbery." Or it may be argued: "A gave money to his poor friend B; (1) therefore A probably is of a benevolent disposition; (2) therefore A probably did not commit the present robbery"; or "(1) therefore he probably had a kindly feeling towards B; (2) therefore he probably did not rob B." The impulse to argue from A's former bad deed or good deed directly to his doing or not doing of the bad deed charged is perhaps a natural one; but it will always be found, upon analysis of the process of reasoning, that there is involved in it a hidden intermediary step of some sort, resting on a second inference of character, motive, plan, or the like. This intermediate step is always implicit, and must be brought out.

The result is that, when the ultimate proposition to be proved is the doing of an act by a defendant, and resort is had evidentially to his past conduct, this is not in order to argue directly from act to act, but in order, by the past act, to evidence character, design, motive, or some other quality, and through that quality to infer that it led to the act charged. To make available such evidence of past conduct or acts, some use for it must be found as evidencing Character either Character (as here), or else Design, Motive, Intent, or some other quality (*post*, §§ 300–371).

This principle has long been accepted in our law. That "the doing of one act is in itself no evidence that the same or a like act was again done by the same person", has been so often judicially repeated that it is a commonplace:

1872, AGNEW, J., in *Shaffner* v. *Com.*, 72 Pa. 65: "It is a general rule that a distinct crime, unconnected with that laid in the indictment, cannot be given in evidence against a prisoner. . . . Logically the commission of an independent offence is not proof in itself of the commission of another crime."

1893, KNOWLTON, J., in *Miller* v. *Curtis*, 158 Mass. 127, 129: "That a person has committed one crime has no direct tendency to show that he committed another similar crime which had no connection with the first."

1896, MARTIN, J., in *People* v. *McLaughlin*, 150 N. Y. 365, 386, 44 N. E. 1017: "It is an elementary principle that the commission of one crime is not admissible in evidence to establish the guilt of a party of another."

§ 193. **Particular Bad Acts to show the Defendant's Character; (1) Relevancy.** It has already been seen (*ante*, § 58) that if a defendant in a criminal

case chooses to offer his good character (for the appropriate trait) as an argument that he probably did not commit the offence charged, the prosecution may by counter-evidence dispute the existence in him of the good character thus alleged; and it has also been seen that the fact thus to be proved or disproved is the real disposition or Character, of which reputation or anything else is merely evidence (*ante*, § 52).

The question thus arises how the Character is to be proved or disproved. It has been noted (*ante*, §§ 52, 53) that there are three conceivable ways of evidencing it: (1) Reputation of the community; this is open to the objection of being Hearsay, and is dealt with *post*, § 1608; (2) Personal Knowledge or Opinion of those who know the defendant; this is open to the objection of the Opinion rule, and is dealt with *post*, § 1980; (3) Particular Acts of Misconduct, exhibiting the particular trait involved. This last sort of evidence is now to be considered.

The law here declares a general and absolute rule of exclusion. It is forbidden, in showing that the defendant has not the good character which he affirms, to resort to *particular acts of misconduct* by him.

Is this prohibition based on the Irrelevancy of such evidence, or on some reason of Auxiliary Policy (*ante*, § 42) which assumes its relevancy but sees reasons of policy for its exclusion? That such former misconduct is relevant, *i.e.* has probative value to persuade us of the general trait or disposition, cannot be doubted. The assumption of its probative value is made throughout the judicial opinions on this subject;[1] and the following acute analysis makes it entirely clear:

> 1876, *State* v. *Lapage*, 57 N. H. 275, 299; on a charge of murder committed in an attempt to rape, the fact of the defendant's recent rape of another person was offered, Mr. *Norris* arguing for the defence: "Making no point of remoteness in time or space, let us see how well this evidence will bear analyzing. Premise to be proved: he committed a rape, in no way, except in kind, connected with this crime. Inference: a general disposition to commit this kind of offence. Next premise: this general disposition in him. Inference: he committed this particular offence. . . . It may be tried by the common test of the validity of arguments. Some men who commit a single crime have, or thereby acquire, a tendency to commit the same kind of crimes; if this man committed the rape, he might therefore have or thereby acquire a tendency to commit other rapes; if he had or so acquired such a tendency, and if another rape was committed within his reach, he might therefore be more likely to be guilty; if more likely to be guilty of rape, and if there was murder committed in perpetrating or attempting to perpetrate rape, he might therefore be more likely to be guilty of this rape, and hence of this murder; a sort of an 'ex-parte' conviction of a single rape, from which the jury are to find a general disposition to that kind of crimes, in order to help them out in presuming the commission of another rape as a mo-

§ 193. [1] For example, in the quotations in the next section, and also in the following: 1851, R. *v.* Shrimpton, 2 Den. Cr. C. 322 (Campbell, L. C. J.: "The question in issue is the good character of the prisoner; surely, whether the prisoner had been previously convicted is relevant to that"; Alderson, B.: "The prisoner raises the question of character, and the evidence of his former conviction is brought to show what his character really is").

For the psychological aspects of conduct as evidencing character, in point of probative value and irrespective of the rules of Evidence, see the present author's "Principles of Judicial Proof" (1913), §§ 84–98.

tive or occasion of the murder. We can find nothing like it in the books." LADD, J.: "But it is nevertheless argued on behalf of the State (if I have not wholly misapprehended the drift of the argument) that the evidence was admitted because, as matter of fact, its natural tendency was to produce conviction in the mind that the prisoner committed rape upon his victim at the time he took her life. . . . I shall not undertake to deny this. If I know a man has broken into my house and stolen my goods, I am for that reason more ready to believe him guilty of breaking into my neighbor's house and committing the same crime there. We do not trust our property with a notorious thief. We cannot help suspecting a man of evil life and infamous character sooner than one who is known to be free from every taint of dishonesty or crime. We naturally recoil with fear and loathing from a known murderer, and watch his conduct as we would the motions of a beast of prey. When the community is startled by the commission of some great crime, our first search for the perpetrator is naturally directed, not among those who have hitherto lived blameless lives, but among those whose conduct has been such as to create the belief that they have the depravity of heart to do the deed. This is human nature — the teaching of human experience. If it were the law, that everything which has a natural tendency to lead the mind towards a conclusion that a person charged with crime is guilty must be admitted in evidence against him on the trial of that charge, the argument for the State would doubtless be hard to answer. If I know a man has once been false, I cannot after that believe in his truth as I did before. If I know he has committed the crime of perjury once, I more readily believe he will commit the same awful crime again, and I cannot accord the same trust and confidence to his statements under oath that I otherwise should. . . . Suppose the general character of one charged with crime is infamous and degraded to the last degree; that his life has been nothing but a succession of crimes of the most atrocious and revolting sort: does not the knowledge of all this inevitably carry the mind in the direction of a conclusion that he has added the particular crime for which he is being tried to the list of those who have gone before? Why, then, should not the prosecutor be permitted to show facts which tend so naturally to produce a conviction of his guilt? The answer to all these questions is plain and decisive: The law is otherwise."

In the Continental traditions of criminal trials, this class of evidence is given great consideration, and is freely used. The following passages illustrate the part it plays at a trial:

French Trials. (1) *Trial for the Murder of the Baroness de Valley.* (1896, Paris; Albert Bataille, "Causes Criminelles et Mondaines", 1896, p. 249.) [On June 16, 1896, Baroness de Valley was found strangled in her apartment in Paris. She was rich, and made a business of lending her money at usurious rates. Robbery was the object of her murderers. A party of several young fellows, Kiesgen, Ferrand, Lagueny and Truel, were charged with the murder. One of them, Kiesgen, son of a merchant, appeared well dressed and well brought up; he had no occupation and his father furnished him with pocket-money. The others were of not so respectable surroundings. Presiding Judge POUPARDIN thus conducted the opening examination at the trial, on November 24.]

JUDGE. "None of you have a criminal record; but that is far from saying that you have a good record.

"You, Kiesgen, seem to have a mode of life not at all creditable. You frequent the low saloons of the Latin Quarter. You were an habitué of the Harcourt Café. You have been getting all the money you could from women. Your mistress, Jeanne Prevost, alias Margot, gave you 15 francs a day from her earnings as a prostitute. You are a panderer of the worst sort. In your cell at Mazas Prison, you kept writing to Margot, asking her to send you cash. Unfortunately for you, she was at that time herself in St. Lazare Prison (Laughter in the audience).

"As for you, Truel, alias Julian, alias Curlyhead, you are the son of a mechanical draftsman at Charenton. After having a job as apprentice-draftsman in a factory, you were discharged for a brutal assault. After that you lived off your mother, . . . Then you became an habitué, like Kiesgen, of the saloons and women of the Latin Quarter. You seem to have been one of a gang of bicycle thieves. In short, after starting as an honest workingman, you gave up that pursuit, and became an agent for houses of ill-fame. You see what you have been brought to by bad company.

"You, Lagueny, like your fellow-defendants, are scarcely twenty years old. You are the natural son of an unfortunate woman who died insane, two years ago, at the St. Anne Asylum. During all your boyhood you were left by her to loaf on the streets. You picked up a living by hawking things now and then; selling newspapers, sometimes dogs, sometimes peddling olives at restaurant-doors; sleeping in the public refuges. At twelve years of age, a charitable society had you baptized in the Sacred Heart Church at Montmartre, and next day you partook of your first communion. Your mother seems to have done some questionable errands for Baroness Valley, and told you that the Baroness was your godmother. You, ever since you became a young man, have been an agent for the assignations of girls in the Latin Quarter. That was where you made the acquaintance of Kiesgen and of Julien the Curlyhead. To them you made the proposal to go and rob the Baroness. She had always showed a kind interest in you; she used to give you odd change."

Lagueny. "Gave me money? Well, I guess not! The old skinflint! She would even pick up old crusts of bread in the street."

JUDGE. "Well, at any rate, your mother used to be her housekeeper, and the Baroness sometimes gave you a lunch."

. . . . . .

[Then the evidence directly to the crime was put in.

Nov. 25. The jury found three of the defendants guilty. But in view of the youth and lack of a criminal record for Kiesgen and Truel (the two who did the actual killing), they recommended those two for leniency. Both were sentenced to hard labor for life. . . .

Lagueny, who had proposed the robbery, was sentenced to ten years' imprisonment, Ferrand to five years, and Durlin was acquitted.]

. . . . . .

(2) *Trial for Blackmailing Max Lebaudy.* (1896, Paris; Albert Bataille, "Causes Criminelles et Mondaines", 1896, p. 95.) [Max Lebaudy was a young millionaire, foolish and extravagant. About the years 1894–5, he became the prey of a number of blackmailers, some of them journalists, some ex-military men, some mere adventurers. Several different widespread intrigues against him were unearthed. He was bled for various sums, — fr. 30,000; 10,000; 40,000; etc. Various well-known personages, political, literary, and dramatic, more or less innocent, were more or less involved in the scandals.

On March 30, 1896, the trial began, under Presiding Judge PLANTEAU.]

Examination of Viscount *Ulrich de Civry.*

JUDGE. "You took part in the war of 1870, and I am bound to say that you behaved very creditably. Leaving the army in 1873, with the rank of cavalry quartermaster, you went back to journalism, and were at last accounts chief editor of the *Army Echo.* You also went into politics; and were candidate for the Assembly at Yvonne in 1893.

"But I am obliged to remind you that you have a record in the criminal court. In 1876, the Paris Court of Appeals sentenced you to one year's imprisonment for illegally wearing military uniform. In 1880, the same Court sentenced you to two months for unlawful eloignment of goods under attachment."

Civry. "My counsel will explain about those convictions."

JUDGE. "But those are not all. You were convicted by default, in 1877, at the Seine Assize Court, of robbery, and were sentenced to twenty years' imprisonment with hard labor. They had to extradite you from England, and the penalty was commuted to three

years. But the judgment was set aside on technical grounds; you had a new trial at Melun, and the public prosecutor withdrew his charge, and you were of course acquitted.

"To get the money for your legal expenses, you had borrowed large sums, through several notaries. One of these notaries has himself just been convicted at the Seine Assize Court. The sums you thus borrowed amounted in notes for more than fr. 1,000,000, nominally, though you yourself received only some fr. 500,000."

[The judge then entered into details of the Hennion case, reading from the records. Hennion was a young man of means from the provinces, who had become entangled in the usurers' and speculators' clutches by the medium of Viscount Civry, and the Viscount had narrowly escaped another criminal sentence.]

JUDGE. "The judgment of the Court there said: 'Hennion's ruin was obviously due to the machinations of unscrupulous adventurers, among whom figured Ulrich de Civry. Unfortunately, the Penal Code does not reach all forms of dishonesty.'

"Well, in spite of these unsavory incidents in your past, you maintained something of a position in a certain section of Parisian society. When you left your regiment in 1891, you were adjutant. What is your business now?"

Civry. "Horse-trading."

JUDGE. "That is not a business. It is reported that you do not do much of anything, and are living as a parasite off other persons. You spent two years in Normandy with an old chum from your regiment, Mr. Davout, but he finally gave you to understand, in correct but unmistakable manner, that you had reached the limits of his hospitality. You then came back to live in Paris, where you ran up debts, even with the house-porter."

Civry. "That was for my room-breakfasts. And I did not have time to pay him; they arrested me too soon." (Laughter in the audience).

[On March 26, the verdict and judgment were rendered.

Joseph de Civry, Georges de Labruyère, Chiarosolo, Rosenthal, and Carle des Perrières were acquitted.

Ulrich de Civry and Cesti were found guilty, and sentenced to thirteen months in jail and 500 francs fine.]

§ 194. **Same: (2) Reasons of Policy.** It may almost be said that it is because of this indubitable Relevancy of such evidence that it is excluded. It is objectionable, not because it has no appreciable probative value, but because it has too much. The natural and inevitable tendency of the tribunal — whether judge or jury — is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge. Moreover, the use of alleged particular acts ranging over the entire period of the defendant's life makes it impossible for him to be prepared to refute the charges, any or all of which may be mere fabrications. These reasons of Auxiliary Policy (*post*, § 1863), directed to prevent the risks of reaching verdicts through insufficient evidence, have operated to exclude that which is in itself relevant.

In early practice this class of evidence was resorted to without limitation.[1]

§ 194. [1] It is clear that before 1670–1680 the accused's prior record of misconduct could be considered: 1669, Hawkins' Trial, 6 How. St. Tr. 921, 935, 949 (larceny; details of a larceny from another person at another time, allowed to be given; L. C. B. Hale: "This, if true, would render the prisoner now at the bar obnoxious to any jury"); 1684, Hampden's Trial, cited *post* (the judge, in excluding such evidence invokes a "case lately adjudged in this court"). The case of Faulconer (1653; 5 How. St. Tr. 323, 354), which Sir J. Stephen has cited (Hist. Cr. Law, I, 368) as an early instance of such evidence, is hardly in point;

But for more than two centuries, ever since the liberal reaction which began with the Restoration of the Stuarts, this policy of exclusion, in one or another of its reasonings, has received judicial sanction, more emphatic with time and experience. It represents a revolution in the theory of criminal trials, and is one of the peculiar features, of vast moment, which distinguishes the Anglo-American from the Continental system of Evidence:[2]

1684, WITHINS, J., in *Hampden's Trial*, 9 How. St. Tr. 1053, 1103: "You know the case lately adjudged in this Court; a person was indicted of forgery, we would not let them give evidence of any other forgeries but that for which he was indicted, because we would not suffer any raking into men's course of life to pick up evidence that they cannot be prepared to answer to."

1692, HOLT, L. C. J., in *Harrison's Trial*, 12 How. St. Tr. 833, 864, 874 (charge of murder; a witness was called to speak of some felonious conduct of the defendant three years before): "Hold, hold, what are you doing now? Are you going to arraign his whole life? How can he defend himself from charges of which he has no notice? And how many issues are to be raised to perplex me and the jury? Away, away! That ought not to be; that is nothing to the matter."

1847, PARKE, B., in *Att'y-Gen'l* v. *Hitchcock*, 1 Ex. 93: "We cannot enter into a collateral question as to the man's having committed a crime on some former occasion, one reason being that it would lead to complicated issues and long inquiries; and another, that a party cannot be expected to be prepared to defend the whole of the actions of his life."

1851, *R.* v. *Oddy*, 2 Den. Cr. C. 264, CAMPBELL, L. C. J.: "The moral weight of such evidence in any individual case would no doubt be great. But the law is a system of general rules; and it does not admit such evidence, because of the inconvenience which would result from it." Mr. *Pickering*, for the prosecution: "But in several analogous cases the law does admit such evidence, notwithstanding the inconvenience; and there the inconvenience, which is confessedly the only ground of exclusion, is tolerated in order that justice may not be defeated. The inconvenience is put upon two grounds; first, that of the prisoner being taken by surprise; secondly, of many different issues being raised." CAMPBELL, L. C. J.: "Yes; that is so." Mr. *Pickering:* "If in such cases [as previous utterings of forgeries to show intent] justice is not permitted to be defeated by the argument drawn from the inconvenience of raising different issues, why should it in the present case?" . . . CAMPBELL, L. C. J.: "It would have been evidence of the prisoner being a bad man, and likely to commit the offences there charged. But the English law does not permit the issue of criminal trials to depend on this species of evidence."

for here the trial was for perjury, and the evidence was offered as "proofs to the credit of Faulconer", *i.e.*, rather looking upon him as a witness to be impeached. Lord Campbell, on the other hand (Lives of the Chief Justices, III, 24), erroneously gives Harrison's Trial, in 1692 (cited *post*) as the first case of exclusion. But at any rate the older practice died hard and slowly: 1695, R. *v.* Hains, Comb. 337 ("If the defendant give evidence of a general reputation, it may be answered by particular instances on the other side for the King").

Yet it is odd to find the following anachronistic remark in a judgment of Lord Mansfield, in 1742 (Clark *v.* Periam, 2 Atk. 339): "If there is a criminal prosecution, and the prisoner in order to strengthen the evidence for his character enters into particular facts to support it, this is called a challenge to the prosecutor, and then he may likewise examine to particular facts."

[2] When Campbell visited Paris, in 1819, and the French lawyers "laughed at our strictness" in excluding hearsay, "I retorted by pointing out the injustice of their practice" in character-evidence (Life of L. C. Campbell, I, 364).

For some examples of French trials, see Stephen's History of the Criminal Law, I, Appendix: Wigmore's Select Cases on the Law of Evidence, 2d ed. 1914, pp. 58–62; and the citations *post*, § 2251, note 12.

In some of the opinions in R. *v.* Bond, 1906, 2 K. B. 389, 408, reference is made to the contrasting French principle.

1865, WILLES, J., in *R.* v. *Rouvton*, L. & C. 520, 541: "[Evidence of particular acts] is excluded, partly for the reason [irrelevancy] already given, and partly because no notice has been given to the other side that such an inquiry is going to be made. . . . The impossibility of giving such notice with respect to the prisoner's conduct would exclude such evidence, even if it were not excluded by general rules of policy."

1858, Mr. John Norton *Pomeroy*, arguing in *People* v. *Stout*, 4 Park. Cr. 97: "In its administration of criminal jurisprudence, the civil law allows and requires such evidence. It investigates the antecedent character, disposition, habits, associates, business, — in short, the entire history of an accused person, to discover whether it is probable that he would commit the alleged crime. English and American criminal law, in its practical administration, confines itself to the investigation of the very crime charged, and restricts judicial evidence to circumstances directly connected with and necessary to elucidate the issue to be tried. These two systems are diametrically opposed to each other, and whatever may be said of their comparative merits, the rule of the common law is so firmly established that it lies at the very foundation of criminal procedure, as an inseparable element of trial by jury. Trained judicial minds may be able to eliminate from a mass of irrelevant and general criminative facts those which directly bear upon the crime charged against the prisoner; but the very character of juries, and the theory of trial by jury, require that all prejudicial evidence tending to raise in their minds an antipathy to the prisoner, and which does not directly tend to prove the simple issue, should be carefully excluded from them."

1873, ALLEN, J., in *Coleman* v. *State*, 55 N. Y. 70: "A person cannot be convicted of one offence upon proof that he committed another, however persuasive in a moral point of view such evidence may be. It would be easier to believe a person guilty of one crime if it was known that he had committed another of a similar character, or indeed of any character. But the injustice of such a rule in courts of justice is apparent. It would lead to convictions upon the particular charge made by proof of other acts in no way connected with it, and to uniting evidence of several offences to produce conviction of a single one."

1882, DEVENS, J., in *Com.* v. *Jackson*, 132 Mass. 20: "The objections to the admission of evidence as to other transactions, whether amounting to indictable crimes or not, are very apparent. Such evidence compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defence, raises a variety of issues, and thus diverts the attention of the jury from the one immediately before it; and by showing the defendant to have been a knave on other occasions, creates a prejudice which may cause injustice to be done him."

1887, THAYER, J., in *State* v. *Saunders*, 14 Or. 300, 309, 12 Pac. 441: "Place a person on trial upon a criminal charge, and allow the prosecution to show by him that he has before been implicated in similar affairs (no matter what explanation of them he attempts to make), it will be more damaging evidence against him and conduce more to his conviction than direct testimony of his guilt in the particular case. Every lawyer who has had any particular experience in criminal trials knows this, — knows that juries are inclined to act from impulse, and to convict parties accused, upon general principles. An ordinary juror is not liable to care about such a party's guilt or innocence in the particular case, if they think him a scapegrace or vagabond. That is human nature."

1903, Hon. A. C. PLOWDEN, "Grain or Chaff; the Autobiography of a Police Magistrate", c. XI, p. 142: "Another circuit hero carved a niche for himself in the temple of Fame by a splendid disregard of what I might call the ordinary conventions of a criminal court. B— was not remarkable for too much devotion to his profession. . . . On a certain occasion at Gloucester, B— was instructed to prosecute a man for burglary. Now if there is one elementary principle in criminal procedure more widely known and sacredly more observed than another, it is that the antecedents of a prisoner, if unfavorable, should be religiously kept a secret from the jury, until after they have delivered their verdict. . . . Of this sacred rule B— quickly showed, to the consternation of the prisoner, that he was

because the guilt of one shows the innocence of the other, but because proof that specific acts were done by one weakens or removes the presumption that the same acts were done by another."

There are, of course (as the preceding passage shows), cases in which X is by hypothesis in some way an accomplice of Y, either at a distance or as a personal sharer; and there is even the rare case of independent and double felonious acts upon the same object. To such cases the argument cannot apply. Apart from them, it is as cogent as an alibi. If the Man with the Iron Mask was the Duc de Vermandois, he could not have been the Général de Bulonde; and if the Tichborne claimant was Arthur Orton, he could not have been Roger Tichborne.

The question that arises, from the point of view of the rules of Evidence, is whether, in evidencing this doing by a third person as a fact of disproof, any unusual requirements should be made as to the strength of the evidence before it can be admitted. Thus, to prove A guilty of murder, evidence of his threats (*i.e.* a design) to commit it are always admissible (*ante*, § 105); now, if the fact to be proved is that B committed the murder (as inconsistent with A's guilt), why should not B's threats be admitted, without further restriction, as A's are? It is true that evidence of B's threats alone would not go far towards proving B's commission; but it is not a question of absolute proof nor even of strong probability, but only of raising a reasonable doubt as to A's commission; and for this purpose the slightest likelihood of B's commission may suffice or at least assist. The evidence of B's threats, to be sure, may, in a given instance, be too slight to be worth considering: but it seems unsound as a general rule to hold that mere threats, or mere evidentiary facts of any one sort, are to be rejected if unaccompanied by additional facts pointing towards B as the doer. Nevertheless, most Courts have shown an inclination to make some such restriction, and to insist that two or more kinds of evidentiary facts pointing towards B must be offered, and that one kind alone will not be received. It is difficult to see the object of this restriction, because if the evidence is really of no appreciable value, no harm is done in admitting it; while if it is in truth calculated to cause the jury to doubt, the Court should not attempt to decide for the jury that this doubt is purely speculative and fantastic, but should afford the accused every opportunity to create that doubt. A contrary rule is unfair to a really innocent accused.

§ 140. **Same: Threats by a Third Person.** *Threats* are perhaps the commonest kind of evidence offered for this purpose. The rulings differ widely in their effect; but in general a wholly unnecessary strictness is shown, and the illiberal attitude of some Courts in this respect towards accused persons is in singular contrast with the maudlin tenderness otherwise often exhibited.[1]

§ 140. [1] *Federal:* 1891, Alexander *v.* U. S., 138 U. S. 353, 355, 11 Sup. 350 (the defendant and the deceased were seen together just before the latter's disappearance; evidence of threats by H. against the deceased, H. then being in search of the deceased, who was supposed to have eloped with H.'s wife, held admissible, subject to a certain discretion in the trial Court as to remoteness); 1892, Worth *v.* R. Co., 51 Fed. 171 (action by a passenger in-

§ 141. **Same: Motive of a Third Person.** A *motive* as evidence is perhaps not of such value as a threat; yet Courts seem more inclined to receive it.[1] There is no reason for requiring that it be coupled with other evidence in order to be admissible.

jured by the derailment of a car; evidence of the design of outsiders to wreck the train by derailment was admitted, no conditions being laid down, but other evidence being presented of the existence of a motive in certain outsiders, and of the presence of suspicious persons at the place); *Alabama:* 1914, Spicer *v.* State, 188 Ala. 9, 65 So. 972 (threats of a third person, admitted); *Arkansas:* 1911, McElroy *v.* State, 100 Ark. 301, 140 S. W. 8 (threats by third persons, excluded, no other evidence of their complicity being offered); *California:* 1861, People *v.* Williams, 18 Cal. 193 (threats to kill, by a third person, admitted); *Connecticut:* 1885, State *v.* Beaudet, 53 Conn. 543, 4 Atl. 237 (unspecified threats of a third person against the assaulted party, excluded; partly because too vague, partly because hearsay, partly because not accompanied by other evidence of the third person's guilt; opinion inconclusive and unsound); *Illinois:* 1886, Schoolcraft *v.* People, 117 Ill. 271, 277, 17 N. E. 649 (murder; the deceased's statement that certain third persons, "whose wives he had been running after, would kill him some day", excluded); 1894, Carlton *v.* People, 150 Ill. 181, 188, 37 N. E. 244 (arson; threats of third person to burn all the property of the injured person, excluded); 1916, People *v.* King, 276 Ill. 138, 114 N. E. 601 (murder of a police officer, the issue being the identity of the slayer; threats of F., made some time previous, against the officer, excluded); *Indiana:* 1901, Keith *v.* State, 157 Ind. 376, 61 N. E. 716 ("isolated threats by third parties is not admissible"); *Kentucky:* 1878, Morgan *v.* Com., 14 Bush 106, 112 (murder; threats against the deceased's life, by a third person present at the affray, admitted, the third person being first shown present and thus by possibility connected with the act); *Massachusetts:* 1916, Bradford *v.* Boston & M. R. Co., 225 Mass. 129, 113 N. E. 1042 (fire set by the defendant to the T. factory and spreading to the plaintiff's house; defendant contended that the fire started in the T. factory; D. the treasurer of the T. Co. was a witness for plaintiff, and there was evidence of his starting the fire; the fact that the T. plant had also burned the year previous was admitted, "as explaining the motive and intent of D."; this is sensible, but is not consistent with Noyes *v.* Boston & M. R. Co., *post*, § 199*a*; *Missouri:* 1889, State *v.* Crawford, 99 Mo. 74, 80, 12 S. W. 354 (arson; threats of burning by a third person, rejected as 'res inter alios', — as if the law of judgments had any connection with the process of drawing an inference; this ground of decision is absurd, for it would exclude the whole process of proof that another was the guilty person); 1896, State *v.* Taylor, 136 Mo. 66, 37 S. W. 907 (burglary; threats by another person to commit such a burglary, excluded, unless perhaps an overt act, etc., had followed); *North Carolina:* 1846, State *v.* Duncan, 6 Ired. 236, 239; 1877, State *v.* Davis, 77 Ired. 483 (for these two cases, see *post*, § 142); *Oregon:* 1893, State *v.* Fletcher, 24 Or. 295, 300, 33 Pac. 575 (threats, etc., by a third person, excluded; there must be "some appropriate evidence directly connecting that person with the *corpus delicti*"); *Pennsylvania:* 1919, Com. *v.* Bednorciki, 264 Pa. 124, 107 Atl. 666 (third person's threats excluded, because no other evidence, except opportunity, was offered); *Texas:* 1881, Dubose *v.* State, 10 Tex. App. 246 (homicide; third person's "motive, threats, and opportunity to kill", admissible); 1920, Taylor *v.* State, 87 Tex. Cr. 330, 221 S. W. 611 (homicide; the mere fact of animus by third persons against the deceased, without showing also threats and opportunity, excluded); *Washington:* 1906, State *v.* McLain, 43 Wash. 267, 86 Pac. 390 (arson; mere threats of a third person, excluded); *West Virginia:* 1871, Crookham *v.* State, 5 W. Va. 510, 513 (prior threats to kill, and subsequent immediate flight, of a third person, excluded as "not pertinent"); *Wisconsin:* 1899, Buel *v.* State, 104 Wis. 132, 80 N. W. 78 (murder; threats of third persons against the deceased, excluded).

Compare § 68, *ante* (*character* of a third person).

The following case is peculiar: 1910, R. *v.* McNulty, 22 Ont. L. R. 350 (murder by defendant man of illegitimate child of M. by him; the paternity being in issue as a motive, defendant's calling of third persons to prove their intercourse with M., who on cross-examination had denied it, excluded; grounds obscure; unsound).

§ **141.** [1] *Federal:* 1918, Griffin *v.* U. S., 1st C. C. A., 248 Fed. 6 (mailing obscene letters; the motive of the third persons to mail such letters to the addressee, held not improperly excluded in discretion); *Alabama:* 1902, Tatum *v.* State, 131 Ala. 32, 31 So. 369 (deceased's declarations of a difficulty with R., and facts indicating a motive in R., held inadmissible); 1904, Bowen *v.* State, 140 Ala. 65, 37 So. 233 (murder; facts showing a motive in third persons, excluded); 1904, Walker *v.* State, 139 Ala. 56, 35 So. 1011 (murder; a third person's motive, without other connecting evidence, excluded); 1910, McDonald *v.* State, 165 Ala. 85, 51 So. 629 (evidence of third person's motive, with evidence of bloodhound's trailing of him, ad-

§ 142. **Same: Miscellaneous Facts.** Of the other kinds of evidence indicating a third person as the doer of the act, it can only be said that the inclination should always be to admit any one of them, unless totally without probative suggestion.[1] In particular, the *conviction of another person* for the

mitted); *Georgia:* 1852, Crawford *v.* State, 12 Ga. 142, 145 (murder; the identity of the assailant not being directly testified to, evidence was admitted that just previously the deceased had had a quarrel with third persons); 1896, McElhannon *v.* State, 99 Ga. 672, 26 S. E. 501 (malicious mischief; motive in the prosecuting witness, admitted); *Illinois:* 1912, People *v.* Pezutto, 255 Ill. 583, 99 N. E. 677 (murder; quarrels, etc., of deceased with third persons, held properly limited by the trial Court in its discretion); *Louisiana:* 1854, State *v.* D'Angelo, 9 La. An. 46 (murder; that the deceased "had innumerable enemies", excluded as too vague; a showing that one or more designated enemies were present at the time of the killing would perhaps be admitted); 1878, State *v.* Johnson, 30 La. An. 921 (murder, no eye-witnesses being present; evidence received, on the peculiar circumstances, of quarrels by the deceased, shortly previous, with other persons who had "more reason for committing the murder than the accused"); *Massachusetts:* 1881, Com. *v.* Abbott, 130 Mass. 475 (murder of a woman; evidence was offered, to fix the murder on a third person, that her husband had quarrelled with her, and that a stranger was seen near the place on the day of the killing; Colt, J.: "The existence of ill-feeling as a motive for the commission of crime will not alone justify submitting to a jury the question of the guilt of a person entertaining such a feeling. It becomes material only when offered in connection with other evidence, proper to be submitted, showing that the person charged with such ill-feeling was in fact implicated in the commission of the crime. . . . The mere claim made by counsel that there are circumstances which tend to implicate the person charged is not enough; there must be proof of such circumstances, or an offer to prove. The evidence that a stranger was in town at the time of the murder does not alone implicate the husband"); *Missouri:* 1906, State *v.* Barrington, 198 Mo. 23, 95 S. W. 235 (murder; certain threats by third persons against the deceased, excluded); *Oklahoma:* 1915, Irvin *v.* State, 11 Okl. Cr. 301, 146 Pac. 453 (murder; evidence which "casts a bare suspicion upon another" is inadmissible); 1922, Phillips *v.* State, — Okl. Cr. —, 203 Pac. 902 (murder; ill-feeling in the neighborhood, not designating any particular person, excluded); *South Carolina:* 1905, State *v.* Gaylord, 70 S. C. 415, 50 S. E. 20 (threats, etc., of a third person received; here, to show that the third person, not the defendant, was the aggressor; compare § 112, *n.* 6, *ante*); *Texas:* 1906, Porch *v.* State, 50 Tex. Cr. 335, 99 S. W. 102 ("there must be something more than mere motive" evidenced against the third person); 1917, Taylor *v.* State, 81 Tex. Cr. 359, 195 S. W. 1147 (murder; motive of members of deceased's own family, admitted); *Vermont:* 1922, State *v.* Long, — Vt. —, 115 Atl. 734 (murder; the deceased's husband's criminal intimacy with another woman, as evidencing his motive to be the slayer, not admitted, there being no other evidence as to his being the slayer); *Washington:* 1920, Sound Timber Co. *v.* Danaher Lumber Co., 112 Wash. 314, 192 Pac. 941 (damage by fire; rule applied); *Wyoming:* 1903, Horn *v.* State, 12 Wyo. 80, 73 Pac. 705 (motive and opportunity of a third person; "much must depend on the circumstances of each case"; here excluded).

§ **142.** [1] ENGLAND: 1890, R. *v.* Dytche, 17 Cox Cr. 39 (felonious wounding; evidence that other persons, already convicted for the offence, were present and made the assault, and not the now defendants, admitted).

UNITED STATES: *Alabama:* 1846, Smith *v.* State, 9 Ala. 990, 995 (conduct of another to be admitted in rare cases only; Goldthwaite, J., dissenting); 1875, Levison *v.* State, 54 Ala. 519, 527 ("The evidence of the guilt must relate to the 'res gesta', and not to the declarations or conduct of the party on whom it is attempted to cast suspicion, subsequent to and having no immediate connection with the crime"; here excluding the flight of a third person); 1895, Whitaker *v.* State, 106 Ala. 30, 17 So. 456 (unexplained flight of a third person, excluded); 1895, Crawford *v.* State, 112 Ala. 1, 20, 21 So. 214 (murder; W.'s concealment of himself, held irrelevant on the facts, the defendant's actual deed of shooting being uncontroverted); 1911, McGehee *v.* State, 171 Ala. 19, 55 So. 159 (inculpatory conduct of a third person, excluded); 1915, Terry *v.* State, 13 Ala. App. 115, 69 So. 370 (murder; the flight of one H., with other evidence as to his guilt, admitted on the facts); *Georgia:* 1862, Phillips *v.* State, 33 Ga. 281, 287 (larceny; pleased conduct of a third person upon the discovery of the article on the defendant's premises, the third person having been present at the time of the theft, admitted); *Indiana:* 1900, Green *v.* State, 154 Ind. 655, 57 N. E. 637 (a dying declaration naming B., and not the defendant, as the murderer, B.'s threats, motive, and doings were admitted to prove B. the murderer, though not B.'s subsequent admissions of guilt); 1910, Stout *v.* State, 174 Ind. 395, 92 N. E. 161 (murder; that one B. had bought a revolver of similar calibre, and that bloodhounds had trailed him after the

same crime (assuming that it is predicated as the deed of one person, not of joint actors) should be received;[2] no technicality of the law of judgments should stand in the way; indeed, it is difficult to see why such a judgment should not be pleaded in bar. Certainly, the law must in some manner avoid the absurdity of convicting two persons for the same crime committable by one only. This same singular and inexcusable attitude of the Courts is seen also in the exclusion of a *third person's confession of guilt* under the exception to the Hearsay rule (*post*, § 1476), and of a *suicide's declarations* (*post*, § 143).

murder, not admitted, no offer of other evidence against B. being promised); *Iowa:* 1885, McPherrin *v.* Jennings, 66 Ia. 626, 24 N. W. 242 (death by unknown cause was rejected as an explanation of the plaintiff's horse's death); 1922, State *v.* Banoch, — Ia. —, 186 N. W. 436 (larceny; mere presence and departure of an unknown third person, excluded); *Kentucky:* 1813, Logan *v.* Steele, 3 Bibb 230 (trespass by burning a barn and killing horses: the plaintiff having proved threats by the defendant, the defendant was allowed to prove that other enemies of the plaintiff "had also threatened to injure his property"); 1908, Etly *v.* Com., 130 Ky. 723, 113 S. W. 896 (wife-murder; sundry evidence pointing to another person, held improperly excluded); *Massachusetts:* 1881, Com. *v.* Abbott, 130 Mass. 475 (cited *ante*, § 142); *Michigan:* 1913, People *v.* Emmons, 178 Mich. 126, 144 N. W. 479 (sale of fermented cider; evidence that other persons had the means of adulterating the cider sold, held admissible); *Missouri:* 1897, State *v.* Hack, 118 Mo. 92, 23 S. W. 1089 (third person's admissions of the larceny, excluded); *North Carolina:* 1833, State *v.* May, 4 Dev. 328, 331 (stealing a slave; evidence that another person, who lived near the slave, while the defendant lived at a distance, had been included in the original warrant for arrest, but had then fled the State, confessing himself guilty, excluded; but "direct evidence connecting W. with the 'corpus delicti' would certainly have been admissible"; the offered evidence, if not followed by evidence of an "overt act", was merely 'res inter alios acta'); 1846, State *v.* Duncan, 6 Ired. 236, 239 (accessory to murder; threats and arrest of other persons, excluded); 1873, State *v.* White, 68 N. C. 158 (larceny; suspicious conduct, and flight from the State, of a third person, excluded); 1874, State *v.* Haynes, 71 N. C. 79 (conduct of another person, before and after the crime, admitted); 1875, State *v.* Bishop, 73 N. C. 44, 46 (larceny; the familiarity of a third person with the premises, and his suspicious conduct on the night of the larceny, excluded); 1877, State *v.* Davis, 77 N. C. 483 (murder; threats of a third person, and his departure for the deceased's house, excluded, on the reasoning of State *v.* May); 1880, State *v.* Baxter, 82 N. C. 602 (larceny; another person's suspicious conduct, excluded); 1912, State *v.* Millican, 158 N. C. 617, 74 S. E. 107 (arson; the defendant's offer to show that during the time after their imprisonment other fires occurred in the same town; unsound; the offer here may have been defective in form, but the opinion's reasoning on the relevancy of such evidence shows a singular ignorance of the facts of crime and of the elements of logic); *South Carolina:* 1895, State *v.* Wallace, 44 S. C. 357, 22 S. E. 411 (a prosecuting witness was said to be the real thief, and other receipts of stolen property by him were admitted); *Vermont:* 1864, State *v.* Barron, 37 Vt. 57, 60 (illegal sale of liquor; a habit of "gentlemen in travelling about the country to carry spirituous liquors in bottles with them", not admitted to explain the source of bottles found in the defendant's public-house); 1883, Lewis *v.* Barker, 55 Vt. 23 (that a clerk in defendant's store had refused to work for him the day after it was burned; not admitted to show that the clerk had burned it); 1900, State *v.* Totten, 72 Vt. 71, 47 Atl. 105 (robbery; certain conduct of a third person indicating his guilt, excluded); *Virginia:* 1820, Rowt's Adm'r *v.* Kile's Adm'r, Gilmer, Va. 202 (action on an instrument of defendant; evidence of its forgery by the son of the payee, admissible; after "the agency of that person" in the forgery is made out, then that person's skill in imitating the hand in question would be admissible); *West Virginia:* 1871, Crookham *v.* State, 5 W. Va. 510, 513 (stabbing; threats and flight of another person, excluded).

[2] *Contra:* 1898, Chamberlain *v.* Pierson, 31 C. C. A. 157, 87 Fed. 420 (injury by derailment; to exonerate the defendant's employees, a conviction of third persons for causing the derailment was excluded); 1897, State *v.* Smarr, 121 N. C. 669, 28 S. E. 549 (that another had been convicted of the burglary charged, inadmissible).

But of course mere *suspicion* is nothing: 1899, Brown *v.* State, 120 Ala. 342, 25 So. 182 (merely showing that another was suspected, excluded).

Nor can the prosecution show that another person was *acquitted*, because this leaves still open the defendant's share in the act (except for the purpose mentioned in note 4, *infra*): 1893, People *v.* Mitchell, 100 Cal. 328, 334, 34 Pac. 698.

The general principle is applicable, it may be noted, equally to *civil cases*, such as the trespasses of animals.[3] Moreover, on the principle noticed already for the argument of opportunity (*ante*, § 132) the prosecution may in advance negative the argument by showing that other possible persons *did not do* the act.[4]

The fact of *mistaken identity* seems also to be relevant in this connection; the argument is that a third person, not the one charged, was really involved, and the fact of the existence of a third person capable of being mistaken for the one charged is some evidence that he possibly or probably did the things attributed to the person charged.[5]

§ 143. **Suicide, or other Self-Infliction of Harm; Suicidal Plans.** If the deceased, with whose death the defendant is charged, committed suicide, obviously the defendant could not have killed the deceased. There ought to be no doubt about the admissibility of *plans or desires to commit suicide*, even where no other evidence of its particular probability or feasibility is offered. Its improbability or non-feasibility should be matter for rebuttal, and should not exclude the evidence of its probability. That the evidence may be manufactured is no reason for its exclusion; for it may also *not* be manufactured, and if not, it is most cogent. The distance in time ought not to exclude the evidence of plans; for it does not exclude evidence of a defendant's threats (*ante*, § 108). That the deceased's hearsay statements of plan are admissible under an exception to the Hearsay rule, is plain (*post*, § 1725).

The relevancy of plans of suicide has been well expounded in the following passage:

1892, FIELD, C. J., in *Com.* v. *Trefethen*, 157 Mass. 180, 31 N. E. 961: "The nature of the case proved by the Commonwealth was such that it was not impossible that she had committed suicide. If it could be shown that she actually had an intention to commit suicide, it would be more probable that she did in fact commit it than if she had no such intention. . . . It may be true that an unmarried woman pregnant with child, if she has an intention to commit suicide, does not always carry that intention into effect, although she have an opportunity; but it is impossible to say that the actual existence of such an intention does not tend to throw some light upon the cause of death of such a woman when found dead under circumstances not inconsistent with the theory of suicide. . . . If it could be shown that during the week before her death she had actually attempted to drown herself, and had been prevented from doing so, it seems manifest that this fact, according to the general experience of mankind, would have some tendency to show that she might have made a second attempt."

[3] 1895, Green *v.* Skoqvist, 57 N. J. L. 617, 31 Atl. 228 (trespass by cattle; the trespassers of other persons' cattle, admitted);

Contra, but wrong: 1898, Dover *v.* Winchester, 70 Vt. 418, 41 Atl. 445 (sheep-killing; killing of other sheep by other dogs, not admissible to negative the guilt of defendant's dogs).

[4] 1897, Bram *v.* U. S., 168 U. S. 532, 18 Sup. 182 (where the probabilities lay between three persons).

[5] The argument is of course a common one, and only seldom has a ruling upon it been necessary: 1882, White *v.* Com., 80 Ky. 484 (mistaken identity allowed to be shown); 1881, State *v.* Witham, 72 Me. 531, 536 (adultery; testimony by a neighbor that the defendant had several times talked with the woman at her gate in the evenings of certain months; counter-testimony was admitted by a nearer neighbor that a person, not the defendant, had talked there during the same time; Peters, J., "Of course, both statements cannot be true; still it cannot reasonably be said that the truth of the one would not lessen the probability of the truth of the other").

Such evidence has constantly been admitted, as the annals of celebrated trials illustrate; until the squeamish doubtings of modern times, hesitating to accept the suggestions of natural logic, and not happening to be provided with justifying authority, furnished a few instances of rejection; but such rulings are without support from any point of view.[1]

§ 144. **Same: Motive for Suicide.** For the same reason, an emotion or feeling impelling to suicide is relevant; and facts tending to show the existence of such an emotion — either events, *e.g.* the pregnancy of a seduced woman, or conduct, *e.g.* exhibitions of melancholy or despair (two kinds of evidence dealt with *post*, §§ 391, 394) — should be received to show it. Contrary facts tending to show emotions averse to suicide would be equally admissible.[1]

§ **143.** [1] ENGLAND: 1699, Spencer Cowper's Trial, 13 How. St. Tr. 1166 (murder, the issue being whether the deceased had committed suicide or was killed; evidence was received of her being melancholy and depressed; "she said her distemper lay in her mind, . . . and the sooner it did kill her the better; . . . she neglected herself in doing those things that were necessary for her health, in hopes it would carry her off, and often wished herself dead").

UNITED STATES: *Federal:* 1917, Brawner *v.* Royal Indemnity Co., 5th C. C. A., 246 Fed. 637 (life policy, issue of suicide; deceased's expressions of inclination to suicide, admitted); *Florida:* 1917, Kersey *v.* State, 73 Fla. 832, 74 So. 983 (murder of wife by shooting; deceased's statements of having taken poison with suicidal intent, excluded, because the death was by gunshot and the shooting could not have been done by herself; unsound); *Illinois:* 1859, Jumpertz *v.* People, 21 Ill. 408 (intention to commit suicide, and consistency of the mode of death with suicide, admitted); 1892, Siebert *v.* People, 143 Ill. 571, 584, 32 N. E. 431 (statements of suicidal intent excluded; no ruling on the question of relevancy); 1917, People *v.* Ahrling, 279 Ill. 70, 116 N. E. 764 (cited *post*, § 1726); *Indiana:* 1909, Carter *v.* State, 172 Ind. 227, 87 N. E. 1081 (cited more fully *post*, § 238, n. 6); *Iowa:* 1912, State *v.* Beeson, 155 Ia. 355, 136 N. W. 317 (cited more fully *post*, § 1725, n. 1); *Kansas:* 1896, State *v.* Asbell, 57 Kan. 398, 46 Pac. 770 (admitted, there being a possibility of suicide); *Louisiana:* 1851, Preston, J., in State *v.* Bradley, 6 La. An. 559 (putting as admissible the supposed fact of a letter being found on the person of the deceased declaring an intention to commit suicide); *Massachusetts:* 1882, Com. *v.* Felch, 132 Mass. 32 (abortion; to show a self-abortion by the deceased, her "purpose and intent" "would be if known a material aid in coming to a correct conclusion"; but her declarations of purpose were excluded); 1892, Com. *v.* Trefethen, 157 Mass. 180 (intention to commit suicide, the defendant being the deceased's seducer, admitted; overruling Com. *v.* Felch; see quotation *supra*); *Minnesota:* 1896, Hale *v.* Life Co., 65 Minn. 548, 68 N. W. 182 (insurance policy; the deceased's threat to commit suicide, not admitted to show suicide, because made two years before); *Missouri:* 1894, State *v.* Punshon, 124 Mo. 448, 457, 27 S. W. 1111 (threats of deceased wife to kill herself, excluded, on the ground of hearsay); 1896, State *v.* Punshon, same decision affirmed on second trial, 133 Mo. 44, 34 S. W. 25; 1895, State *v.* Fitzgerald, 130 Mo. 407, 32 S. W. 1113 (excluded, unless accompanied by an attempt to execute them; overruling State *v.* Ludwig, 70 Mo. 412); 1915, State *v.* Ilgenfritz, 263 Mo. 615, 173 S. W. 1041 (murder; deceased's threats of suicide, held admissible; overruling State *v.* Punshon and State *v.* Fitzgerald); *New York:* 1890, Smith *v.* Benef. Soc., 123 N. Y. 85, 25 N. E. 197 (suicide as a defence to an insurance policy; the deceased's design to commit suicide before taking out the policy, admitted); *Ohio:* 1872, Blackburn *v.* State, 23 Oh. St. 146, 149, 165 (intention more than six years before, admitted); *Tennessee:* 1884, Boyd *v.* State, 14 Lea 161, 177 (a disposition and intention to commit suicide, held admissible, "as there is no direct testimony as to the fact of the homicide"); *Vermont:* 1896, State *v.* Fournier, 68 Vt. 262, 35 Atl. 178 (question left undecided); 1898, State *v.* Marsh, 70 Vt. 288, 40 Atl. 836 (deceased's declarations that he was giving his horse arsenic as medicine, offered to show that he had it and might have used it himself, excluded).

Compare the citations *post*, § 1725 (declarations of intention to suicide).

§ **144.** [1] 1699, Spencer Cowper's Trial, Eng. (see citation *ante*, § 143); 1904, State *v.* Kelly, 77 Conn. 266, 58 Atl. 705 (deceased's despondency several months before, excluded; unsound); 1859, Jumpertz *v.* People, 21 Ill. 408 (evidence admitted of mental condition of cheerfulness, or the contrary, pointing towards or against suicide); 1896, State *v.* Punshon, 133 Mo. 44, 34 S. W. 25 (the deceased's "disordered condition of mind",

excluded); 1872, Blackburn *v.* State, 23 Oh. St. 165 (a previous melancholy disposition, tending to suicide, admitted; the interval between the death and the time testified to affecting only the weight of the evidence); 1884, Boyd *v.* State, 14 Lea Tenn. 161, 177 (melancholy or despondent disposition relevant on the question whether suicide was committed; Deaderick, C. J.: "The conditions and surroundings at the time of death may be looked into if of a character likely to impel suicide"); 1899, Morrison *v.* State, 40 Tex. Cr. 473, 51 S. W. 358 (deceased's cheerful behavior up to time of death, admitted to disprove suicide); 1898, State *v.* Marsh, 70 Vt. 288, 40 Atl. 837 (state of health of deceased, considered).

Compare the citations *post*, § 391 (motive for suicide).

SUB-TITLE I (*continued*): EVIDENCE TO PROVE A HUMAN ACT

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

CHAPTER VIII.

§ 148. **General Principle.** The convenience has already been explained (*ante*, § 43) of grouping the various kinds of evidentiary facts according as they come, in time, before, at, or after, the act to be proved. There have now been considered the various kinds of evidentiary facts in the first two groups, *i.e.* facts having Prospectant and Concomitant indications; there remains the third group, namely, facts having a *Restrospectant* indication.

The inference here *looks backward from the evidentiary fact to the alleged act; i.e.* taking our stand at the fact offered, we infer from it that at *some previous time the act was or was not done.*

The common feature of this group of evidentiary facts is that they are all open to a similar source of weakness, and thus offer to the opponent a general

mode of explaining away (*ante*, § 34) their force. Thus, if, to show that A on January 1 stole a bicycle, there is offered the fact of his possession of the bicycle on June 1, the probative force of this fact rests on the assumption that the hypothesis that will explain his possession is that he obtained the bicycle by stealing it. But there are also in truth other possible hypotheses, for example, that it was given or sold to him by the thief or by a purchaser from the thief, or that he found it. The question of admissibility is whether the hypothesis of his stealing is, among all hypotheses, 'prima facie' sufficiently prominent to make the fact admissible (on the general theory of Relevancy, *ante*, § 31); and, if it is admissible, the opponent may show that one of the other hypotheses is in truth a much more probable explanation (on the theory of Explanation, *ante*, § 34). So, if in proving the doing of an act by A as a mark of his former existence as B, there is offered (as in the Tichborne case) the fact that A has a recollection of the event, or if, to disprove it, we offer the fact that A has no recollection of it, the opponent may show, in the first instance, that the recollection has come, not from having done the act, but from having heard or read about it; and, in the second instance, that the lack of recollection is due, not to not having done the act, but to the natural fading of memory.

In short, the tests of Relevancy and the opportunities of Explanation are of the same general nature in this group of evidentiary facts. The general argument runs: Is the trace one whose possession (or lack of possession) by the person charged could be explained by the operation of other causes than the doing (or not doing) of the act in question?[1]

The kinds of facts may best be roughly subdivided according to the mode in which such causes might operate, *i.e.* according as the connection between the evidentiary trace and the act in question is *mechanical*, *organic*, or *mental*. The typical case of the first is the possession of stolen goods; of the second sort, corporal resemblance of child to parent; of the third sort, consciousness of guilt.

a. MECHANICAL TRACES

§ 149. **Miscellaneous Instances in Criminal Cases; Identity-Evidence distinguished.** The presence upon the person or premises of articles, fragments, stains, tools, or any other resulting circumstance, is constantly employed as the basis of an inference that the person did an act with which these circumstances are associated. In general, however, few questions of relevancy arise.[1] There are innumerable instances in the records of celebrated

§ 148. [1] From the point of view of logic and psychology as applicable to argument before the jury (not the rules of Admissibility), see the materials collected in the present author's "Principles of Judicial Proof, as given by Logic, Psychology, and General Experience, and illustrated in Judicial Trials" (1913), §§ 138–155.

§ 149. [1] *Federal:* 1909, Sorenson *v.* U. S., 8th C. C. A., 168 Fed. 785 (burglary; possession of revolver, nitroglycerine, etc., 18 days later, excluded on the facts); *Ala.* 1892, Gilmore *v.* State, 99 Ala. 154, 159, 13 So. 536 (boot-tracks); 1897, Thornton *v.* State, 113 Ala. 43, 21 So. 356 (book and pencil); 1909, Phillips *v.* State, 162 Ala. 14, 50 So. 194 (human

trials; but their relevancy is so patent that no occasion is given for rulings of law:

> "Who finds the heifer dead and bleeding fresh,
> And sees, fast by, a butcher with an axe,
> But will suspect 'twas he that made the slaughter?"
>
> *William Shakspeare*, Henry VI., Pt. II, III, 2.

1850, Mr. *W. Wills*, Circumstantial Evidence, 3d ed., 96: "In a case of burglary, the thief had gained admittance to the house by means of a penknife, which was broken in the attempt, and part left in the window-frame; the broken knife was found in the pocket of the prisoner, and perfectly corresponded with the fragment. . . . In another case, identification was established by the correspondence of the wadding of fire-arms with part of a torn letter found in the prisoner's possession; and in a case on the Northern circuit, where a man had been shot by a ball, the wadding of the pistol, which stuck in the wound, was found to be part of a ballad, which corresponded with another part found in the pocket of the prisoner."

(1) The few rulings recorded are merely the occasional instances in which such questions have been (usually quite without necessity) pushed to a decision in the higher Court.

(2) It is to be noted that (on the principle of § 34, *ante*) the opponent may always *explain away* the indication by showing other hypotheses for the presence of the trace, — as where, on a charge of murder, the presence of blood-stains is explained by the killing of a chicken, or the presence of a weapon by the owner's previous loan of it to another person. It is also to be noted that an argument may be based *negatively* on such traces, — as where it is shown, on a charge of murder, that the murderer must have been stained with blood, while the accused bears no blood-stains and therefore could not have done the killing. To this also there is a counter-argument (of Explanation) that the absence of such traces can be accounted for by their intervening destruction.

(3) The question may be asked, What is the distinction between evidence of *Traces* and evidence of *Identity?* For example, to prove a murder, evidence

tracks); *Fla.* 1893, Whetston *v.* State, 31 Fla. 240, 250, 12 So. 661 (shoe-tracks excluded, because having no marked peculiarities); *Iowa:* 1907, State *v.* Kehr, 133 Ia. 35, 110 N. W. 149 (burglary while armed with a revolver; the possession of a revolver when arrested two months later, excluded; this is finical); *Kan.* 1905, State *v.* McAnarney, 70 Kan. 679, 79 Pac. 137 (blood-stains on trousers; excluded here, because the trousers had been placed in contact with the deceased's bloody clothing before chemical testing); *Ky.* 1900, Ireland *v.* Com., — Ky. —, 57 S. W. 616 (slungshot, excluded on the facts); *Me.* 1870, State *v.* Kingsbury, 58 Me. 238, 243 (fire set by kerosene; presence of kerosene stains on a shirt admitted); *Mass.* 1850, Webster's Trial, 5 Cush. 295, 318, Barnes' Rep., 84 (the lower jaw of the deceased, etc., found on the defendant's premises); *Mo.* 1898, State *v.* Miller, 144 Mo. 26, 45 S. W. 1104 (pistols); *N. Y.* 1908, People *v.* Del Vermo, 192 N. Y. 470, 85 N. E. 690 (knife like that with which a killing was done); *N. Dak.* 1897, State *v.* Campbell, 7 N. D. 58, 72 N. W. 935 (burglary; various tools, etc., admitted); *S. Dak.* 1898, State *v.* Garrington, 11 S. D. 178, 76 N. W. 326 (sack of defendant found on premises the next day, admitted); *Tex.* 1899, Pike *v.* State, 40 Tex. Cr. 613, 51 S. W. 395 (the fact of the sale of some liquor being admitted, the presence of drunken men about the defendant's store was admitted to show that the liquor was intoxicating; compare R. *v.* Burton, cited *post*, § 152 and the cases in § 153); *Utah:* 1906, State *v.* Freshwater, 30 Utah 442, 85 Pac. 447 (defective typewriter showing the mark on a letter); *Va.* 1898, McBride *v.* Com., 95 Va. 818, 30 S. E. 454 (certain traces held inadmissible).

is offered that a gun found in the defendant's possession is exactly fitted by the bullet found in the body of the deceased; what kind of evidence is this? The truth is that this evidentiary fact is really double and involves both kinds of inferences. The nature of the argument to prove Identity (*post*, § 411) is that a certain fact offered is an essential mark of sameness of person, — in this instance, that the fit of the bullet is a necessary and unique mark of the slayer. The weakness of this type of argument is that the mark may not be necessarily associated with one person but may be common to a number of persons; and hence the mode of dealing with such evidence is to show that other persons also have the same mark, — here, that other persons in the neighborhood possessed guns of the same bore. Now the argument from Traces assumes that the argument to identity has been settled and accepted, *i.e.* here it assumes that the use of the gun in question is an essential or sufficient mark of the murderer, and it then sets about to prove that the accused possessed that mark, *i.e.* used that gun; and to do this it offers the fact of its subsequent finding in the accused's possession. Here the weakness of the argument is an entirely new and different one, namely, the trace of subsequent possession does not necessarily indicate a use at the time of the murder, since the gun may be one which the accused has recently borrowed, or it may be his own gun which was lent to another person at the time of the murder. Thus, there are two wholly different evidentiary questions involved in the use of this evidence, — first, the question of Identity, whether this individual gun is a necessary mark of the slayer; and secondly, the question of Traces, whether its subsequent possession evidences its use at the time of the murder. The present type of argument, then, — the argument from Traces to a former act, — is a distinct argument from that of Identity. Although in some instances the same circumstance offered may give rise to both arguments, this is by no means necessary or usual, and there is no essential connection between the two kinds of arguments.

§ 150. **Brands on Animals and Timber.** When an animal is found in B's possession, and the animal bears a brand or other mark, and one of the issues is whether A is the owner of the animal, it is a natural and immediate inference that the animal belongs to the person whose brand it bears, and, if that brand is A's, then to A. This inference, however, while sufficiently probable in the light of practical experience, is in truth a composite one, made up of two steps: (1) first, the inference, from the presence of A's usual mark, that A placed this particular mark, — a genuine argument under the present principle, from a trace to the source of the trace; and (2) secondly, the inference from the fact that A placed it there, to the fact of his ownership of the animal. The latter step of inference is the vital one; it is perhaps not less natural than the former, but it is more serious in its effect. Its real probative foundation is that of the well-established presumption of ownership from possession (*post*, § 2515).

Courts have usually held, when the question was raised, that the inference

of *ownership* may be drawn, as a matter of common law;[1] and it has been universally conceded that the presence of the brand is evidence of *identity* (*i.e.* of the animal being one of those originally branded by the brand-user) even though not of ownership. The larger scope of the evidence has been generally confirmed by legislation. In most of the stock-raising communities, the *brand on animals* is made evidence of ownership; though in order to encourage registration and thus prevent confusion, the rule is applied only to brands duly registered by law.[2]

§ 150. [1] 1900, R. *v.* Forsythe, 4 N. W. Terr. Can. 398 (a brand is on common law principles evidence of ownership; Rouleau, J., diss.; best opinion on the subject, by McGuire, J.); 1886, People *v.* Bollinger, 71 Cal. 17, 11 Pac. 799; (larceny; "an earmark used by the alleged owners of the hogs was some evidence of ownership"); 1907, State *v.* Wolfley, 75 Kan. 403, 89 Pac. 1016 (on common-law principles a brand may be evidence of ownership as well as of identity); 1865, Plummer *v.* Newdigate, 2 Duv. Ky. 1 (a brand "U. S." is admissible as evidence of ownership, but is not 'per se' sufficient evidence); 1886, State *v.* Cardelli, 19 Nev. 319, 10 Pac. 433, *semble* (at common law a cattle-brand may be some evidence of ownership); 1888, Stewart *v.* Hunter, 16 Or. 62, 16 Pac. 876 ("Branding stock furnishes evidence of its ownership").

Contra: 1872, Peoples *v.* Devault, 11 Heisk. 431 (a "U. S." brand is not evidence of ownership unless shown to have been put on by U. S. officers).

For the use of an unrecorded brand as indicating a *scheme to suppress evidence of larceny*, see *post*, § 278.

[2] It should be remembered that some of the ensuing decisions interpret earlier statutes which may have been changed in the interval: CANADA: *Dom.* R. S. 1906, c. 146, Crim. C. § 989, (in criminal cases, the presence upon cattle of a duly recorded brand or mark is to be evidence of ownership); *Alta.* St. 1913, 2d sess., c. 24, § 5 (brand not vented shall be evidence of ownership by registered brand-owner); *Br. C.* St. 1914, 4 Geo. V, c. 9, § 5 (stock-brand not vented to be evidence of ownership, if recorded and uncancelled); *Man.* R. S. 1913, c. 25, § 8 (cattle-brand duly allotted shall be evidence of ownership, where title to cattle is involved); *N. W. Terr.* Cons. Ord. 1898, c. 76, § 5, St. 1900, c. 22, § 5 ("the presence of a recorded brand on any stock" shall be evidence of the ownership of the animal); *Ontario:* St. 1919, c. 70, Brand Act, § 4 (certificate of recorded brand of stock shall be evidence of "the ownership of such certificate" with further proof of authenticity); *Saskatchewan:* R. S. 1920, c. 123, § 5 (duly recorded brand shall be "'prima facie' evidence of the ownership by the owner of such brand of the animal bearing the same").

UNITED STATES: *Arizona:* Rev. St. 1913, Civ. c. § 3760 (on trial for violation of the stock laws, the presence of brand or earmark "claimed by the accused to be his brand or mark", though not recorded, is evidence of conversion; and the ownership of live-stock from a foreign State, etc., "may be shown by the marks or brands thereupon" though not recorded); § 3757 (official record of live-stock brands, proved by certified copy, is 'prima facie' evidence of all the facts required to be entered in said book", and of the rights of the person named, or of the assignee on proof of assignment, "to use said brand", etc.); § 3758 (brand or earmark duly recorded is prima facie evidence that the animal "is the property of the owner of such brand and earmark", except when the animal is one seized pursuant to this law, and except for fresh brands upon mavericks, etc.); 1901, Brill *v.* Christy, 7 Ariz. 217, 63 Pac. 757 (statute held not to make the recorded brand evidence of ownership); 1914, Marley *v.* State, 15 Ariz. 495, 140 Pac. 215 (St. 1905, c. 51, §§ 66, 67, and St. 1912, c. 4, p. 13, as to brand evidence of ownership, considered); *California:* Pol. C. 1872, § 3168 (county recorder's certified copy of recorded cattle brand or mark is evidence "as to the ownership of all animals legally marked or branded"); § 3172 (in action to recover possession, "the mark or brand is prima facie evidence that the animal belongs to the owner of the mark or brand"); *Colorado:* Comp. St. 1921, § 3119 (earmarks may be used in evidence "in connection with the owner's recorded brand"); § 3126 (in all suits or criminal proceedings involving the title to animals, a certified copy of the record of a brand shall be "prima facie evidence of the ownership of such animal"); 1895, Chesnut *v.* People, 21 Colo. 512, 523, 42 Pac. 656 (recorded brand, admissible "merely as a mark of identification"); 1897, Brooke *v.* People, 23 Colo. 375; 48 Pac. 502 (unrecorded brand; same);
Idaho: Comp. St. 1919, §§ 1920, 1924, 1927 (in all proceedings where title or right of possession is involved, the brand on an animal, if duly recorded, shall be 'prima facie' evidence that "the animal belongs to" the brand-owner and that the latter has the right of possession at the time of action; "no evidence of ownership of stock by brands or for the purpose of identification shall be permitted"

unless the brand is recorded; the State recorder's certified copy of the record, or the original certificate, shall be evidence of the right to use the brand; "parol evidence shall be inadmissible to prove the ownership of a brand"); § 1944 (brandbook, recording animals to be removed from State, to be "evidence of the facts recited therein"); 1907, State *v.* Dunn, 13 Ida. 9, 88 Pac. 235 (under the statute oral evidence of the ownership of a brand is inadmissible; since the statute, "still the brand itself may serve as the means to the owner himself for the identification of the animal"; compare § 1639, *post*); 1920, State *v.* Grimmett, 33 Ida. 203, 193 Pac. 380 (larceny; unrecorded brand admissible to evidence identity, though not ownership, under St. 1913, c. 171, p. 543, amending Rev. C. 1908, § 1228);

Illinois: Rev. St. 1874, c. 88, § 3 (county clerk's record of stock brands and marks, admissible);

Missouri: Rev. St. 1919, § 4251 ("If any dispute shall arise about the question of whose any particular mark or brand may be, it shall be decided by the record of the clerk [of the county court]"; an interesting specimen of primitive legislative modes of expression);

Nebraska: § 90 (ownership of cattle, horses, mules, and swine in issue; the recorded brand to be 'prima facie' evidence of "ownership of the person whose brand it may be"); § 106 (on trial of offences concerning cattle running at large, etc., "proof of brand shall be deemed 'prima facie' evidence of ownership of such stock)";

Nevada: Rev. L. 1912, § 7172 (on trial of offences concerning animals running at large upon a range, "the brand and other marks upon such animal shall be prima facie evidence of ownership"); § 2237 (on trial of actions for possession of any animal marked or branded as provided by statute, "the mark and brand" shall be primary evidence of ownership); § 2234 (certified copy by recorder under seal of recorded mark and brand, to be evidence of ownership in "any action" of all animals legally marked and branded); 1886, State *v.* Cardelli, 19 Nev. 319, 10 Pac. 433 (an unrecorded brand may be evidence of ownership)

New Mexico: Annot. St. 1915, § 118 (no brand not lawfully recorded "shall be recognized as evidence of ownership of the horses", etc.); § 122 (in prosecutions for cattle-offences, certified copy of the registered brand "shall be sufficient to identify all horses" etc., and "shall be prima facie proof that the person owning the recorded brand is the owner of the animal branded with such brand"); 1891, Pryor *v.* Portsmouth C. Co., 6 N. Mex. 44, 27 Pac. 327 (instruction under the statute construed); 1892, Terr. *v.* Chavez, 6 N. Mex. 455, 30 Pac. 902 (the brand is evidence equally for an assignee of it); 1901, Gale *v.* Salas, 11 N. Mex. 211, 66 Pac. 520 (statute applied); 1909, Terr. *v.* Valles, 15 N. Mex. 228, 103 Pac. 984 (larceny; unrecorded brand is evidence of identity);

North Dakota: Comp. L. 1913, § 2596 (certificate of record of brand or mark of stock by commissioner of agriculture and labor, to be "evidence of ownership"); § 2597 (vent-brand to be "prima facie evidence of the sale or transfer of such stock"); § 2605 (where a certificate of brand or mark is lost or destroyed, "the original brand records only shall be prima facie evidence of ownership, except where a fact can otherwise be established");

Oklahoma: Comp. St. 1921, § 4028 (recorded brand on stock, to be evidence of ownership); 1906, Hurst *v.* Terr., 16 Okl. 600, 86 Pac. 280 (larceny of cattle; an unrecorded brand is evidence of ownership; the statutory rule merely provides an additional, not an exclusive sort of evidence, Texas rulings distinguished);

Oregon: Laws 1920, § 9162, as amended by St. 1921, Feb. 21, c. 151 ("No evidence of ownership of stock by brand, or for the purpose of identification, shall be permitted" unless the brand is recorded: except as in § 1968); § 1968 (for animals other than sheep, goats, or hogs, earmarks "shall be taken in evidence in connection with the owner's recorded brand", when title is in issue; for sheep, hogs, and goats, earmarks as well as brands etc. "shall be considered in evidence" when title is in issue, even though not recorded); 1899, State *v.* Hanna, 35 Or. 195, 57 Pac. 629; State *v.* Morse, 35 Or. 462, 57 Pac. 631; 1914, State *v.* Henderson, 72 Or. 201, 143 Pac. 627 (unrecorded brand is admissible to identify); 1920, State *v.* Moss, 95 Or. 616, 188 Pac. 702 (where two brands are found, one older than the other, the presumption of ownership attaches to the earlier brand); 1917, State *v.* Randolph, 85 Or. 172, 166 Pac. 555 (under St. 1915, c. 33, an unrecorded braad cannot be used to evidence either identity or ownership; history of the legislation examined); 1919, State *v.* Warner, 91 Or. 11, 178 Pac. 221 (larceny; under St. 1915, c. 33, § 3, all evidence of ownership or identification founded on an unrecorded brand is excluded; Bean, J., diss. because here there was other evidence than the unrecorded brand);

South Dakota: Rev. C. 1919, § 8135 (in civil action involving title, recorded brand on animal is "prima facie evidence of the ownership of the person whose brand it may be"; and "proof of the right of any person to use any brand shall be made by a copy of the record of the same", etc.);

Texas: (recorded brand on stock is evidence of ownership); Rev. Civ. St. § 7160 ("No brands except such as are recorded by the officers named in this chapter shall be recognized in law as any evidence of ownership of the cattle, horses, or mules upon which the same may be used"); St. 1913, c. 69, p. 129 (amend-

The same policy has led, in timber-producing communities, to similar legislation for *marks on logs* and *timber*.[3]

ing Rev. Civ. St. § 7160, by providing "that this shall not apply in criminal cases"); 1898, Turner *v.* State, 39 Tex. Cr. 327, 45 S. W. 1020 (larceny; brand recorded after the date of the alleged taking is not evidence of ownership under the statute; moreover, as evidence of identity it is unnecessary; prior cases on the latter point disapproved); 1900, Welch *v.* State, 42 Tex. Cr. 338, S. W. 46 (preceding case approved, but treated as holding that the unrecorded or subsequently recorded brand is at least evidence of identity); 1899, Chowning *v.* State, 41 Tex. Cr. 81, 51 S. W. 946 (like Welch *v.* State; repudiating Tittle *v.* State, 30 Tex. App. 597); 1900, Walton *v.* State, 41 Tex. Cr. 454, 55 S. W. 566 (recorded brand is evidence of ownership, even in a county other than where recorded); 1903, Swan *v.* State, — Tex. Cr. —, 76 S. W. 464 (Turner case cited, but held not to exclude but merely to limit the purpose of a multiple brand as evidence); 1903, Sapp *v.* State, — Tex. Cr. —, 77 S. W. 456 (Turner and Welch Cases, *supra*, both approved).

Utah: Comp. L. 1917, § 211 (State livestock board secretary's record of marks and brands; certified copy "shall be deemed evidence in law");

Washington: R. & B. Code 1909, § 3158 (recorded stock-brand, to be evidence of ownership of animal);

Wyoming: Comp. St. 1920, § 7474 (on any indictment, "proof of the brand thereon shall be sufficient to identify all classes of live-stock, and proof of the ownership of such brand shall by prima facie evidence of the ownership of such live stock"); (live-stock brands; § 3095 certified copy of recorded brand to be "prima facie evidence" of the ownership of such animal by the party whose brand or mark it might be, and shall be taken as evidence of ownership in all civil or criminal proceedings "when the title to the animal is involved or proper to be proved, when such claim is sustained and corroborated with other evidence"); 1916, Harris *v.* State, 23 Wyo. 487, 153 Pac. 881 (larceny; certified copy of recorded brand, admitted, under St. 1913, c. 126, and Comp. St. 1910, § 6177).

Distinguish here the inference of *larceny* of cattle from the *possession of stock misbranded* with the defendant's brand placed over another brand. Here the inference is from the act of misbranding the stock to the act of stealing, *i.e.* the inference from defendant's conduct in fabricating evidence of his ownership so as to conceal the evidence of actual ownership by another. This inference belongs therefore under the principle of § 278, *post* (fabrication of evidence as an implied admission). But it rests on the additional assumption that the defendant himself effected or was privy to the misbranding, and not merely on the fact of the misbranding or of the finding of such stock in defendant's possession. Hence the ruling in State *v.* Moss, 95 Or. 616, 188 Pac. 702 (1920), cited *post*, § 278, n. 6.

[3] CANADA: R. S. 1906, c. 146, Crim. C. § 990 (in trials for certain offences concerning timber, a duly registered timber-mark shall be evidence of ownership of the timber).

UNITED STATES: *Ark.* Dig. 1919, § 8407 (logs and timber "having any such recorded mark impressed or fixed thereon shall be presumed to belong" to the person recorded for that mark); *Fla.* Rev. G. S. 1919, § 2396 ("Any log found" bearing recorded brand "shall be deemed prima facie to be the property of such person"): § 3903 (official stamp "appearing upon timber or lumber adrift", to be evidence of ownership); *Minn.* Gen. St. 1913, § 5471 (recorded log-mark on logs to be evidence of ownership); *Mo.* Rev. St. 1919, § 10322 (recorded mark on logs, lumber, etc., to be evidence of ownership); § 5727 (recorder of deeds' record of flour-brands, provable by certified copy); *N. Mex.* Annot. St. 1915, § 3377 (log-brands; "the certificate of the recorded brand and the proof of the brand upon any such product shall be prima facie evidence of the ownership thereof"); *N. Y.* Com. L. 1909, Navigation, § 73 (presence of recorded mark on floating logs or timber, presumptive evidence of ownership of party recording); *North Carolina:* Con. St. 1919, § 3989 (timber marked with registered trade-mark is presumed to be "the property of the proprietor of such trademark"); *Oh.* Gen. Code Ann. 1921, § 6232 (registered trade-mark on timber, to be prima facie evidence of trade-mark proprietor's ownership of timber); *Or.* Laws 1920, § 7651 (recorded mark on log or timber, to be evidence of ownership); *Philippine Islands:* Admin. C. 1917, § 517 (registered brand of animals; the copy issued to the owner is to be "a certificate of ownership, which certificate shall be 'prima facie' evidence that the animal is the property of the person therein named as owner"); 1908, Catabian *v.* Tungcul, 11 P. I. 49; *Wash.* R. & B. Code 1909, § 7094 (recorded mark on logs or timber afloat, to be evidence of ownership); *W. Va.* Code 1914, c. 62E, § 16, St. 1882, c. 119 (trade-mark on timber; the timber presumed to be "the property of the proprietor of such trade-mark"); *Wisconsin:* Stats. 1919, § 1739 (recorded mark on logs or timber afloat, raises presumption of ownership).

Distinguish the question whether the *official register* of brands or marks is admissible to show a person to be entitled to use the brand recorded as his; this is usually dealt with in the same legislation, but it falls under another principle (*post*, § 1647).

§ 150*a*. **Tags, Signs, and Number-Plates on Automobiles, Railroad Cars, Ships, and other Vehicles and Premises.** The foregoing principle is equally applicable to other marks on property, provided only in common experience the particular kind of mark is associated with ownership or control of the person signified by the mark. Thus, the name or number marked on a *shop*, a *ship*, a *railroad car*, or other chattel or structure, may be admissible to show that person's ownership or control.[1] In particular, the number-plate borne on an *automobile* is admissible to show that the person who originally registered that number as owner is the owner of the car bearing that number-plate.[2] This would be plain on principle at common law; yet only a few

§ **150***a*. [1] *Canada:* 1921, R. *v.* Hayton, 57 D. L. R. 532, Ont. (keeping liquor; the brand "liquor" on a box, held not sufficient evidence of contents); *Illinois:* 1903, Chicago City R. Co. *v.* Carroll, 206 Ill. 318, 68 N. E. 1087 (injury by defendant's railroad car; that the cars running on the line where the plaintiff was injured bore the inscription "Chicago City R. Co.", admitted); 1895, Pittsburgh, F. W. & C. R. Co. *v.* Callaghan, 157 Ill. 406, 41 N. E. 909 (lettering on locomotive cab, held to be evidence of ownership by purporting owner); *Iowa:* 1913, Howell *v.* Mandelbaum & Sons, 160 Ia. 119, 140 N. W. 397 (name on a wagon, held evidence of ownership; cases collected); *Kansas:* 1907, State *v.* Ford, 76 Kan. 424, 91 Pac. 1056 (keeping a place for illegal sale of liquor; bills of sale of liquor found in the defendant's cash register, naming him as vendee, admitted, as analogous to the circumstantial evidence of tags on goods); *Mass.* 1859: Stearns *v.* Doe, 12 Gray 482, 486 (port-name on stern of vessel); 1883, Com. *v.* Collier, 134 Mass. 203, 205 (label on barrel); 1900, Ingraham *v.* Chapman, 177 Mass. 123, 58 N. E. 171 (presence of name on a dog's collar is some evidence of the person's ownership; "it is like the case of a brand or mark upon cattle"); 1916, Robinson *v.* Doe, 224 Mass. 319, 112 N. E. 1007 (battery by a man alleged to be an agent of the deft circus-owner; the signs on wagons, etc., and the men's uniforms, etc., held to be sufficient evidence of defendant's identity as owner and employer); 1922, Eshenwald *v.* Suffolk Brewing Co., — Mass. —, 134 N. E. 642 (personal injury caused by defendant's wagon; the marked name on the wagon, etc., admitted as evidence of ownership); *Mich.* 1918, Theisen *v.* Detroit T. & T. Co., 200 Mich. 136, 166 N. W. 901 (agency evidenced by defendant's letterhead bearing agent's name); *N. Y.* 1910, People *v.* Hill, 198 N. Y. 64, 91 N. E. 272 (murder; keys with tag bearing defendant's name found at the place; held doubtful; this case shows how different a man the judge is when reasoning about his own affairs at home and reasoning in the judicial strait-jacket; suppose he had forbidden a certain young man to court his daughter and then one morning found on the parlor floor by the sofa a bunch of keys with the tabooed young man's name; would he hold that "there was some doubt whether the evidence was properly admitted"?); *Or.* Laws 1920, § 8776 (fraudulent use of food container; stamped name on container, presumed to be that of the owner); *W. Va.* Code 1914, c. 62E, § 22, St. 1897, c. 15 (bottle bearing trademark, presumed to be the property of trademark owner).

[2] *Conn.* St. 1921, c. 400, § 45 (motor-vehicles; "proof of the registration number of any motor vehicle therein concerned [*i.e.* violation of law] shall be prima facie evidence in any criminal case that the owner was the operator thereof"); *Mass.* 1910, Trombley *v.* Stevens-Duryea Co., 206 Mass. 516, 92 N. E. 764 (an automobile, occupied by the driver only, injured the plaintiff; held (1) that the number borne on the car with the certificate of registration of the defendant, who was not the driver, were sufficient evidence of the defendant's ownership or right to possession; (2) that the driver's possession of the automobile was no evidence that he was the agent or servant of the owner; the Court's opinion is on the latter point, inconsistent, for after first stating the question to be "whether there was evidence for the jury", it proceeds to rule that "there is no presumption"; whichever ruling the Court meant to make, it is unsound as a matter of practical experience, which is the basis of all presumptions); *Mich.* 1918, Hatter *v.* Dodge Bros., 202 Mich. 97, 167 N. W. 935 ("a proof of the license number upon an automobile . . . identifies both vehicle and ownership"); *Minn.* Gen. St. 1913, § 2643 (in proceedings against the registered owner of a

of the elaborate motor-vehicle statutes expressly so declare. But the apparent caution exercised by watchful devotees of automobilist interests in keeping such a provision out of the statutes should not permit the common-law principle to be ignored by the courts; for it is a dictate of common sense.

The principle of Explanation (*ante*, § 149, 34) leaves the opponent free to point out any facts which in the case in hand weaken the inference from general experience.

But a caution is necessary in extending the analogy of these brand and mark cases to the use of *tags*, *labels*, *bills of sale*, and other documents.[3] The basis of the inference in the brand cases is the known custom that *only the owner ordinarily* imprints a brand or mark of his initials, name, etc. But when *e.g.* a bill of sale for liquor sold by Roe to J. S. is found on J. S.'s premises, the inscription to J. S. is by custom the statement of the vendor, hence is (even when authenticated) no more than the vendor's hearsay statement; hence, its only available status, prima facie, is that of an *admission* of J. S.; to bring it to this point, the principles of §§ 260 and 1073, *post*, must be invoked and satisfied.

§ 151. **Postmarks on Envelopes.** The postmark on an envelope is, upon the same principle, admissible to show that the envelope bearing it had *passed through the hands of the postal officials* at the time and place indicated. Here, however, the question separates itself more distinctly into two others, — first, whether the postmark may be assumed genuine, without more evidence (*post*, § 2152), and if so, whether the postmark, regarded as a statement of the postal official, may be admitted under the Hearsay exception for official statements (*post*, § 1674). This analysis might be applicable equally to the brands of stock and timber; but it seems not to have been made, and its recognition for postmarks only is due to the course of early English rulings.

§ 151*a*. **Fingerprints; Footmarks.** (1) The inference from *fingerprints*, in its present aspect, is no different from the inference from any other Trace, *e.g.* a paint-smear or a torn coat. The peculiar strength of this evidence

motor-vehicle, "the fact that such motor-vehicle has upon it the registration-number assigned to such owner under this Act shall be prima facie evidence that such motor-vehicle belonged to such registered owner"); *N. Mex.* St. 1912, c. 28, § 4 ("in any controversy respecting the identity or ownership or control of an automobile, the number borne by it shall be prima facie evidence that it was owned and operated by the person to whom the license therefor was issued"); *N. D.* Comp. L. 1913, § 2976 (in actions against registered owner of motor-vehicle, the presence on the vehicle of the registration number assigned under the statute is evidence "that such motor-vehicle belonged to such registered owner"); *Pa.* St. 1919, June 30, § 30, Dig. 1920, § 995, automobiles (motor vehicles; "the registration number displayed on such motor vehicle shall be prima facie evidence that the owner of such vehicle was then operating the same"; with detailed rule for overcoming the presumption); *Wyo.* Comp. St. 1920, § 3484 ("in any controversy respecting the identity or ownership or control of any motor vehicle, the number borne by it shall be prima facie evidence that it was owned and operated by the person to whom the certificate of registration therefor was issued").

Distinguish the question whether the *ownership* of the car is evidence of the *agency of the driver* (*post*, § 2509).

[3] As applied in State *v.* Ford, Kan., *supra*, n. 1.

lies rather in the Identity inference; for the use of all evidence from Traces involves commonly both inferences at the same time (as noted *ante*, § 149). Fingerprints as evidence can therefore better be considered under Identity (*post*, § 413*a*).[1]

(2) The inference from *footmarks* is also no different, in its present aspect, from the inference from other Traces. Here, too, the Identity inference plays an important part, in that the Identity inference (in contrast to the use of fingerprints) is apt to be specially weak, because open to special dangers. It is therefore considered under Identity (*post*, § 413*b*).

§ 152. **Possession of Stolen Chattels.** On a charge of taking goods, the fact that A was found, subsequently to the taking, in possession of the goods taken is relevant to show that he was the taker. It is true that several other hypotheses are conceivable as explaining the fact of his possession; nevertheless the hypothesis that he was the taker is a sufficiently natural one to allow the fact of his possession to be considered as evidentiary. There has never been any question of this:

1866, POLLOCK, C. B., in *R.* v. *Exall*, 4 F. & F. 922 (burglary; the three accused were seen near the place on the night in question, and the next morning the watch was found on Exall): "The law is that if, recently after the commission of the crime, a person is found in possession of the stolen goods, that person is called upon to account for the possession, — that is, to give an explanation of it which is not unreasonable or improbable. The strength of the presumption which arises from such possession is in proportion to the shortness of the interval which has elapsed. If the interval has been only an hour or two, not half a day, the presumption is so strong that it almost amounts to proof, because the reasonable inference is that the person must have stolen the property; in the ordinary affairs of life, it is not probable that the person could have got possession of the property in any other way. . . . Such evidence is, no doubt, not conclusive. As an illustration of this, I may mention that I remember hearing the late Baron Gurney say that he once picked up something lying in the road and observed, 'Now if this has been stolen and I am found with it, I might be charged with the robbery.' The other circumstances in the case, however, will always aid or rebut the presumption, and it is not the less evidence because it is not conclusive evidence. It is *some* evidence, if its weight depends upon the circumstances, and especially on the nature of the possession, whether it is open and avowed or secret and concealed, and what is the nature of the account given of it. What the jury have to consider in each case is, what is the fair inference to be drawn from all the circumstances before them, and whether they believe the account given by the prisoner is under the circumstances reasonable and probable or otherwise."

The use of this sort of evidence goes back as far as any in our law; for in the earlier system of Germanic law the possession of goods stolen gave rise to a peculiar and particularly speedy mode of procedure unfavorable to the accused. In modern times the fact of recent possession is also given a procedural effect, in that it casts upon the defendant the duty of producing an explanation, in default of which the case may be closed adversely to him.

151a. [1] Whether the object — door, table, etc. — on which the fingerprints were impressed *must be produced* in proving them, depends upon the general principle as to the production of chattels (*post*, § 1182).

This effect of the evidence as a *presumption* or as *sufficient* ('prima facie') *evidence* is dealt with elsewhere (*post*, § 2513).

The inquiry is here as to the admissibility of the evidence, and only one or two questions capable of dispute have ever been suggested. The *time* of the subsequent possession is immaterial; the lapse of a long interval opens a greater possibility of innocent explanations, and may prevent the raising of a presumption of law, but does not alter the relevancy of the fact.[1] Possession by a *husband* can probably not be used against the wife, unless the husband is shown to be ignorant of the presence of the articles.[2] The possession of goods of the *same kind* as the general class of goods from which the taking was done is receivable, even though the specific quantity or any quantity of the general mass cannot be identified or discovered or shown to be missing.[3] But these and other questions are almost invariably discussed in judicial opinions from the point of view of the legal presumption to be attached to the evidence (*post*, § 2513), and not as involving a question of admissibility. Where a presumption is held to be created, the admissibility of the evidence is of course conceded; but where the presumption is refused, it is sometimes difficult to say whether the inadmissibility of the evidence is also intended to be declared.

§ 153. **Possession of Chattels as indicating other Crimes than Larceny.** Wherever goods have been taken as a part of the criminal act, the fact of the subsequent possession is some indication that the possessor was the taker, and therefore the doer of the whole crime. Thus such possession is receivable to prove the commission of other acts than the simple crime of larceny. It is receivable to show the commission of a *burglary*,[1] a *forgery*,[2] a *counter-*

§ **152.** [1] 1862, R. *v.* Wilson, 2 F. & F. 123, Bramwell, B. (said to be "strong evidence", if "shortly after" the stealing; here seventeen months after; yet the evidence was used); 1846, Com. *v.* Montgomery, 11 Metc. 534, 537 ("at a period somewhat distant", sufficient).

[2] See *post*, § 2513.

[3] *England:* 1854, R. *v.* Burton, Dears. Cr. C. 282 (larceny of pepper; the defendant was found coming out of the warehouse with pepper in his pockets of a sort similar to that on the next floor above in the warehouse, but it could not be shown that any pepper was missing; Maule, J., admitting the evidence: "If a man go into the London Docks sober without means of getting drunk, and comes out of one of the cellars very drunk wherein are a million gallons of wine, I think that would be reasonable evidence that he had stolen some of the wine in that cellar, though you could not prove that any wine was stolen or any wine was missed"); 1881, Sartin *v.* State, 7 Lea Tenn. 679 (stealing M's horse; the defendant when found was riding M's mule, and evidence was received of the stealing of M's mule on a day subsequent to that charged, in company with C, who when found was riding M's horse charged to have been stolen by the defendant); 1898, Parker *v.* U. S., 1 Ind. Terr. 592, 43 S. W. 858 (larceny of cattle; defendant's possession of other stolen cattle not received to identify those charged, because not taken from the same place).

For other cases concerning the *possession of stolen goods* as evidence of crime on other evidential principles, see *post*, §§ 218, 414.

§ **153.** [1] 1904, McCormick *v.* State, 141 Ala. 75, 37 So. 377 (watch); 1905, Flanagan *v.* People, 214 Ill. 170, 73 N. E. 347; and cases cited *post*, § 2513, n. 8; 1878, Short *v.* State, 63 Ind. 376, 380; 1804, Com. *v.* Millard, 1 Mass. 6; 1922, State *v.* Crawford, — Utah —, 206 Pac. 717 (robbery; revolver found in defendant's room 40 days later, excluded on the facts).

[2] 1861, Com. *v.* Talbot, 2 All. Mass. 161 (possession of a forged document by one claiming a benefit under it, admitted, to show forgery); 1885, State *v.* Yerger, 86 Mo. 33, 39 (possession of forged instrument is evidence of forgery of it).

feiting,[3] a *murder*,[4] a *liquor-selling*,[5] or any other crime in which either a chief or a subordinate result might be the possession of a material article. For the same reason, the possession of *burglar's tools* is relevant to show that the possessor committed burglary, provided it first appears that the burglary was committed with such tools.[6]

§ 154. **Possession of Money to evidence Larceny, etc.** The mere possession of *money* is in itself no indication that the possessor was the taker of money charged as taken, because in general all money of the same denomination and material is alike, and the hypothesis that the money found is the same as the money taken is too forced and extraordinary to be receivable. Where the denominations of the money found and the money taken correspond in a fairly close way, the fact of the finding of that specific money would have probative value and be relevant, because the money found is fairly marked as identical with the money taken.

Another mode, however, of making the fact of money-possession relevant is to show its *sudden possession*, *i.e.* to show that before the time of taking the person was without money, while immediately after that time he had a great deal; this reduces the hypotheses to such as involve sudden acquisition, and a dishonest acquisition thus becomes a natural and prominent hypothesis. On such conditions the possession of unidentified money becomes relevant.[1]

[3] 1815, R. *v.* Fuller, R. & R. 308, by all the Judges (admitted to show a procuring with intent to utter).

[4] 1905, People *v.* Jackson, 182 N. Y. 66, 74 N. E. 565 (murder; the defendant's possession of the deceased's watch and pocket-book, admitted); 1857, Williams *v.* Com., 29 Pa. 102, 103, 106 (murder; possession of money and watch of the deceased, admitted; "possession of the fruits of crime is of great weight in establishing the proof of murder, where that crime has been accomplished with robbery").

[5] Going into a place sober and coming out drunk evidences the *obtaining of liquor* therein: 1854, Maule, J., in R. *v.* Burton, Dears. Cr. C. 282 (quoted *ante*, § 152); 1859, Com. *v.* Taylor, 14 Gray Mass. 26; 1867, Com. *v.* Kennedy, 97 Mass. 224; 1889, Com. *v.* Finnerty, 148 Mass. 165, 19 N. E. 215; 1893, Com. *v.* Hurley, 158 Mass. 159, 33 N. E. 342.

The following rulings probably depend upon the same principle: 1860, Com. *v.* Maloney, 16 Gray Mass. 20 (goings in and comings out of numbers of persons with jugs, etc., admitted to show liquor-selling); 1889, Com. *v.* Finnerty, 148 Mass. 165, 19 N. E. 215 (admitting the mere fact of frequent goings in and comings out, as under certain circumstances indicating the sale of liquor within); 1893, Com. *v.* Brothers, 158 Mass. 206, 33 N. E. 386 (same); 1899, Pike *v.* State, 40 Tex. Cr. 613, 51 S. W. 395 (cited *ante*, § 149).

[6] 1865, People *v.* Winters, 29 Cal. 658 (but first it must be shown that a burglary was committed, and by the aid of such tools; otherwise "there is no connection, probable or possible, between it and an offence confessedly committed without the aid of such tools"); 1882, People *v.* Hope, 62 Cal. 291, 295 (same in substance); 1890, People *v.* Sansome, 84 Cal. 449, 453, 24 Pac. 143 (same principle applied); 1879, State *v.* Morris, 47 Conn. 179, 181 (burglary while armed; the possession of arms after emerging from the house admitted as evidence of their possession while in it); 1884, State *v.* Franks, 64 Ia. 39, 42, 19 N. W. 832; 1866, State *v.* Harrold, 38 Mo. 496, 498 (burglary; the finding of the goods stolen, and of the burglar's tools, admitted); 1872, State *v.* Dubois, 49 Mo. 573 (finding of burglars' tools, admitted).

Distinguish the admission of burglar's tools, possessed *before the act*, to show a design (*post*, § 238, *ante*, § 88).

§ 154. [1] CANADA: 1914, R. *v.* Minchin, 15 D. L. R. 792, Alta. (theft of public moneys; the accused's deposits and withdrawals of amounts in bank account, admitted, though in themselves "absolutely immaterial", to show that the money went into his possession and not that of fellow-employees; Beck, J., diss.; Stuart, J., concurring, said: "The case [of Williams *v.* U. S., *infra*] is criticised severely and perhaps with justice in W. on Evidence, § 154, in a note; the criticism is apparently very sound, but the authority of the Supreme Court of the United States is impressive"); 1918, R. *v.* Minchin, 18 D. L. R. 340, Can.

§ 155. **Same: Discriminations as to Stolen Chattels and Money.** The use of possession of stolen goods to show their stealing must be distinguished from the use of possession of *other stolen goods* to show a *knowing receipt* of stolen goods, the object there being to show knowledge or intent (*post*, § 323). The relevancy of lack of money to show a *motive for stealing* (*post*, § 392) or to show *incapacity* to pay or to lend (*ante*, § 89) involves also different questions. Whether a person may be *tried under the same indictment* for stealing and for knowing receipt of stolen goods, and be found guilty as an accessory of the theft, raises questions of criminal pleading.

§ 156. **Possession of Receipt or Instruments of Debt, to show Payment.** The payee of money naturally leaves behind him in the hands of the payor some document by way of receipt or evidence of payment. (1) Where this document is a *signed acknowledgment*, — in the strict sense, a receipt, — it is receivable as an Admission.[1] (2) Where this document is merely the *instrument of liability itself*, customarily surrendered to the obligor upon satisfaction made, — *e.g.* a promissory note, a bond, — the possession of the instrument by the obligor may be relevant to show a past transaction of discharge. The circumstances in each case, however, must determine; for

Sup. (stealing money while an official; bank-book of defendant showing an unexplained excess of deposits, held not erroneously admitted; but the judges differed in their reasoning; no authority on this point cited).

UNITED STATES: *Federal:* 1897, Williams *v.* U. S., 168 U. S. 382, 18 Sup. 92 (extortion; large bank deposits by the defendant, about the times of the alleged offence, and in excess of his salary, held improperly submitted to the jury as evidence of dishonest acquisition, because there was no necessary connection between this excess and the alleged extorted sums; the Court treats the question as though the jury had been told that this proved guilt, though the trial Court merely said "you are at liberty to infer" an unfavorable explanation; the opinion is valueless and illustrates this Court's frequent confusion of the admissibility of evidence and its effect as a presumption); *Alabama:* 1897, Leonard *v.* State, 115 Ala. 80, 22 So. 564 (possession of money after a larceny, admitted); 1900, Turner *v.* State, 124 Ala. 59, 27 So. 272 (possession of money after a larceny, excluded on the facts); 1901, Leath *v.* State, 132 Ala. 26, 31 So. 108 (forgery; mere possession of a smaller sum of money, held inadmissible; a strained ruling); *Illinois:* 1853, Gates *v.* People, 14 Ill. 433, 438 (that the defendant before a murder and robbery had no money, but after it had some resembling that taken, admitted); *Kansas:* 1877, State *v.* Grebe, 17 Kan. 458, 460 (larceny; possession of money by one who had been poor, admitted); *Massachusetts:* 1846, Com. *v.* Montgomery, 11 Metc. 534, 537 (larceny of bank bills and checks; principle applied); 1854, Boston & W. R. Co. *v.* Dana, 1 Gray 101 (embezzlement; insolvency before entering the employment and subsequent possession of property far exceeding his earnings in the employment, admitted; leading opinion); 1898, Com. *v.* Mulrey, 170 Mass. 103, 49 N. E. 91 (false pretences by a city official having a salary of $1,200; deposits in bank at the time charged too large to be accounted for by his salary, received); 1902, Com. *v.* Devaney, 182 Mass. 33, 64 N. E. 402 (robbery); 1905, Com. *v.* Tucker, 189 Mass. 457, 76 N. E. 127 (murder; the accused's lack of money before the crime and possession of it afterwards, and the loss of money from the house of the victim, admitted); 1911, Com. *v.* Richmond, 207 Mass. 240, 93 N. E. 816; *New York:* 1886, New York & B. F. Co. *v.* Moore, 102 N. Y. 667, 6 N. E. 293 (civil action for embezzlement by an employee); 1905, People *v.* Gaffey, 182 N. Y. 257, 74 N. E. 836 (forgery; the defendant's small salary and large deposits, admitted to show the probable mode of disposition of the cash-stealings covered by the forged notes; the Court seems to err in calling this "evidence of motive"); *Washington:* 1898, State *v.* Burns, 19 Wash. 52, 52 Pac. 316 (possession of any money when arrested, admitted).

Distinguish the use of *lack of money* to show *motive* (*post*, § 392).

§ **156.** [1] For admissions in general as open to explanations, see *post*, § 1058.

For receipt as not conclusive but open to denial by *parol evidence*, see *post*, § 2432.

For a receipt in *unproved handwriting*, as presumptively authenticated, see *post*, § 2148.

For a receipt of a *third person*, as not admissible without calling him to the stand, see *post*, § 1456.

the party offering the evidence must be one who would naturally have received the instrument from the party now seeking for payment.[2] *Counter-explanations* may be shown by circumstances explaining the possession otherwise, as where the debtor has access to the place of custody of the instrument. But in judicial opinions few questions here arise except upon the propriety of creating a *presumption of payment* (*post*, § 2518), for this requires a much stronger quality of probative value than mere admissibility.[3]

§ 157. **Possession or Existence of a Document, to show Execution, Delivery, or Seisin.** The possession or existence of a document is connected with a number of inferences, most of them resting on the present principle, but some of them requiring for convenience to be treated elsewhere in connection with other principles.

(1) The *existence of a document* purporting to be *signed* by A is under all circumstances some evidence of A's *genuine execution* of it. But the question which has naturally arisen is whether under certain circumstances it is sufficient evidence of A's execution. That it is sufficient, in combination with one or more circumstances, is well recognized in a few classes of cases. The *age* of the document, together with its custody, and (if it is a deed of land) with the fact of possession of the land, suffices for its authentication (*post*, § 2137); the *official custody* of a purporting official document equally suffices (*post*, § 2158); the imprint of an *official seal* will often suffice to authenticate (*post*, § 2161); and the course of the mails may suffice for a *reply-letter* (*post*, § 2153). All these rules, however, are auxiliary rules of sufficiency, not rules of admissibility. It is necessary here merely to note that the rules are founded on an inference applying the present principle.

(2) The *existence of a document* in a certain *kind of place* — such as the grantee's custody or office of registry — may be sufficient evidence of the *delivery* of the document, so far as its delivery may be material. Here the usual question is not of the admissibility of the fact (which is conceded), but of its sufficiency to raise a presumption of law (*post*, § 2520).

(3) The *existence of a document in the house or among the goods* of A may be offered as evidence that A has had *possession* of it, or has otherwise dealt with it.[1] Here the question is genuinely one of mere admissibility; and it is

[2] Instances of the use of this evidence: 1800, Egg *v.* Barnett, 3 Esp. 196 (possession of a bill of exchange, bearing the plaintiff's indorsement as payee and the defendant's name as drawer); 1809, Sluby *v.* Champlin, 4 Johns N. Y. 461, 468 (possession by surety of a bond for duties and of the collector's receipt).

[3] This explains the apparent illiberality of the following ruling: 1810, Lord Ellenborough, C. J., in Pfial *v.* Vanbatenberg, 2 Camp. 439 (excluding the mere bill of exchange, when offered by the acceptor against the drawer to prove payment; "Show that the bills were once in circulation after being accepted, and I will presume that they got back to the acceptor's hands by his having paid them. But when he merely produces them, how do I know that they were ever in the hands of the payee, or any indorsee, with his name upon them as acceptor? It is very possible that when they were left for acceptance he refused to deliver them back, and, having detained them ever since, now produces them as evidence of a loan of money").

§ 157. [1] 1843, R. *v.* O'Connor, 4 State Tr. N. S. 935, 1045 (sedition; Rolfe, B.: "If time elapses between the apprehension of the party and his being taken away, and you find documents afterward in his possession, 'non constat' but they came there afterwards"); 1848, R. *v.* O'Brien, 7 State Tr. 1, 100, 193 (documents found in a portmanteau of the defendant after

usually answered by holding that the fact of the document's discovery in that condition is admissible, provided the place was actually in A's control and provided the lapse of time has not made too probable the hypothesis of other persons' intrusion:

1581, *Campion's Trial*, 1 How. St. Tr. 1050, 1061; Campion the Jesuit being charged with treason in seducing subjects to take an oath of obedience to the Pope, *Anderson*, Queen's counsel, said: "These papers, thus found in houses where you were, show that for ministering such oaths you are a traitor. . . . For if a poor man and a rich man come both to one house, and after their departure a bag of gold be found hidden, forasmuch as the poor man had no such plenty and therefore could leave no such bag behind him, by common presumption it is to be intended that the rich man only, and no other, did hide it. So you, a professed papist, coming to a house, and there such reliques found after your departure, how can it otherwise be implied than that you did both bring them and leave them there; so it is flat they came there by means of a papist, 'ergo' by your means." *Campion:* "Your conclusion had been necessary if you had also showed that none came into the house, of my profession, but I."

From the foregoing inference must be distinguished the inference, from the existence of a document in A's possession, to his *knowledge of its contents* (*post*, § 260) or, still further, to his *approval of the contents* as his admission (*post*, § 1073).

(4) The *existence of a document of ownership of land* (a deed, lease, or license) may be evidence that the *maker of the document had possession of the land* at the time of making it. This doctrine, now well settled in English law, is applicable in proof of title by *adverse possession in prior generations*, where no evidence has survived except the documents themselves which embodied acts of claim of ownership.[2] It used to be said occasionally that the

he had been arrested and others had had access to it, received); 1897, State *v.* Shive, 58 Kan. 783, 51 Pac. 274 (robbery; near the place was found an envelope addressed to one defendant bearing the return-request of the other; excluded, because no possession of the envelope by either was shown).

[2] The line of cases is as follows: ENGLAND: 1783, Clarkson *v.* Woodhouse, 5 T. R. 412, 3 Doug. 189 (a custom to hold land exempt from common right; to show prescriptive exercise, leases of 71 and 123 years of age were received; Lord Mansfield, C. J.: "They are so old that nobody can speak to possession under them"); 1808, Rogers *v.* Allen, 1 Camp. 309 (alleged licenses of fishing and dredging, dated from 1661 to the end of that century, were objected to because no rent appeared to have been paid under them; Heath, J., thought this not necessary, "as they were of such an ancient date that it could not reasonably be supposed that evidence of such payments was still preserved; however, to give any weight" to them, the receipt of payment, or other acts of ownership, must be shown "in later times"); 1809, Doe *v.* Askew, 10 East 520 (to prove a custom of a widow's holding during chaste viduity, entries in the manor book of successions to estates so described were admitted, although no instances of the acting upon the custom by forfeiture for unchastity were testified to); 1829, Coombs *v.* Coether, M. & M. 398, *semble* (old lease-copies; possession not necessary for chapter-house leases, which were like public records); 1842, Doe *v.* Pulman, 3 Q. B. 622 (a counterpart of a lease, admitted, as equivalent to it, without accounting for the original lease or showing possession); 1862, Malcomson *v.* O'Dea, 10 H. L. C. 593, 614 (Willes, J.: "Ancient documents . . . purporting on the face of them to show exercise of ownership, such as a lease or a license, may be given in evidence without proof of possession or payment of rent under them, as being in themselves acts of ownership and proof of possession; this rule is sometimes stated with the qualification, provided that possession is proved to have followed similar documents, or that there is some proof of actual enjoyment in accordance with the title to which the documents relate"); 1878, Bristow *v.* Cormican, L. R. App. Cas. 641, 653 (see quotation *supra*); 1899, Blandy-Jenkins *v.* Dunraven, 2 Ch. 121 (ancient agreement in settlement of litigation

deed was itself an act of possession; but this is incorrect; it is merely evidence of possession, in the nature of a trace or mark such as only a possessor is likely to have. The limitations of the doctrine are thus expounded:

1878, CAIRNS, L. C., in *Bristow* v. *Cormican*, L. R. 3 App. Cas. 641, 653, 668: "Old leases have always been considered to be admissible as being evidence facts of ownership. . . . [The circumstances of giving and taking them] are real transactions between man and man not intelligible except on the footing of title, or at least an honest belief in title." Lord BLACKBURN: "Inasmuch as after long time all the witnesses who could prove such possession are dead, the law permits ancient documents, either with or without evidence of ancient payment of rent, to be given as evidence from which the jury may properly draw an inference that there was such possession. For in the ordinary course of things men do not make leases unless they act on them, and lessees do not pay rent unless they are in possession, so that the ancient payment of rent adds weight to the ancient indenture."

1847, COLLIER, C. J., in *Doe* v. *Eslava*, 11 Ala. 1028, 1039: "Ancient documents, it is said, are allowed to support ancient possession, though these documents are not proved to be part of any 'res gesta.' They are admitted in such cases as forming a part of every legal transfer of title and possession by act of parties. . . . Care is first taken to ascertain their genuineness; and this is shown prima facie by proof that the document comes from the proper custody or by otherwise accounting for it."

This doctrine is in itself simple, and the only difficulty has arisen in distinguishing it from two superficially related principles which usually come into application in the same sort of litigation. (*a*) One of these is the doctrine (referred to *supra*, par. 1) of presuming the *genuineness of ancient deeds*. As a part of that doctrine it has in some Courts been laid down that possession of the land must have been enjoyed by the grantee before his alleged ancient deed can be presumed genuine (*post*, § 2142); in that rule, then, it is the land-possession which is evidence of the document's genuineness; while in the present rule it is the document which is evidence of the land-possession. Moreover, in that rule it is the grantee's possession which is material, while in the present rule it is the lessor's or grantor's. Thus the two rules are really

for trespass, admitted as "evidence of an act of possession"; following Malcomson *v.* O'Dea);

CANADA: 1885, Esterbrooks *v.* Towse, 24 N. Br. 387, 398 (defendant claimed under the son of C, who had been in possession, presumably under a purchase from B, who had a power of attorney to sell, given by the administrator of A, the original grantee; all the parties prior to defendant being deceased, B's indorsement on the original grant to A, which was in C's possession, that B had sold the land to C, was held admissible, though on varying grounds; Wetmore, J., diss.).

UNITED STATES: *Federal:* 1889, Baeder *v.* Jennings, 40 Fed. 199 (certain old documents of title admitted as evidence of possession); 1918, Virginia & W. Va. Coal Co. *v.* Charles, D. C. W. D. Va., 251 Fed. 83, 122 (ancient land-titles: "the English doctrine referred to in W. on Evidence, § 157, does not seem to be at all applicable to the situation before us"); *Massachusetts:* 1870, Boston *v.* Richardson, 105 Mass. 351 (licenses, etc. of the city made 67 and more years ago, to use certain land, objected to because "no acts were proved to have been done under them"; the licenses were received, "at least when taken in connection with the evidence of the subsequent occupation", because "it would be impossible to supply the proof required"); 1905, Murphy *v.* Com., 187 Mass. 361, 73 N. E. 524 (boundary of town land; certain leases, town votes, and treasurer's entries, not all ancient, admitted to show "actual possession by the town, through its lessees, under a claim of title"); *Texas:* 1904, State *v.* Bruni, 37 Tex. Civ. App. 2, 83 S. W. 209 (ancient deeds admitted to show possession and other acts of ownership).

Whether *payment of taxes* (as evidenced by tax-receipts) is evidence of possession of the land, has been a large question; see the following opinion, and cases cited: 1904, Chastang *v.* Chastang, 141 Ala. 451, 37 So. 799.

concerned with different evidential purposes, and rest on independent grounds. (*b*) The other principle is that of using deeds, or other land-documents, ancient or modern, as verbal acts accompanying an act of possession and signifying the *scope of the claim of possession* (*post*, § 1778). Here the possessor may be grantee or grantor; his possession is, with reference to the document, neither evidence of it nor evidenced by it; the document's genuineness or validity is immaterial; it merely colors and defines his claim, as a verbal part of his act of adverse possession.

(5) Finally, the reverse of the preceding inference (4) may be made; *i.e.* from the present *possession of land* the inference that there once *existed a deed* of it, now lost, may be made:

1844, GILCHRIST, J., in *New Boston* v. *Dunbarton*, 15 N. H. 201, 205: "The jury may find, from the facts in a case, that a certain deed once existed, although there be no direct evidence of its execution. Where parties have occupied land and have conducted themselves precisely as they would have done if a deed had been made, it may be left to the jury to say whether a deed under which one of the parties claims ever had an existence. . . . Whether a fact which is unknown is to be presumed from its usual connection with other facts which are known would seem to be properly in all cases a question for the jury."

This is the logical foundation of the *presumption of a lost grant*, which after long service has finally degenerated into a mere rule of substantive law (*post*, § 2522), although the living principle of the original inference is still occasionally open to application.[3] It may be noted here that this inference, of a document's execution from the fact of land-possession, has no relation to the inference of *possession of the whole* of a piece of land from possession of a part (*post*, § 378).

§ 158. **Negative Traces**: (1) **Lack of News, to show Death or Loss.** Where certain results would have followed if an act or an event had occurred (or not occurred), the absence of those results is some indication that the act or event has not occurred (or occurred).

A common class of evidence of this sort is that of *lack of news* to show probable *death* of a person or the probable *loss* of a ship; for as it is usual for living persons to be heard from directly or indirectly, by persons having an interest in knowing, and for ships' officers to leave word of their journey at the ports they touch or with the other ships they pass, the lack of any such news indicates their non-existence. Such evidence has always been received.[1] It

[3] 1869, Goodell *v.* Labadie, 19 Mich. 88 (agreement to exchange lands; deed performing this agreement by one party admitted to show probable performance by the other also); 1844, Downing *v.* Pickering, 15 N. H. 344, 350 (possession, plus an agreement to make the deeds, sufficient on the facts to go to the jury).

§ 158. [1] A good example of such evidence in its various possibilities will be found in the Tichborne Case, R. *v.* Castro, Charge of C. J. Cockburn, *passim*. Other examples are as follows: 1763, Rowe *v.* Hasland, 1 W. Bl. 404, Lord Mansfield, C. J. (that a person "has not been heard of for many years", admissible to show death; here the person had lived in Liverpool); 1815, Watson *v.* King, 1 Stark. 121 (loss of a ship; evidence admitted that she had been last seen in a tempest in March, 1814, and never since heard from; Lord Ellenborough, C. J., "observed that this was the kind of proof usually given in actions against insurers, where the vessel is proved to have sailed and has not been heard of for two or three years").

Compare the cases cited *post*, § 664 (negative testimony).

is usually discussed, however, with reference to the legal *presumption of death*, founded on this evidence (*post*, § 2531). The fact of lack of news is admissible without regard to the time elapsed, and is not limited by the seven-year-period required for the presumption. In counter-explanation (*ante*, § 34) such facts as the infrequency of communication from the place the person went to, the fixed determination of the person to give up all connection with his former home, and the like, may of course be used to explain away the force of the fact of lack of news.[2]

So, too, *fictitious nature* of a name, or the *non-existence* of an alleged person of a certain name and residence, may be evidenced by the failure to find any such person after diligent search.[3]

§ 159. **Same: (2) Lapse of Time, to show Payment.** It is a natural propensity of creditors to *seek to* realize their claims, when left unsatisfied, by process of law, within a fair space of time. When it is found, after some time, that a creditor has not resorted to law for the realization of his claim, there is a natural inference that this failure was due to the lack of right and necessity to resort to law, *i.e.* that the claim had been satisfied by payment. The fact may be explained away by showing a more probable hypothesis (*ante*, § 34), for example, the insolvency of the debtor, his absence, or other circumstance likely to prevent the creditor from proceeding even though the claim was unpaid. The general evidentiary fact, however — lapse of time — is also the foundation of a legal *presumption of payment* (*post*, § 2517), and plays very little part in the theory of admissibility.

§ 160. **Same: (3) Lost Will; Lost Documents in general; Debtor's Fraud in Possession; Sundry Instances.** There are various other situations in which a retrospectant inference is permissible from the absence of certain results to the absence of certain causes. Most of these raise no doubt of admissibility and are commonly of importance only in the rules of presumption or elsewhere; the chief of these are the inference, from the *non-discovery of a will* once existing, to the testator's *revocatory destruction* of it (*post*, § 2523), the inference from the non-discovery of *any document* and the lapse of time, to the *loss of the document* (*post*, §§ 1195, 2522), and the inference, from a *debtor's continued possession of property*, after its mortgage or sale, of his fraudulent intent to defraud creditors by the transfer (*post*, §§ 336, 1082, 1779). In

[2] That the evidence of inability to find a person is not hearsay, see *post*, § 1789.

[3] 1907, Phelps *v.* Nazworthy, 226 Ill. 254, 80 N. E. 756 (whether a deed-grantee was a fictitious person; that no person by that name had ever lived in the township, admitted); 1858, State *v.* Wentworth, 37 N. H. 217; and cases cited *post*, §§ 1313, 1725, 1789, and 2531, n. 7.

Contra: 1906, Taylor *v.* State, 50 Tex. Cr. 381, 97 S. W. 474 (forgery of names of persons said to be fictitious; the sheriff's returns of "not found" on subpœnas issued in various countries for these persons as witnesses, excluded; such a ruling may be a suitable part of some little esoteric game of quibbles; but it is so vast a distance sundered from the world of common sense as to create a suspicion that the Court is under some mistake as to the nature of the objective, called Truth, which it was placed there to ascertain).

That a *voter*, alleged to have voted illegally as a *non-resident*, cannot be found or heard of on diligent search in the district, is another example of the principle; but some Courts are pedantically strict in their application of it: 1905, State *v.* Rosenthal, 123 Wis. 442, 102 N. W. 49.

general, that a certain effect was not seen or heard by those who would naturally have seen or heard it had its cause occurred is some evidence of the non-occurrence.[1] But, though this situation can thus be treated as permitting an inference from circumstantial evidence, it is usually more natural to treat it as involving testimonial evidence; *i.e.* the argument is that witness A is qualified to testify that act X was not done by B, because A would have seen or heard it if it had been done; A's statement that it was not done is therefore receivable; thus, the principle of testimonial knowledge is here the controlling one (*post*, § 671).

b. Organic Traces

Next are to be considered those retrospectant inferences which rest for their validity, not upon mechanical associations of effect and cause, but upon the working of organic natural laws, and usually upon some physiological principle. The fact offered as evidence is traced back to its cause through some physiological process to the originating act.

§ 163. **Birth during Marriage, to show Legitimacy.** When a child X is born to a wife A married to a husband B, it is natural to infer that the intercourse which begot the child was the intercourse of the husband B, *i.e.* that the *child is legitimate*. It is true that this inference is less strong where the birth occurs very shortly after marriage; but even here the likelihood that the pre-marital intercourse was B's is greater than that it was another man's. It is also true that, even where the birth occurs a year or more after the marriage, it is possible that the begetting intercourse was another man's; but it is still exceedingly more likely that it was that of B the husband. Upon this likelihood is founded a rule of procedure, namely, the presumption of legitimacy (*post*, § 2527). No controversy of admissibility arises.

§ 164. **Same: Adultery of the Mother, to show Illegitimacy.** A birth during marriage having been shown by the proponent of legitimacy, the opponent, according to the theory of explanation (*ante*, § 34), would ordinarily be allowed to show that the birth could be accounted for otherwise than by the husband's begetting, *i.e.* could show the mother's intercourse with another man, about the probable time of conception, as accounting for the birth. In the same way, a person charged as the father of an unmarried woman's child might explain away the evidentiary fact of the birth of a child by showing the fact of her intercourse with other men about the time. This form of argument, however, seems more correctly to fall under the theory of multiple

§ **160.** [1] 1805, R. *v.* Long Buckby, 7 East 45 (the fact that a document required to be stamped and sealed is not found recorded as so treated, admissible to show that it was not stamped); 1894, State *v.* Delaney, 92 Ia. 467, 61 N. W. 189 (to show that a person could not have left the house during the night, the fact admitted that other inmates were so situated that they must have been awakened, but were not); 1920, Davin *v.* Isman, 228 N. Y. 1, 126 N. E. 257 (whether a deceased mortgagor had received no consideration therefor, the deed reciting the receipt of $6500; absence of any record of receipt of such a sum in the records of the banks used by the mortgagor, excluded; unsound).

opportunity, and the rule of law accordingly is examined under that head (*ante*, §§ 133, 134).

§ 165. **Physiological and Mental Traits, as evidencing Ancestry by reason of Heredity.** If by heredity a physiological or mental trait is transmitted so as to be perceptible and identifiable, then the presence of that trait in a given person will be some evidence of a specific ancestry; and, conversely, a given ancestry will be evidence of the recurrence of the trait in a specific descendant.

In a few classes of cases, where the traits are marked and easily identifiable, general popular experience has found that such an inference, resting on hereditary transmission, is worth considering. Thus far the only ones so recognized are the inferences as to *longevity* (*post*, § 223), *paternity*, indicated by external corporal features (*post*, § 166), *race*, indicated in like manner (*post*, § 167), and *insanity* (*post*, § 231). The inference of transmissible *moral character* (*post*, § 190) has not been recognized. This sanction or denial of such an inference has thus far, of course, been based solely on general popular experience.

But the progress of science has shown, in the field of heredity, that the transmission takes place more or less according to definite principles, and also that the traits transmitted include minute and normal elements, and not merely grossly obvious or abnormal features. Hence, it may become possible by analysis to determine the evidential significance of a great variety of physiological elements, and thus in general to make inferences as to ancestry:

1921, Dr. *Charles B. Davenport*, "Heredity" (Proceedings of International Eugenics Conference, N. Y., 1921; Eugenics Record Office, N. Y.): "Some of the results of analytical study of these eugenical data are fairly well established. A few clearly simple Mendelian traits have been found. Such is eye color in which brown is dominant over its absence. It is possible that in some cases additional factors may be present, but the rule serves as a first approximation. Dominant, also, appears to be curliness of the hair as contrasted with recessive straight. And there are various diseases and defects that appear either as simple dominants or recessives, such as abnormalities in number and form of fingers and toes, which are mostly dominant over the normal condition; various defects of the eyes such as cataract, certain types of congenital deafness, various abnormalities of skin, and hair and nails.

"Other, and probably many other, traits are due to multiple factors — so often this is true as to suggest the hypothesis that in mammals, as contrasted with insects, traits are genetically relatively complex. Thus stature and build and proportions of parts and pigmentation of hair and skin are dependent on multiple factors. Indeed, there seems to be evidence that negro skin color is dependent upon two pairs of factors which merely reinforce each other.

"Other traits are associated with sex in the remarkable fashion called sex-linked. That is, they are usually found only in the male sex and are inherited through the mother, though she, herself, is not affected. In such cases one usually finds male relatives of the mother who are affected. Such are color blindness, hemophilia and atrophy of the optic nerve. The facts of sex-linked heredity bring home, even to the layman, the lesson that heredity is a matter of the gametes; and that bodily appearance often gives no hint of the nature of the particular germ-cells carried and, in so far, of what the inheritance shall be. The parents of an albino may have pigmented hair and skin, but both carry gametes which lack the capacity of forming pigment.

"Our knowledge of the inheritance of these physical traits is sufficiently precise to be applied practically in cases of doubtful parentage. If the child, the known mother and both of the putative fathers can be seen, and some inquiry be made as to family stock of the three adults, a decision can generally be rendered with a high degree of certainty ranging from 75 to 99 per cent. For usually, there will not be one critical trait merely, but several traits whose combined evidence will be overwhelming. Already the Eugenics Record Office has been asked to answer certain questions about the inheritance of traits in a case of a claimant who maintained that he was the son of a wealthy man who died without known heirs. As lawyers get more used to the idea of utilizing the advances of knowledge for evidence, it is probable that eugenical knowledge will be more and more called upon."

It is, however, necessary to point out, to scientists as well as to Courts, the danger of hasty use of such supposed discoveries in judicial inquiries of fact. In the first place, the data for exact observation hitherto have been found chiefly in the vegetable and animal world, and not in human beings. In the next place, the scope of observation has been inadequate for determining veritable laws in so complex a subject. In the third place, the scientist's "laws" represent the general truths averaged from a mass of instances, and do not represent the invariable result in individual instances; *i.e.* in one thousand cases, a "law" might be discernible, and yet in fifty or a hundred of those instances it might not operate because of counteracting and unknown considerations; hence, a scientific generalization is seldom to be treated as a certain indication for the individual case.

For these reasons, Science must show that it has attained definite and dependable results, accepted in general consensus, before it can expect Law to rely upon its discoveries.[1]

§ 166. **Resemblance of Child, to show Paternity.** If the corporal traits of the progenitor are or may be transmitted to the progeny, then a specific corporal trait of the progeny may point back to a person of similar trait as

§ 165. [1] For example, the accomplished scientist from whose essay the above quotation is made, has stated to the present writer that the data whence those generalizations are drawn are as yet unpublished, and yet he advances publicly the claim that "a decision can generally be rendered [in certain conditions] with a high degree of certainty, ranging from 75 to 99 per cent." To expect that so extraordinary a discovery, in a field of knowledge hitherto dark and undecipherable, will be accepted for any practical purpose without making a complete disclosure of the entire data and thus enabling others to test the logic of the generalizations, is of course out of the question.

The following newspaper dispatch illustrates the risks of premature reliance upon promising scientific enthusiasms: "San Francisco, Sept. 1, 1921: — Science, art and the law are one in declaring Julius B. Sorine the father of the third child of his divorced wife, despite the woman's assertion to the contrary, but the court's ruling, handed down today, denied his petition for custody of the child. Dr. Albert Abrams reported to the court that a test of the blood of father and son provided positive proof, in his opinion, that the child was Sorine's. Haig Patigian, a sculptor, by a series of facial sketches similar to those used in the famous Singsby case in England, told the court the child resembled Sorine. In the decision of Judge Graham today the court declared that irrespective of these tests, the child was born during the lawful wedlock of the parties, but ruled the child should remain in the mother's care."

In the following article will found an account of a case in Argentina where the judge was presented with expert opinions as to the physiological traits of identity in a filiation proceeding, and declared them insufficient in the present state of knowledge; Quesada, "La prueba scientifica de la filiacion natural" (Revista de criminologia psiquiatria y medicina legale, 1919, nos. 31, 34, 35).

the progenitor, on the condition that the person so charged as progenitor is within the number of those who by association and opportunity may have had intercourse; for otherwise the possible number of similar persons would leave open too many hypotheses. The propriety of the inference rests on the supposed physiological fact that bodily traits may be transmitted by procreation. The validity of this physiological principle, and therefore the propriety of the inference, is and always has been a matter of common knowledge and general action thereon:

1598, *William Shakspeare*, King John, Act I, Scene 1 (the king hears a lawsuit between Philip Faulconbridge, the supposed Bastard son of Sir Robert Faulconbridge's wife by Richard the Lion-hearted, and Robert Faulconbridge, his younger brother, who claims the estates):

Bastard: "But that I am as well begot, my liege, . . .
Compare our faces and be judge yourself
If old Sir Robert did beget us both
And were our father and this son like him."
Elinor (queen-mother of Richard): "He hath a trick of Cœur-de-Lion's face;
The accent of his tongue affecteth him.
Do you not read some tokens of my son
In the large composition of this man?"
Bastard (who is more interested in proving himself Richard's son): "Sir Robert could do well; marry, to confess,
Could he get me? Sir Robert could not do it;
We know his handiwork. Therefore, good mother,
To whom am I beholding for these limbs?
Sir Robert never holp to make this leg." [1]

1769, Lord MANSFIELD, C. J., in the *Douglas Peerage Case*, 2 Hargr. Collect. Jurid. 402: "I have always considered likeness as an argument of a child's being the son of a parent; and the rather as the distinction between individuals in the human species is more discernible than in other animals. A man may survey ten thousand people before he sees two faces perfectly alike; and in an army of an hundred thousand men every one may be known from another. If there should be a likeness of features, there may be a discriminancy of voice, a difference in the gesture, the smile, and various other things; whereas a family-likeness generally runs through all these; for in everything there is a resemblance, as of features, size, attitude, and action. . . . If Sir John Stewart, the most artless of mankind, was actor in the enlevement of Mignon and Sanry's [the supposed parents'] children, he did in a few days what the acutest genius could not accomplish for years. He found two children, the one the finished model of himself, and the other the exact picture in miniature of Lady Jane. It seems nature had implanted in the children what is not in the parents; for it appears in proof that in size, complexion, stature, attitude, color of the hair and eyes, nay and in every other thing, Mignon and his wife, and Sanry and his spouse, were 'toto cœlo' different from and unlike to Sir John Stewart and Lady Jane Douglas. Among eleven black rabbits, there will scarce be found one to produce a white one."

1859, FOWLER, J., in *Gilmanton* v. *Ham*, 38 N. H. 108, 113: "The practice of bringing before the jury, on trials for bastardy, the child whose paternity is sought to be established, when living, has been almost universal in this State, from the earliest recollection of the oldest practitioners. . . . If the child were referred to at all, its general appearance, its

§ 166. [1] So also in Richard the Second, IV, 2; Henry the Fourth, part one, II, 5; Winter's Tale, II, 5.

complexion and features, might properly be commented upon; and we think, under the well-established physiological law that like begets like, and that generally there is a striking resemblance, more or less strong and striking, between the parent and his child, it was a fair matter of argument before the jury, by the counsel on both sides, whether or not there had been anything in the complexion, appearance, and features of the child which the witness had produced and identified before them, tending to indicate its other parent."

The English practice seems always to have admitted this evidence without question.[2] In the United States the early practice was probably the same; but as the chief use of the evidence was found in filiation proceedings, to charge the defendant with the paternity of a bastard, the possible abuses of the evidence led to an unfortunate questioning of its validity under any circumstances:

1888, Foster, J., in *Clark* v. *Bradstreet*, 80 Me. 454, 456, 15 Atl. 56: "While it may be a well-known physiological fact that peculiarities of form, feature, and personal traits are oftentimes transmitted from parent to child, yet it is equally true as a matter of common knowledge that during the first few weeks, or even months, of a child's existence, it has that peculiar immaturity of features which characterize it as an infant, and that it changes often and very much in looks and appearance during that period. Resemblance can then be readily imagined. . . . And in a trial in bastardy proceedings the mere fact that a resemblance is claimed would be too likely to lead captive the imagination of the jury, and they would fancy they could see points of resemblance between the child and the putative father."

Now it must be noted that this opinion (which is representative of others) does not dispute the validity of the inference from resemblance of features to paternity; its quarrel is with the difficulty of establishing the fact which is the foundation of the inference, namely, the resemblance. The answers to this objection are several: (1) The fanciful acceptance of a resemblance — which is the danger feared — is only likely where the child is so young as to have no decidedly marked features; and it is both proper and feasible to obviate this objection by excluding the evidence where the child is too young, either by leaving the matter to the trial Court's discretion, or by fixing a

[2] *England:* 16—, Piercy's Case, 12 How. St. Tr. 1199 ("This James Piercy was a truck-maker in the Strand; . . . one of his arguments to make you believe him a true descendant of the Piercys was that he was born with a mole on his body, as other of the Piercys had been, like a half-moon; the crescent being the crest of the Piercys earls of Northumberland"); 1743, Annesley *v.* Anglesea, 17 How. St. Tr. 1139, 1318, 1324; 1769, Douglas Peerage Case (quoted *supra*); 1797, Day *v.* Day, Trial, 3d ed., 327, quoted in Nicolas, Adulterine Bastardy, 140, and Hubback, Succession, 384 (Heath, J., received "evidence that the defendant bore a strong resemblance to his supposed father", and in summing up "admitted that resemblance was frequently fanciful, and therefore the jury should be well convinced that it did exist; but if they were so convinced, it was impossible to have stronger evidence"; this latter part of the remark of Mr. J. Heath has sometimes been omitted, when the former part was quoted, by Courts opposed to the use of the evidence, *e.g.* in Jones *v.* Jones, *infra*; Heath, J.'s ruling is also given in the abridged report of the case in Craik's English Causes Célèbres, 215, 223); 1837, Andrews *v.* Askey, 8 C. & P. 7, 9 (used without objection); 1827, 1836, Morris *v.* Davis, 3 C. & P. 214, 5 Cl. & F. 163 (legitimacy; "the defendant's counsel much relied . . . on the circumstance of personal resemblance that was proved by several witnesses to exist" between the plaintiff and the mother's paramour; on appeal, similar evidence was admitted on both sides without question).

Canada: 1853, Doe *v.* Marr, 3 U. C. C. P. 36, 51 (inheritance; to show the defendant a bastard, his resemblance to S. and not to the husband M. was held admissible, as "auxiliary evidence").

specific minimum age. (2) The physiological principle being perfectly well settled, it is poor policy to exclude invariably a piece of evidence that will usually be useful merely because it may occasionally be abused. (3) The Opinion rule cannot avail to exclude testimony to resemblance, because matters of identity, similarity, and the like are well settled to be not obnoxious to that rule (*post*, § 1974).

1916, ELLIS, J., in *Flores* v. *State*, 72 Fla. 302, 73 So. 234 (holding that the exhibition of a child not yet 3 months old, on an issue of paternity, was erroneous): "The sound rule is to admit the fact of similarity of specific traits, however presented, provided the child is in the opinion of the trial court old enough to possess settled features or other corporal indications. . . . [Thus] the objection to the evidence on account of its inherent weakness and unreliability would be largely, if not entirely, removed. In the first place, the trial Court would have passed upon the question as to whether the child possessed features or other corporal indications of sufficient development to permit a comparison between them and those of the defendant. In the second place, the particular features or other corporal traits claimed to be possessed by the child would be by the adoption of the rule brought specifically to the jurors' attention, and the comparison made with reference only to such features or corporal traits. It seems to us that to permit an issue of such grave consequences to be determined against a defendant in a bastardy proceeding upon the imaginary, fancied, or notional general resemblance between a child of a week old, or even a few months old, and the defendant in such proceedings, would be to place the defendant at a disadvantage which he could not possibly overcome."

Some Courts in the United States now exclude this kind of evidence, partly through misunderstanding the precedents in its favor, partly for the reasons above quoted.[3] Moreover, by a curious contrariety of views, in some in-

[3] The rulings in the various jurisdictions are as follows: *Federal:* 1809, U. S. *v.* Collins, 1 Cr. C. C. 592 (excluded, from witnesses);
Alabama: 1875, Paulk *v.* State, 52 Ala. 427, 429 (lack of resemblance to the defendant, or resemblance to another man who had opportunities of intercourse, admissible; but not resemblance to the children of the other man, because they might have their features from their mother; *semble*, also that resemblance may not be shown by testimony); 1902, Kelly *v.* State, 133 Ala. 195, 32 So. 56 (bastardy; child about a year old, allowed to be shown to the jury); 1913, Watts *v.* State, 8 Ala. App. 264, 63 So. 18 (seduction; exhibition of child, and testimony to its paternity allowed); 1920, Tarver *v.* State, 17 Ala. App. 424, 85 So. 855 (seduction; child exhibited to jury);
Arkansas: 1910, Adams *v.* State, 93 Ark. 260, 124 S. W. 766 (seduction; resemblance of a child a few months old, testified to);
California: 1889, *Re* Jessup, 81 Cal. 408, 417, 21 Pac. 976 (inheritance; resemblance, as shown by photographs, allowed to be used to show paternity; inspection in Court declared much more valuable; *semble*, the opinion of witnesses, inadmissible); 1911, People *v.* Richardson, 161 Cal. 552, 120 Pac. 20 (child 5½ months old, allowed to be exhibited as evidence of paternity);
Connecticut: 1905, Shailer *v.* Bullock, 78 Conn. 65, 61 Atl. 65 (bastardy; exhibition of the child — here 10 months old — allowed);
Florida: 1916, Flores *v.* State, 72 Fla. 302, 73 So. 234 (bastardy; a child "within a few days of being 3 months old", held improperly exhibited, as too young; citing the above text with approval);
Georgia: 1854, Wright *v.* Hicks, 15 Ga. 160, 172 (legitimacy; resemblance of the child to the alleged paramour, considered); 1904, McCalman *v.* State, 121 Ga. 491, 49 S. E. 609 (testimony to resemblance excluded; following Hanawalt *v.* State, Wis.; Chandler, J., diss.);
Indiana: 1862, Risk *v.* State, 19 Ind. 152 (age unstated; propriety of evidence doubted, because of the uncertainty of a mere infant's features, and because "it would involve the necessity of giving the alleged father in evidence"); 1870, Reitz *v.* State, 33 Ind. 187 (same);
Iowa: 1874, Stumm *v.* Hummel, 39 Ia. 478, 480 (criminal conversation; resemblance assumed to be relevant); 1878, State *v.* Danforth, 48 Ia. 43, 47 (child three months old; resemblance excluded, there being no corroborating evidence); 1880, State *v.* Smith, 54 Ia. 104, 6 N. W. 153 (child two years and one month old; resemblance allowed to be considered as a general principle, the child

stances, the evidentiary fact of resemblance is excluded only when offered through testimony of those who have seen the child; in other instances, only when offered by the presentation of the child in court. The partial exclusion of the former mode of evidence is based chiefly on the Opinion rule — the fallacy of which, in this application, needs no further exposition; and partly also on the ease with which a resemblance can be affirmed in general terms, but the simple correction for this danger is to require detailed statements of specific traits, for the force of the inference rests on these and not on a general resemblance. The partial exclusion of the other mode of evidence — presentation of the child in court — rests on no good reason what-

being of sufficient age); 1900, State *v.* Harvey, 112 Ia. 416, 84 N. W. 535 (exhibition of child under two years, held improper); 1911, State *v.* Nathoo, 152 Ia. 665, 133 N. W. 129 (rape; the child's resemblance to the Hindoo defendant; not decided);
Kansas: 1895, Shorten *v.* Judd, 56 Kan. 43, 42 Pac. 337 (admitted);
Maine: 1839, Keniston *v.* Rowe, 16 Me. 38 ("it was not the color or any peculiarity of conformation or form of features as matters of fact that were proposed to be proved; it was to prove a resemblance, which is matter of opinion", and therefore inadmissible); 1888, Clark *v.* Bradstreet, 80 Me. 454 (a child six weeks old; resemblance, whether by exhibition or by testimony held irrelevant, apparently irrespective of the child's age);
Maryland: 1876, Jones *v.* Jones, 45 Md. 144, 151 (inheritance; "When the parties are before the jury, and the latter can make the comparison for themselves, whatever resemblance is discovered may be a circumstance, in connection with others, to be considered"; but resemblance being "notional" and "fanciful", it cannot be shown by testimony);
Massachusetts: 1862, Eddy *v.* Gray, 4 All. 435, 438 (excluded; here offered by witnesses, and declared obnoxious to the Opinion rule); 1876, Finnegan *v.* Dugan, 14 All. 197 (admitted as relevant; here the child was shown to the jury; no authorities cited); 1869, Young *v.* Makepeace, 103 Mass. 50, 54 (child shown to the jury; but testimony to the dissimilarity between the child and a third person, not present, but alleged by the defendant to be the real father, excluded; reasons confused and exact rule left obscure; Finnegan *v.* Dugan not cited); 1894, Farrell *v.* Weitz, 160 Mass. 288, 35 N. E. 783 (likeness not allowed to be shown by photograph of third person alleged as the father by defendant; *semble*, comparison by actual presence allowable);
Michigan: 1884, People *v.* White, 53 Mich. 537 (resemblance of a young infant; "we do not well see how the jury could be prevented from noticing the child, which was properly enough in court"); 1896, People *v.* Wing, 115 Mich. 690, 74 N. W. 179 (bastardy; People *v.* White followed);
New Hampshire: 1859, Gilmanton *v.* Ham, 38 N. H. 108, 113 (resemblance allowed to be considered; here by exhibition); 1900, State *v.* Saidell, 70 N. H. 174, 46 Atl. 1083 (resemblance on exhibition to jury, allowed to be considered); 1905, State *v.* Danforth, 73 N. H. 215, 60 Atl. 839 (rape; rule of the foregoing cases confined; here the child was exhibited and its peculiarities pointed out; the rule as stated above in the text "appears reasonable");
New Jersey: 1888, Gaunt *v.* State, 50 N. J. L. 490, 495, 14 Atl. 600 (fornication; resemblance admissible, without any apparent limitations; "the illusory nature of such resemblances rather imposing a duty on the Court in conjunction with the admission of the proof, than militating against the relevancy of the inquiry"; resemblance to be available either by inspection or through witnesses);
North Carolina: 1872, State *v.* Woodruff, 67 N. C. 89, *semble* (admissible); 1878, State *v.* Britt, 78 N. C. 439, 442 (resemblance to a third person, the alleged father, admitted); 1888, State *v.* Horton, 100 N. C. 443, 6 S. E. 238 (State *v.* Woodruff followed);
Ohio: Crow *v.* Jordan, 49 Oh. St. 655, 32 N. E. 750 (child allowed to be exhibited);
Oregon: 1908, Anderson *v.* Aupperle, 51 Or. 556, 95 Pac. 330 (seduction; infant of less than 3 months, exhibited; State *v.* Danforth, N. H., followed); 1913, State *v.* Russell, 64 Or. 247, 129 Pac. 1051 (incest; child of 14 months allowed to be exhibited);
Tennessee: 1846, Cannon *v.* Cannon, 7 Humph. 410, 411 (distribution of estate; resemblance used to evidence illegitimacy);
Texas: 1892, Higginbotham *v.* State, — Tex. Cr. —, 20 S. W. 360 (admitted); 1899, Hilton *v.* State, 41 Tex. Cr. 190, 53 S. W. 113 (adultery; resemblance of child seven months old, excluded);
Utah: 1901, State *v.* Neel, 23 Utah 541, 65 Pac. 494 (illicit intercourse; child not allowed to be exhibited, following Hanawalt *v.* State *infra*);
Wisconsin: 1895, Hanawalt *v.* State, 64 Wis. 84, 24 N. W. 489 (excluded, where the child was less than a year old; but perhaps admissible for an adult; the jury's inspection disapproved).

ever, and is further considered under the principle involved (*post*, § 1160). The sound rule is to admit the fact of similarity of specific traits, however presented, provided the child is in the opinion of the trial Court old enough to possess settled features or other corporal indications.

It is to be noted that the evidence is relevant not merely in *bastardy* proceedings, but also in trying the *legitimacy* of a child *born during marriage*, whenever the presumption of legitimacy allows the issue to be raised (*post*, § 2527), as well as occasionally in other proceedings.

§ 167. **Corporal Traits, to show Race or Nationality.** A physiological principle, similar to the preceding one, but attended usually with more clearly marked results, tells us that the progeny of persons of one race receive from the progenitors certain corporal traits very different from the traits transmitted from a progenitor of another *race*. The presence of these peculiar traits of the race is therefore evidential to show a progenitor of the race bearing those traits. The admissibility of this evidence has never been doubted by Courts; though its use, since the abolition of slavery in this country, is now very rare, because the issues in which it is relevant can only be uncommon.[1] There seems no reason why similar evidence should not occasionally be usable to show *foreign birth* or origin from a foreign nation, even though from a people of the same race.[2]

§ 168. **Birthmarks, to show Events during Pregnancy; Venereal Disease, to show Adultery; Pregnancy, to show Intercourse.** There remain some other

§ 167. [1] CANADA: *B. C.* Rev. St. 1911, C. 78, § 23 (the Court or jury "may infer as a fact the nationality or race of the person in question from the appearance of such person"); U. S. *Federal:* 1904, U. S. *v.* Hung Chang, 134 Fed. 19, 23 (Chinese descent, evidenced by appearance); *Arkansas:* 1861, Daniel *v.* Guy, 23 Ark. 50, 51 (foot-formation, admitted as evidential of negro race); *Georgia:* 1856, Bryan *v.* Walton, 20 Ga. 480, 508 (complexion, etc., of alleged slaves, considered to prove ancestry); *Illinois:* 1916, People *v.* Kingcannon, 276 Ill. 251, 114 N. E. 508 (rape under age, followed by birth of a child; polydactylism of the child and of the defendant, with evidence that such a feature is heritable, held admissible to evidence paternity); *Indiana:* 1864, Nave's Adm'r *v.* Williams, 22 Ind. 370 (color and features, to show race, admitted); *Kentucky:* 1835, Gentry *v.* McGinnis, 3 Dana Ky. 382, 388 (white color of an alleged slave, received to show white ancestry; "a black or mulatto complexion is prima facie evidence" of slavery, black ancestors being necessarily slaves, and "one apparently a white person or an Indian", is prima facie free); 1839, Chancellor *v.* Milly, 9 Ky. 24 (appearance of an alleged slave, received to infer ancestry); *Maine:* 1888, Clark *v.* Bradstreet, 80 Me. 454, 457 (complexion, etc., admissible in determining race); *Missouri:* Rev. St. 1919, § 3513 (illegal mixed marriage; jury "may determine the proportion of negro blood in any party to such marriage from the appearance of such person"); *New Jersey:* 1826, Fox *v.* Lambson, 8 N. J. L. 275, 277 (black color raises a presumption of slavery); *North Carolina:* 1897, Warlick *v.* White, 76 N. C. 175, 178 (color of a child, to show black blood, and therefore illegitimacy, admitted); *South Carolina:* 1846, White *v.* Collector, 3 Rich. 138, 140 (color admissible to evidence race); *Virginia:* 1806, Hudgins *v.* Wrights, 1 Hen. & M. 134, 137 (long, straight, black hair, and copper complexion, for Indians, and flat nose, woolly hair, and color of complexion, for negroes, admissible to show ancestry); 1811, Hook *v.* Pagee, 2 Munf. 379, 383 (complexion of an alleged slave, admitted to show ancestry); 1827, Gregory *v.* Baugh, 4 Rand. 611, 613 (complexion, etc., assumed proper to determine Indian ancestry).

The same principle should apply to the resemblance of an *animal*, as evidence of its pedigree: 1904, Brady *v.* Shirley, 18 S. D. 608, 101 N. W. 886, *semble* (qualities of a horse, admitted on the question of its siring by a Hambletonian).

[2] 1856, Dennis *v.* Brewster, 7 Gray 351, 353 (foreign birth; arrival as a child on a ship, foreign appearance, speech, and gestures, dark complexion, etc., held sufficient).

common instances of this form of inference: (1) That a shock received by the mother during *pregnancy* may leave a mark upon the child has long been a popular belief. Should it ever receive scientific sanction in any defined terms, the child's corporal mark after birth may be taken as evidential of the act which produced it.[1]

(2) That the existence of *venereal disease* in a husband is some evidence of an act of adultery on his part has always been conceded;[2] it is merely a question of the strength of the explanatory circumstances.

(3) So, too, in prosecutions for *rape*, *rape under age*, and *seduction*, the pregnancy is admissible as evidence at least of the *intercourse;* the accused's identity being provable by other evidence.[3]

§ **168.** [1] Anon., cited by Irving Browne, Green Bag, 1892, V, 555 (Mercer Co., Pa.; the complainant charged an assault upon her two weeks before by the defendant in a lonely house; the defendant was held for trial, but three weeks before it occurred, the complainant was delivered of a child, and on the child's throat and wrist appeared marks of a thumb, etc., such as the complainant had alleged).

[2] 1794, Popkin *v.* Popkin, 1 Hagg. Eccl. 765, 767 ("Whether this disease is [sufficient] evidence of adultery may depend upon circumstances"); 1916, Sheffield *v.* Beckwith, 90 Conn. 93, 96 Atl. 316 (alienation of wife's affections; like Johnson *v.* Johnson, N. Y.); 1922, Riley *v.* State, — Ga. —, 111 S. E. 729 (rape under age; venereal disease in the defendant and then in the victim, admitted to evidence the act); 1835, Johnson *v.* Johnson, 14 Wend. N. Y. 637, 639, 641 (venereal disease contracted by a husband during the wife's absence is evidence of his adultery); 1912, U. S. *v.* Tan Teng, 23 P. I. 145, 153 (gonorrhea in the victim of a rape).

[3] *Accord: California:* 1904, People *v.* Tibbs, 143 Cal. 100, 76 Pac. 904 (seduction under promise of marriage; birth of a child as shown by its presence in court, admitted); 1909, People *v.* Soto, 11 Cal. App. 431, 105 Pac. 420 (pregnancy admissible to prove the act charged; but not, as here, the birth of a child from a prior act of intercourse used evidentially); *Colorado:* 1919, Laycock *v.* People, 66 Colo. 441, 182 Pac. 880 (rape under age; pregnancy, admitted, in connection with other acts); *Columbia* (Dist.): 1912, Kidwell *v.* U. S., 38 D. C. App. 566 (rape under age); 1920, Terr. *v.* Fong Yee, 25 Haw. 309 (seduction); *Idaho:* 1911, State *v.* Henderson, 19 Ida. 524, 114 Pac. 30 (rape under age; birth of a child, admitted); *Iowa:* 1906, State *v.* Dolan, 132 Ia. 196, 109 N. W. 609 (seduction; an obscure ruling, which finds fault with the trial court for not clearly instructing the jury; birth is said to be admissible as evidence of a seduction, but not of the defendant's being the seducer); 1907, State *v.* Nugent, 134 Ia. 237, 111 N. W. 927 (seduction; birth of a child, admitted); 1908, State *v.* Blackburn, 136 Ia. 743, 114 N. W. 531 (rape under age; birth of child, held to be not corroborative of woman's testimony; following State *v.* Coffman, 112 Ia. 8, but ignoring the above two cases); 1909, State *v.* Hunt, 144 Ia. 257, 122 N. W. 902 (seduction; birth of a child held "corroborative of the prosecutrix as to the corpus delicti", though not as connecting the defendant; Dolan and Nugent cases not cited); 1911, State *v.* Nathoo, 152 Ia. 665, 133 N. W. 129 (carnal knowledge of an insensible female; the fact of a birth was held admissible as corroborative, if intercourse was otherwise proved); *Kansas:* 1904, State *v.* Walke, 69 Kan. 183, 76 Pac. 468 (statutory rape); 1905, State *v.* Miller, 71 Kan. 200, 80 Pac. 51 (same); 1906, State *v.* Gereke, 74 Kan. 196, 86 Pac. 160, *semble* (rape under age; birth of a child, admitted); *Michigan:* 1905, People *v.* Stisson, 140 Mich. 216, 103 N. W. 542 (incest); *Missouri:* 1906, State *v.* Palmberg, 199 Mo. 233, 97 S. W. 566 (rape under age; birth of child, admitted); *Nebraska:* 1904, Woodruff *v.* State, 72 Nebr. 815, 101 N. W. 1114 (rape under age); *South Dakota:* 1912, State *v.* Holter, 30 S. D. 353, 138 N. W. 953 (seduction; plaintiff's pregnancy admitted); *Texas:* 1920, Klepper *v.* State, 87 Tex. Cr. 597, 223 S. W. 468 (seduction); *Utah:* 1906, State *v.* Thompson, 31 Utah 228, 87 Pac. 709 (adultery with a single woman; her pregnancy admitted as corroborating her, but not as connecting the defendant); *Washington:* 1903, State *v.* Fetterly, 33 Wash. 599, 74 Pac. 810 (rape under age; Fullerton, C. J.: "It conclusively proves her testimony to the effect that the crime charged was committed, and the truth of that lends credence to her testimony to the effect that the person she names is the guilty party"; said of the birth or miscarriage of a child); 1905, State *v.* Nelson, 39 Wash. 221, 81 Pac. 721 (adultery; birth of child twenty months after husband's absence, admitted); and some cases cited *post*, § 398; 1909, State *v.* McCool, 53 Wash. 486, 102 Pac. 422 (rape under age; admitted, but held not sufficient corroboration under the rule of § 2062, *post*).

Contra: 1906, Kevern *v.* People, 224 Ill. 170, 79 N. E. 574, *semble* (rape); 1918, Jordan

(4) So, also, a result of any *disease*, subsequent to a time in issue, may evidence its prior existence.[4]

c. MENTAL TRACES

§ 172. **General Principle.** The struggle of a victim for his life, and the act of taking his life, may leave upon the perpetrator indelible traces of blood, wounds, or rent clothing, which point back to the deed as done by him; these traces come from a mechanical contact with the body, weapons, and other things involved in the deed, and they remain upon him or are divested from him by a mechanical process. But a deed may also leave traces upon the doer through other than a mechanical process, *i.e.* through a *mental* or *moral*, *i.e. psychological* process. These traces may be as significant in their way as the others, — perhaps more so; and they may be equally relevant evidentially to show their bearer to be the doer of the act. These traces, like those of the other sorts, may be employed either *affirmatively* or *negatively*. The presence of such a trace may be used as indicating the doing of the act by the person bearing it; and the absence of the trace may be used as indicating the not doing it by the person not bearing the trace. The traces of this mental or psychological sort will be some form of a *mental condition*, — memory, belief, consciousness, knowledge, or whatever other name may be more usual and appropriate.

How to evidence this mental condition — by conduct or the like — is a different question. There is here evolved simply the question, When is memory, consciousness, and the like, relevant to show the doing of a past act? The evidencing of this mental condition raises different and more complicated questions as to the significance of conduct; hence a consideration of the state of the law upon the various uses of the present sort of evidence can best be made in connection with the rules of conduct-evidence. Those rules in their details are elsewhere examined (*post*, §§ 265–293). It is enough here to summarize the chief types of inference of the present sort, and thus to exhibit the place of this inference in the general doctrine of Relevancy.

§ 173. **Consciousness of Guilt.** The commission of a crime leaves usually upon the consciousness a moral impression which is characteristic. The innocent man is without it; the guilty man usually has it. Its evidential value has never been doubted. The inference from consciousness of guilt to "guilty" is always available in evidence. It is a most powerful one, because the only other hypothesis conceivable is the rare one that the person's consciousness is caused by a delusion, and not by the actual doing of the act. The difficulty in connection with this evidence is, not its own relevancy to

v. Com., 180 Ky. 379, 202 S. W. 896 (seduction); 1906, People *v.* Brown, 142 Mich. 622, 106 N. W. 149 (rape under age in June, 1904, the statutory age being reached on July 15, 1904; pregnancy in March and May, 1905, excluded; a queer decision, the present question not being distinguished from others involved).

[4] Cases cited *post*, § 225, n. 1.

show the doing of the act — that is universally conceded — but the mode of proving this consciousness of guilt in its turn by other evidence. There are two processes or inferences involved, — from conduct to consciousness of guilt, and then from consciousness of guilt to the guilty deed. The latter, belonging here, gives rise to no disputed questions of evidence. The former gives rise to many questions, due to the variety of conduct offerable in evidence. These questions are dealt with (*post*, §§ 273–291), in discussing evidence of consciousness or knowledge in general. It is worth while here to note this double step of inference involved; for it exhibits the true significance of the evidential use of conduct as indicating consciousness of guilt.

§ 174. **Consciousness of Innocence.** Just as the lack of mechanical or corporal traces may be used negatively (*ante*, § 158) to show the non-doing of an act, so the lack of guilty consciousness may be useful to show innocence of a crime. This lack of guilty consciousness — in other words, this consciousness of innocence — seems not to have been doubted by Courts as having in itself evidential value. But, assuming it to be relevant, a difficulty arises in the proof of it as a proposition, — the difficulty that the conduct offered to evidence it is so likely to be feigned and artificial. The disputed question, then, whether the conduct of an accused person is admissible in his favor, involves a doubt, not as to the evidential value of consciousness of innocence as indicating non-doing, but as to the evidential value of conduct as showing consciousness of innocence, — a problem elsewhere examined (*post*, § 293).

§ 175. **Belief or Recollection of Personal Doings, as Evidence of Identity.** All personal deeds are likely to leave some sort of a mark in the recollection or belief. The presence of that mark is some indication of the doing of the act recollected, and the absence of the mark is some evidence of the non-doing of the act. Where a person's identity is in issue, his recollection or non-recollection of experiences known to have occurred to the person with whom he is to be identified may often serve as useful evidence. For the reasons already stated, the rulings on this subject can best be examined elsewhere (*post*, § 270).

§ 176. **Same: Legitimacy, as evidenced by Parent's Conduct; Marriage, by "Habit"; Testamentary Execution, by the Deceased's Belief.** Among the most notable facts of life which are certain to leave marked traces on those into whose experience they enter are the facts of marriage, of the birth of children, and of the execution of a testament. Long tradition has recognized this, and has in these cases sanctioned the inference from subsequent belief or recollection to the prior act or experience. But the real difficulty lies in the inference from conduct to that belief, and, for the reason already noted, the details of the law can best be examined in another place, — the inference to Legitimacy, under § 269, to Marriage, under § 268, and to Testamentary Execution, under § 271.

§ 177. **Conduct of Animals, as evidencing a Human Act; Tracking by Bloodhounds.** If the instinct or habit of animals can in a given case be supposed to be sensitive to the dealings of men with them, it would seem that the conduct of an animal may be trusted evidentially as indicating the human act which would naturally have caused the animal's conduct.[1] Such indications may be of two kinds:

(1) The behavior of the animal may be a *trick* or other action *expressly taught* or *implicitly acquired* during his past association with a particular person; the possession of such a trick by a given animal will therefore serve to identify him as having been in that person's possession. This evidential use is well established in judicial practice, though it has seldom been brought before courts of appeal.[2]

(2) The behavior of the animal may be the result of an *impression* made on some *peculiarly strong sense* by a casual outward event or human act, incapable of being perceived by the human senses. The behavior of a horse in the vicinity of a concealed beast of prey is an instance of this. The custom, in certain of our communities, of *tracking fugitives by bloodhounds*, rests on a similar trait of those animals. It is conceded by most Courts that the fact that a well-trained and well-tested bloodhound of good breed, after smelling a shoe or other article belonging to the doer of a crime, has tracked definitely to the accused, is admissible to show that the accused was the doer of the criminal act.[3]

§ 177. [1] For animal's conduct as evidencing the character or *disposition of the animal*, see *post*, § 201.

[2] Circa 1530, More's "Life of Sir Thomas More", quoted in Campbell's "Lives of the Chancellors", II, 37 (story of the beggar-woman's little dog, who was bought from a thief by the Chancellor's wife; the Chancellor allowed her to prove property by the dog's recognition of her); 1800, Anon., in Twiss' Life of Lord Eldon, I, 354 (quoted *post*, § 1154); 1888, State *v.* Ward, 61 Vt. 185, 17 Atl. 483 (where a complicated set of turnings on different roads must have been followed by the incendiary, evidence was admitted that the defendant's horse shortly after took the same turning without guidance); 1894, Chicago *Herald*, May 31 (a German saloonkeeper in Chicago lost his parrot; in the possession of an American saloonkeeper a similar parrot was found; the ownership of this parrot was claimed by both parties, each affirming that he had possessed and trained the parrot for a long time, and that the parrot would show the effect of this training in his language; at the trial before Justice of the Peace Eberhardt, the parrot would not speak; he was therefore committed temporarily to the custody of a police-captain; "Captain Barcel will keep the bird in custody, and will keep his ears strained to catch either 'Set 'em up again', or 'Unser bier ist gut' "); 1900, Boston *Transcript*, Dec. 12 (in East Orange, N. J.; the larceny of a carrier pigeon by B. from E. was charged; the defendant claiming to be owner, the pigeon was released, and alighted later in E.'s barn); 1907, State *v.* Hunter, 143 N. C. 607, 56 S. E. 547 (Chief Justice Clark reminds us of "the classical incident of Ulysses, on his return from his memorable wanderings, being recognized by his dog Argos (who died from joy), when his family and his followers knew him not", and "the more modern incident of Aubry's dog of Montargis, who procured the confession of his master's murderer by his recognition of him").

Compare the following: 1905, Miller *v.* Terr., 9 Ariz. 123, 80 Pac. 321 (larceny of a colt; testimony from stockmen who had observed the animal's conduct that "the colt belonged to a certain mare which it had been following", admitted).

Compare the unsound ruling in State *v.* Landry, 29 Mont. 218, 74 Pac. 418 (1903), cited *post*, § 1163, n. 6.

[3] *Alabama:* 1890, Simpson *v.* State, 111 Ala. 6, 20 So. 572, *semble* (that bloodhounds had tracked the defendant from the place of the crime, admitted, the dog's habit being never to leave a human track once scented); 1892, Hodge *v.* State, 98 Ala. 10, 11, 13 So. 385 (murder; that a trained dog had followed the trail to the defendant's house, admitted, on the facts); 1905, Little *v.* State, 145 Ala. 662, 39 So. 674

Nevertheless, in actual usage, this evidence is apt to be highly misleading, to the danger of innocent men. Amidst the popular excitement attendant upon a murder and the chase of the suspect, all the facts upon which the trustworthiness of the inference rests are apt to be distorted in the testimony. Moreover, the very limited nature of the inference possible is apt to be overestimated, — a consequence dangerous when the jurors are moved by local

(the animal must be shown to have been trained to track human beings and to be able to do so accurately); 1906, Richardson *v.* State, 145 Ala. 46, 41 So. 82 (tracing by hounds; admitted); 1906, Hargrove *v.* State, 147 Ala. 97, 41 So. 972 (burglary; trailing of accused by bloodhounds, shown to be trained to the purpose, admitted); 1909, McDonald *v.* State, 165 Ala. 85, 51 So. 629 (admitted; here the uncertainty of the evidence was exhibited by the dogs' trailing of two different persons); *Arkansas:* 1916, Padgett *v.* State, 125 Ark. 471, 188 S. W. 1158 (assault; bloodhound evidence admitted); 1921, West *v.* State, 150 Ark. 555, 234 S. W. 997 (rape; tracing by trained dog, admitted); *Florida:* 1903, Davis *v.* State, 46 Fla. 137, 35 So. 76 (burglary; trailing by dogs is admissible, on certain conditions indicating "that reliance may reasonably be placed upon the accuracy of the trailing"); 1904, Davis *v.* State, 47 Fla. 26, 36 So. 170 (former opinion applied); *Georgia:* 1915, Fite *v.* State, 16 Ga. App. 22, 84 S. E. 485 (bloodhound trailing, held admissible, under strict conditions specified); 1915, Aiken *v.* State, 16 Ga. App. 848, 86 S. E. 1076 (burglary; as to bloodhound evidence, "we adopt the rule laid down in Pedigo's Case", Ky., *infra*); *Illinois:* 1914, People *v.* Pfanschmidt, 262 Ill. 411, 104 N. E. 804 (murder and arson, trailing by a bloodhound, by means of a horse-and-buggy scent, to the accused's camp, held not admissible, partly because the conditions here were too full of obstacles to make the trailing trustworthy, and also on the ground that "the trailing of either a man or an animal by a bloodhound should never be admitted in any case"); *Indiana:* 1910, Stout *v.* State, 174 Ind. 395, 92 N. E. 161 (trailing of another person than the accused; the present question not decided); 1917, Ruse *v.* State, 186 Ind. 237, 115 N. E. 778 (crime unspecified: the trailing by bloodhounds was held inadmissible; Sairy, C. J., and Myers, J., diss.); *Iowa:* 1904, McClurg *v.* Brenton, 123 Ia. 368, 98 N. W. 881 (where the defendant had trespassed on the plaintiff's premises, looking for stolen fowls, and led by bloodhounds, the Court disparaged such methods); *Kansas:* 1911, State *v.* Adams, 85 Kan. 435, 116 Pac. 608 (murder; tracking of accused by bloodhounds, held allowable, on a showing that the dogs are qualified by breed and training, and that "the person testifying is reliable"); 1914, State *v.* Mooney, 93 Kan. 353, 144 Pac. 228 (State *v.* Adams, followed); 1917, State *v.* Sweet, 101 Kan. 746, 168 Pac. 1112 (murder; "bloodhound evidence" admitted pursuant to the limitations of State *v.* Adams and State *v.* Mooney, *supra*); *Kentucky:* 1898, Pedigo *v.* Com., 103 Ky. 41, 44 S. W. 143 (admitted; DuRelle, J.: "It is difficult to lay down a general rule as to the introduction of testimony of this kind. . . . We think it may be safely laid down that, in order to make such testimony competent, even when it is shown that the dog is of pure blood, and of a stock characterized by acuteness of scent and power of discrimination, it must also be established that the dog in question is possessed of these qualities, and has been trained or tested in their exercise in the tracking of human beings, and that these facts must appear from the testimony of some person who has personal knowledge thereof. We think it must also appear that the dog so trained and tested was laid on the trail, whether visible or not, concerning which testimony has been admitted, at a point where the circumstances tend clearly to show that the guilty party had been, or upon a track which such circumstances indicated to have been made by him"; Guffy, J., diss., in an able opinion); 1904, Allen *v.* Com., — Ky. —, 82 S. W. 589 (rule of Pedigo *v.* Com. applied to exclude such evidence where the dog's qualities were not sufficiently shown); 1905, Denham *v.* Com., 119 Ky. 508, 84 S. W. 538 (Pedigo *v.* Com. followed); 1909, Sprouse *v.* Com., 132 Ky. 269, 116 S. W. 344 (trailing by hounds from a burned house to defendant's house; excluded, partly because the skill of the hounds was not sufficiently shown, and partly because due precautions for accuracy were not taken); 1916, Blair *v.* Com., 171 Ky. 319, 188 S. W. 390 (Pedigo *v.* Com. rule applied, here excluding the evidence); 1922, Meyers *v.* Com., — Ky. —, 240 S. W. 71 (arson; applying the rule of Pedigo *v.* Com., *supra*, but announcing that bloodhound evidence alone "would be insufficient to convict", *i.e.* to identify the accused; it seems odd that any court could deliberate one moment over such a preposterous assertion as the contrary); *Louisiana:* 1919, State *v.* King, 144 La. 430, 80 So. 615 (murder, bloodhound evidence admitted, on conditions showing reliability of the animal); *Minnesota:* 1921, Crosby *v.* Moriarty, 148 Minn. 201, 181 N. W. 199 (action for arson; conduct of bloodhounds in tracing the perpetrator, excluded on the facts); *Missouri:* 1912, State *v.* Rasco, 239 Mo. 535, 144 S. W. 449 (murder; trailing by bloodhounds, allowed on the testimony to

prejudice.[4] Hence Courts do well to insist on the strictest fulfilment of the above conditions of admissibility; and additional requirements are sometimes made. The hesitation shown in some Courts to the use of this evidence is due to the risks of its misuse by the jury; for in some regions of our country the mysteriously accurate operation of the dogs' senses has given rise to a superstitious faith in the dogs' inerrant inspiration, and this gross popular creed might in a jury mislead them into giving excessive credit to the evidence of the dogs' itinerary.

their habits and skill); *Nebraska:* 1903, Brott v. State, 70 Nebr. 395, 97 N. W. 593 (behavior of bloodhounds in trailing the defendant, held inadmissible on the facts; Sullivan, C. J.: "That the bloodhound is frequently wrong is a fact well attested by experience. . . . It is unsafe evidence, and both reason and instinct condemn it"); *North Carolina:* 1901, State v. Moore, 129 N. C. 494, 39 S. E. 626 (that a bloodhound trailed and pointed out the defendants, charged with larceny of meat and other things, was held inadmissible on the facts, without denying that it might be a "circumstance to be considered in connecting a person with an act"); 1907, State v. Hunter, 143 N. C. 607, 56 S. E. 547 (arson; trailing by a trained bloodhound, admitted); 1908, State v. Freeman, 146 N. C. 615, 60 S. E. 986 (burglary; a dog's trailing of the defendant, by shoe-scent, admitted); 1919, State v. Yearwood, 178 N. C. 813, 101 S. E. 513 (arson; trail by bloodhounds, admitted, after proof of their training and reputation); 1921, State v. Robinson, 181 N. C. 516, 106 S. E. 155 (assault; conduct of bloodhounds, admitted on the facts); *Ohio:* 1907, State v. Dickerson, 77 Oh. 34, 82 N. E. 969 (trailing of a murderer by a bloodhound held admissible, provided that the particular dog was trained in tracking human beings and had in experience been found reliable, this reliability being testified to from personal knowledge, and that the dog had been laid on the trail at a point or track clearly indicated as the guilty party's; the pedigree, etc., of the dog to be admissible in corroboration); *South Carolina:* 1916, State v. Brown, 103 S. C. 437, 88 S. E. 21 (arson; bloodhound evidence sanctioned, because Crim. Code § 945 authorizes the use of dogs for tracking lawbreakers; here held inadmissible because the dogs were not set on the track within the period of efficiency); *Texas:* 1904, Parker v. State, 46 Tex. Cr. 461, 80 S. W. 1008 (bloodhound's tracking of defendant admitted; rule of Pedigo v. Com., Ky., approved).

[4] The limitations are well stated by Mr. E. Austin Freeman, in one of the detective stories in his volume entitled "The Singing Bone" (London, 1914). This story, entitled "A Case of Premeditation", is quoted in part in the Illinois Law Review, IX, 192.

TITLE I (*continued*): CIRCUMSTANTIAL EVIDENCE

SUB-TITLE II: EVIDENCE TO PROVE A HUMAN QUALITY OR CONDITION

CHAPTER IX.

§ 190. **Nature of this Class of Evidence.** 1. The reasons for dividing into three groups the whole subject of Circumstantial Evidence have been already

stated (*ante*, § 43). The groups being distinguished according to the propositions to be proved, the second group is now to be considered, namely, Evidence to prove a *Human Quality, Condition*, or other attribute.

This group of propositions (*facta probanda*) separates itself from the first (Human Acts) with fair distinctness, first, because the circumstances available as evidence are usually distinct for the two groups, but chiefly because certain general considerations of Auxiliary Policy, as well as of Relevancy, run through the present group, constantly reappearing, and not only making various analogies useful, but rendering it impossible to understand the rules of Evidence for certain kinds of propositions without considering those for others. The distinction between the two groups is by no means an artificial one, but is fully in harmony with the attitude of the Courts towards the problems involved.

2. The various conceivable propositions to be proved may be reduced to the following well-defined sorts:

Moral Character or Disposition;	Motive or Emotion;
Physical and Mental Capacity;	Habit or Custom, and Possession;
Design or Plan, and Intent;	Traits of Handwriting;
Knowledge, Belief, or Consciousness;	Identity.

A different analysis and order of treatment is conceivable; but with reference to the usefulness of putting in proximity those matters which throw light upon each other, this division and this order seem the most practical.[1]

3. It will be understood that we are here *not concerned how the above human qualities come to be propositions* for proof (*ante*, § 2). We are concerned only to learn what facts will be admissible evidentially to prove the quality proposed for proof. For instance, Character may be in issue through the pleadings in a suit for slander on a plea of justification, or in an action for personal injury as an element of the defendant's liability for an incompetent servant; or it may be used, not as in issue under the pleadings, but as evidential, to prove a human act, for example, the good character of a defendant in a criminal case or his bad character in rebuttal. So, also, Knowledge may be in issue in a suit to set aside a purchase in fraud of creditors, or it may be evidential only, as when it is offered to prove the doing of a past act as a mark of identity (*post*, § 270). In all these instances the quality which is termed Character, Knowledge, or the like, has somehow come into the case as a proposition to be proved; and the question how to evidence it presents itself equally whether the 'factum probandum', when once proved, is going in turn to be used itself evidentially to show some other fact, or is one of the very ultimate propositions made material by the pleadings. It is true that by tradition or by policy the mode of proof available in the one case may sometimes

§ 190. [1] From the point of view of logic and psychology as applicable to argument before the jury (not the rules of Admissibility), see the materials collected in the present author's "Principles of Judicial Proof, as given by Logic, Psychology, and General Experience, and illustrated in Judicial Trials" (1913), §§ 28, 84–98.

not be available in the other; but this is only an incidental and not a necessary or common feature.

4. Three species of evidential facts are available to show a human quality or condition:

(1) *Conduct;* this is the expression, in outward behavior, of the quality or condition operating to produce those effects. These results are the traces by which we may infer the moving cause. In point of time, conduct is closely associated with the internal condition giving rise to it; nevertheless, the indication is strictly not a concomitant, but a retrospectant one (*ante,* § 43), because the argument is backwards from effect (conduct) to cause (internal condition).

(2) *External facts* (prospectant) pointing forward to the probable coming into existence of the quality; for example, the victim's gold, as pointing forward to the defendant's probable desire to rob him, or the reputation of A's insolvency, as pointing forward to B's probable receipt of knowledge of it. In using this evidence, we take our stand beforehand and argue that the evidential fact probably gave rise to the emotion, knowledge, or intent to be proved. The indication is thus prospectant; while that of conduct is retrospectant.

(3) There is also a third sort of fact, having either a prospectant or a retrospectant indication, and not exactly corresponding to either of the preceding sorts, namely, *prior or subsequent condition,* as showing condition at a given time. Thus, to prove insanity, we may offer (1) conduct as the effect illustrating its cause, mental aberration, (2) circumstances of unsuccessful business, domestic troubles, and the like, tending to bring on insanity; and (3) prior or subsequent insanity, pointing forwards or backwards to insanity at the time in question. So also, to show a husband's desire or motive to get rid of his wife, we may offer (1) his conduct exhibiting such a desire, (2) the existence of a paramour, tending to create such a desire, and (3) a prior desire, as pointing forward to its continued existence at the time in question. A similar general question presents itself in all evidence of this third sort, namely, how far before or after the time in question the survey may extend in considering the fact of prior or subsequent condition.

For some subjects, all three of these sorts of evidence are available, perhaps with equal frequency; for others only one or two of them are available, at least usually; thus, to evidence character, facts of the second sort do not come into play at all, — unless the principles of heredity one day become so clearly ascertainable as to offer a sure basis of argument from ancestry. It is enough to note that in taking up the different 'facta probanda' a convenient order of arrangement of the evidential facts may be based on this triple division.

5. The distinction between a pure principle of *Relevancy* and a doctrine of Auxiliary Policy (expounded *ante,* § 42) is in the present subject of constant importance. Our first question, for any kind of evidence, must be, Is it Rele-

vant, *i.e.* has it probative value enough to be considered? But even when it is relevant and would so far be admissible, it may still be shut out by some auxiliary policy forbidding confusion of issues, undue prejudice, or unfair surprise (*post*, § 1904). It is practically necessary to treat in one place the two sets of considerations, Relevancy and Auxiliary Policy, as applied to the same piece of evidence; but it must not be forgotten that the two are entirely distinct in function.

Topic I: EVIDENCE TO PROVE CHARACTER OR DISPOSITION

§ 191. **Kinds of Evidence.** It is here assumed that Moral Character or Disposition is somehow in the case to be proved, — either as material under the pleadings or as evidential to prove something else (*ante*, § 54). The question then here arises, What evidential facts may be used to prove it?

Of the three sorts of facts just described, the *second* sort (prospectant) is here wholly unavailable; there is no external fact from which we can argue forward that a person will have a certain character. Heredity, as a biological indication that an ancestor's trait will recur in a descendant, is as yet not accepted by science in any details available for judicial proof (*ante*, § 165). Only in the case of insanity (*post*, § 231), longevity (*post*, § 223), and of a few marked physiological traits (*ante*, §§ 166, 167), has such a use of heredity been given recognition. No doubt in juvenile court practice the family record is studied by the judge, but hardly for mere evidential purposes. Some day in this field a body of data will be accumulated from which evidential principles may be drawn.

The *third* sort of fact, *prior or subsequent character*, as indicating character at the time in question, is undoubtedly available evidence; but its use is so complicated with the question of using Reputation (under the Hearsay exception) at a prior or subsequent time, that both subjects can best be examined together; accordingly the use of prior or subsequent character, to evidence character at the time in question, is there dealt with (*post*, § 1617).

The material here to be considered, therefore, is the *first* sort of evidence, *i.e. conduct*, — the sort by far the commonest and the only one that raises questions of serious difficulty. Under what condition, then, is conduct admissible to evidence Character?

1. Conduct to show Character of a Defendant in a Criminal Case

§ 192. **Nature of the Inference; an Act is not evidential of another Act.** At the outset of this entire prospectant class of inferences, it must be noted that, where the doing of an act is the proposition to be proved, there can never be a direct inference from an act of former conduct to the act charged; there must always be a double step of inference of some sort, a 'tertium quid.' In other words, it cannot be argued: "Because A did an act X last year, therefore he probably did the act X as now charged." Human action being in-

finitely varied, there is no adequate probative connection between the two. A may do the act once, and may never do it again; and not only may he not do it again, but it is in no degree probable that he will do it again. The conceivable contingencies that may intervene are too numerous.

Thus, whenever resort is had to a person's past conduct or acts as the basis of inference to a subsequent act, it must always be done *intermediately through another inference*. It may be argued: "A once committed a robbery; (1) therefore he probably has a thieving disposition; (2) therefore he probably committed this robbery"; or "(1) therefore he had some general design to commit certain robberies; (2) therefore he probably carried out that design and committed this robbery." Or it may be argued: "A gave money to his poor friend B; (1) therefore A probably is of a benevolent disposition; (2) therefore A probably did not commit the present robbery"; or "(1) therefore he probably had a kindly feeling towards B; (2) therefore he probably did not rob B." The impulse to argue from A's former bad deed or good deed directly to his doing or not doing of the bad deed charged is perhaps a natural one; but it will always be found, upon analysis of the process of reasoning, that there is involved in it a hidden intermediary step of some sort, resting on a second inference of character, motive, plan, or the like. This intermediate step is always implicit, and must be brought out.

The result is that, when the ultimate proposition to be proved is the doing of an act by a defendant, and resort is had evidentially to his past conduct, this is not in order to argue directly from act to act, but in order, by the past act, to evidence character, design, motive, or some other quality, and through that quality to infer that it led to the act charged. To make available such evidence of past conduct or acts, some use for it must be found as evidencing Character either Character (as here), or else Design, Motive, Intent, or some other quality (*post*, §§ 300–371).

This principle has long been accepted in our law. That "the doing of one act is in itself no evidence that the same or a like act was again done by the same person", has been so often judicially repeated that it is a commonplace:

1872, AGNEW, J., in *Shaffner* v. *Com.*, 72 Pa. 65: "It is a general rule that a distinct crime, unconnected with that laid in the indictment, cannot be given in evidence against a prisoner. . . . Logically the commission of an independent offence is not proof in itself of the commission of another crime."

1893, KNOWLTON, J., in *Miller* v. *Curtis*, 158 Mass. 127, 129: "That a person has committed one crime has no direct tendency to show that he committed another similar crime which had no connection with the first."

1896, MARTIN, J., in *People* v. *McLaughlin*, 150 N. Y. 365, 386, 44 N. E. 1017: "It is an elementary principle that the commission of one crime is not admissible in evidence to establish the guilt of a party of another."

§ 193. **Particular Bad Acts to show the Defendant's Character; (1) Relevancy.** It has already been seen (*ante*, § 58) that if a defendant in a criminal

case chooses to offer his good character (for the appropriate trait) as an argument that he probably did not commit the offence charged, the prosecution may by counter-evidence dispute the existence in him of the good character thus alleged; and it has also been seen that the fact thus to be proved or disproved is the real disposition or Character, of which reputation or anything else is merely evidence (*ante*, § 52).

The question thus arises how the Character is to be proved or disproved. It has been noted (*ante*, §§ 52, 53) that there are three conceivable ways of evidencing it: (1) Reputation of the community; this is open to the objection of being Hearsay, and is dealt with *post*, § 1608; (2) Personal Knowledge or Opinion of those who know the defendant; this is open to the objection of the Opinion rule, and is dealt with *post*, § 1980; (3) Particular Acts of Misconduct, exhibiting the particular trait involved. This last sort of evidence is now to be considered.

The law here declares a general and absolute rule of exclusion. It is forbidden, in showing that the defendant has not the good character which he affirms, to resort to *particular acts of misconduct* by him.

Is this prohibition based on the Irrelevancy of such evidence, or on some reason of Auxiliary Policy (*ante*, § 42) which assumes its relevancy but sees reasons of policy for its exclusion? That such former misconduct is relevant, *i.e.* has probative value to persuade us of the general trait or disposition, cannot be doubted. The assumption of its probative value is made throughout the judicial opinions on this subject;[1] and the following acute analysis makes it entirely clear:

> 1876, *State* v. *Lapage*, 57 N. H. 275, 299; on a charge of murder committed in an attempt to rape, the fact of the defendant's recent rape of another person was offered, Mr. *Norris* arguing for the defence: "Making no point of remoteness in time or space, let us see how well this evidence will bear analyzing. Premise to be proved: he committed a rape, in no way, except in kind, connected with this crime. Inference: a general disposition to commit this kind of offence. Next premise: this general disposition in him. Inference: he committed this particular offence. . . . It may be tried by the common test of the validity of arguments. Some men who commit a single crime have, or thereby acquire, a tendency to commit the same kind of crimes; if this man committed the rape, he might therefore have or thereby acquire a tendency to commit other rapes; if he had or so acquired such a tendency, and if another rape was committed within his reach, he might therefore be more likely to be guilty; if more likely to be guilty of rape, and if there was murder committed in perpetrating or attempting to perpetrate rape, he might therefore be more likely to be guilty of this rape, and hence of this murder; a sort of an 'ex-parte' conviction of a single rape, from which the jury are to find a general disposition to that kind of crimes, in order to help them out in presuming the commission of another rape as a mo-

§ 193. [1] For example, in the quotations in the next section, and also in the following: 1851, R. *v.* Shrimpton, 2 Den. Cr. C. 322 (Campbell, L. C. J.: "The question in issue is the good character of the prisoner; surely, whether the prisoner had been previously convicted is relevant to that"; Alderson, B.: "The prisoner raises the question of character, and the evidence of his former conviction is brought to show what his character really is").

For the psychological aspects of conduct as evidencing character, in point of probative value and irrespective of the rules of Evidence, see the present author's "Principles of Judicial Proof" (1913), §§ 84–98.

tive or occasion of the murder. We can find nothing like it in the books." LADD, J.: "But it is nevertheless argued on behalf of the State (if I have not wholly misapprehended the drift of the argument) that the evidence was admitted because, as matter of fact, its natural tendency was to produce conviction in the mind that the prisoner committed rape upon his victim at the time he took her life. . . . I shall not undertake to deny this. If I know a man has broken into my house and stolen my goods, I am for that reason more ready to believe him guilty of breaking into my neighbor's house and committing the same crime there. We do not trust our property with a notorious thief. We cannot help suspecting a man of evil life and infamous character sooner than one who is known to be free from every taint of dishonesty or crime. We naturally recoil with fear and loathing from a known murderer, and watch his conduct as we would the motions of a beast of prey. When the community is startled by the commission of some great crime, our first search for the perpetrator is naturally directed, not among those who have hitherto lived blameless lives, but among those whose conduct has been such as to create the belief that they have the depravity of heart to do the deed. This is human nature — the teaching of human experience. If it were the law, that everything which has a natural tendency to lead the mind towards a conclusion that a person charged with crime is guilty must be admitted in evidence against him on the trial of that charge, the argument for the State would doubtless be hard to answer. If I know a man has once been false, I cannot after that believe in his truth as I did before. If I know he has committed the crime of perjury once, I more readily believe he will commit the same awful crime again, and I cannot accord the same trust and confidence to his statements under oath that I otherwise should. . . . Suppose the general character of one charged with crime is infamous and degraded to the last degree; that his life has been nothing but a succession of crimes of the most atrocious and revolting sort: does not the knowledge of all this inevitably carry the mind in the direction of a conclusion that he has added the particular crime for which he is being tried to the list of those who have gone before? Why, then, should not the prosecutor be permitted to show facts which tend so naturally to produce a conviction of his guilt? The answer to all these questions is plain and decisive: The law is otherwise."

In the Continental traditions of criminal trials, this class of evidence is given great consideration, and is freely used. The following passages illustrate the part it plays at a trial:

French Trials. (1) *Trial for the Murder of the Baroness de Valley.* (1896, Paris; Albert Bataille, "Causes Criminelles et Mondaines", 1896, p. 249.) [On June 16, 1896, Baroness de Valley was found strangled in her apartment in Paris. She was rich, and made a business of lending her money at usurious rates. Robbery was the object of her murderers. A party of several young fellows, Kiesgen, Ferrand, Lagueny and Truel, were charged with the murder. One of them, Kiesgen, son of a merchant, appeared well dressed and well brought up; he had no occupation and his father furnished him with pocket-money. The others were of not so respectable surroundings. Presiding Judge POUPARDIN thus conducted the opening examination at the trial, on November 24.]

JUDGE. "None of you have a criminal record; but that is far from saying that you have a good record.

"You, Kiesgen, seem to have a mode of life not at all creditable. You frequent the low saloons of the Latin Quarter. You were an habitué of the Harcourt Café. You have been getting all the money you could from women. Your mistress, Jeanne Prevost, alias Margot, gave you 15 francs a day from her earnings as a prostitute. You are a panderer of the worst sort. In your cell at Mazas Prison, you kept writing to Margot, asking her to send you cash. Unfortunately for you, she was at that time herself in St. Lazare Prison (Laughter in the audience).

"As for you, Truel, alias Julian, alias Curlyhead, you are the son of a mechanical draftsman at Charenton. After having a job as apprentice-draftsman in a factory, you were discharged for a brutal assault. After that you lived off your mother, . . . Then you became an habitué, like Kiesgen, of the saloons and women of the Latin Quarter. You seem to have been one of a gang of bicycle thieves. In short, after starting as an honest workingman, you gave up that pursuit, and became an agent for houses of ill-fame. You see what you have been brought to by bad company.

"You, Lagueny, like your fellow-defendants, are scarcely twenty years old. You are the natural son of an unfortunate woman who died insane, two years ago, at the St. Anne Asylum. During all your boyhood you were left by her to loaf on the streets. You picked up a living by hawking things now and then; selling newspapers, sometimes dogs, sometimes peddling olives at restaurant-doors; sleeping in the public refuges. At twelve years of age, a charitable society had you baptized in the Sacred Heart Church at Montmartre, and next day you partook of your first communion. Your mother seems to have done some questionable errands for Baroness Valley, and told you that the Baroness was your godmother. You, ever since you became a young man, have been an agent for the assignations of girls in the Latin Quarter. That was where you made the acquaintance of Kiesgen and of Julien the Curlyhead. To them you made the proposal to go and rob the Baroness. She had always showed a kind interest in you; she used to give you odd change."

Lagueny. "Gave me money? Well, I guess not! The old skinflint! She would even pick up old crusts of bread in the street."

JUDGE. "Well, at any rate, your mother used to be her housekeeper, and the Baroness sometimes gave you a lunch."

. . . . . .

[Then the evidence directly to the crime was put in.

Nov. 25. The jury found three of the defendants guilty. But in view of the youth and lack of a criminal record for Kiesgen and Truel (the two who did the actual killing), they recommended those two for leniency. Both were sentenced to hard labor for life. . . .

Lagueny, who had proposed the robbery, was sentenced to ten years' imprisonment, Ferrand to five years, and Durlin was acquitted.]

. . . . . .

(2) *Trial for Blackmailing Max Lebaudy.* (1896, Paris; Albert Bataille, "Causes Criminelles et Mondaines", 1896, p. 95.) [Max Lebaudy was a young millionaire, foolish and extravagant. About the years 1894–5, he became the prey of a number of blackmailers, some of them journalists, some ex-military men, some mere adventurers. Several different widespread intrigues against him were unearthed. He was bled for various sums, — fr. 30,000; 10,000; 40,000; etc. Various well-known personages, political, literary, and dramatic, more or less innocent, were more or less involved in the scandals.

On March 30, 1896, the trial began, under Presiding Judge PLANTEAU.]

Examination of Viscount *Ulrich de Civry.*

JUDGE. "You took part in the war of 1870, and I am bound to say that you behaved very creditably. Leaving the army in 1873, with the rank of cavalry quartermaster, you went back to journalism, and were at last accounts chief editor of the *Army Echo.* You also went into politics; and were candidate for the Assembly at Yvonne in 1893.

"But I am obliged to remind you that you have a record in the criminal court. In 1876, the Paris Court of Appeals sentenced you to one year's imprisonment for illegally wearing military uniform. In 1880, the same Court sentenced you to two months for unlawful eloignment of goods under attachment."

Civry. "My counsel will explain about those convictions."

JUDGE. "But those are not all. You were convicted by default, in 1877, at the Seine Assize Court, of robbery, and were sentenced to twenty years' imprisonment with hard labor. They had to extradite you from England, and the penalty was commuted to three

years. But the judgment was set aside on technical grounds; you had a new trial at Melun, and the public prosecutor withdrew his charge, and you were of course acquitted.

"To get the money for your legal expenses, you had borrowed large sums, through several notaries. One of these notaries has himself just been convicted at the Seine Assize Court. The sums you thus borrowed amounted in notes for more than fr. 1,000,000, nominally, though you yourself received only some fr. 500,000."

[The judge then entered into details of the Hennion case, reading from the records. Hennion was a young man of means from the provinces, who had become entangled in the usurers' and speculators' clutches by the medium of Viscount Civry, and the Viscount had narrowly escaped another criminal sentence.]

JUDGE. "The judgment of the Court there said: 'Hennion's ruin was obviously due to the machinations of unscrupulous adventurers, among whom figured Ulrich de Civry. Unfortunately, the Penal Code does not reach all forms of dishonesty.'

"Well, in spite of these unsavory incidents in your past, you maintained something of a position in a certain section of Parisian society. When you left your regiment in 1891, you were adjutant. What is your business now?"

Civry. "Horse-trading."

JUDGE. "That is not a business. It is reported that you do not do much of anything, and are living as a parasite off other persons. You spent two years in Normandy with an old chum from your regiment, Mr. Davout, but he finally gave you to understand, in correct but unmistakable manner, that you had reached the limits of his hospitality. You then came back to live in Paris, where you ran up debts, even with the house-porter."

Civry. "That was for my room-breakfasts. And I did not have time to pay him; they arrested me too soon." (Laughter in the audience).

[On March 26, the verdict and judgment were rendered.

Joseph de Civry, Georges de Labruyère, Chiarosolo, Rosenthal, and Carle des Perrières were acquitted.

Ulrich de Civry and Cesti were found guilty, and sentenced to thirteen months in jail and 500 francs fine.]

§ 194. **Same: (2) Reasons of Policy.** It may almost be said that it is because of this indubitable Relevancy of such evidence that it is excluded. It is objectionable, not because it has no appreciable probative value, but because it has too much. The natural and inevitable tendency of the tribunal — whether judge or jury — is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge. Moreover, the use of alleged particular acts ranging over the entire period of the defendant's life makes it impossible for him to be prepared to refute the charges, any or all of which may be mere fabrications. These reasons of Auxiliary Policy (*post*, § 1863), directed to prevent the risks of reaching verdicts through insufficient evidence, have operated to exclude that which is in itself relevant.

In early practice this class of evidence was resorted to without limitation.[1]

§ 194. [1] It is clear that before 1670–1680 the accused's prior record of misconduct could be considered: 1669, Hawkins' Trial, 6 How. St. Tr. 921, 935, 949 (larceny; details of a larceny from another person at another time, allowed to be given; L. C. B. Hale: "This, if true, would render the prisoner now at the bar obnoxious to any jury"); 1684, Hampden's Trial, cited *post* (the judge, in excluding such evidence invokes a "case lately adjudged in this court"). The case of Faulconer (1653; 5 How. St. Tr. 323, 354), which Sir J. Stephen has cited (Hist. Cr. Law, I, 368) as an early instance of such evidence, is hardly in point;

But for more than two centuries, ever since the liberal reaction which began with the Restoration of the Stuarts, this policy of exclusion, in one or another of its reasonings, has received judicial sanction, more emphatic with time and experience. It represents a revolution in the theory of criminal trials, and is one of the peculiar features, of vast moment, which distinguishes the Anglo-American from the Continental system of Evidence:[2]

1684, WITHINS, J., in *Hampden's Trial*, 9 How. St. Tr. 1053, 1103: "You know the case lately adjudged in this Court; a person was indicted of forgery, we would not let them give evidence of any other forgeries but that for which he was indicted, because we would not suffer any raking into men's course of life to pick up evidence that they cannot be prepared to answer to."

1692, HOLT, L. C. J., in *Harrison's Trial*, 12 How. St. Tr. 833, 864, 874 (charge of murder; a witness was called to speak of some felonious conduct of the defendant three years before): "Hold, hold, what are you doing now? Are you going to arraign his whole life? How can he defend himself from charges of which he has no notice? And how many issues are to be raised to perplex me and the jury? Away, away! That ought not to be; that is nothing to the matter."

1847, PARKE, B., in *Att'y-Gen'l* v. *Hitchcock*, 1 Ex. 93: "We cannot enter into a collateral question as to the man's having committed a crime on some former occasion, one reason being that it would lead to complicated issues and long inquiries; and another, that a party cannot be expected to be prepared to defend the whole of the actions of his life."

1851, *R.* v. *Oddy*, 2 Den. Cr. C. 264, CAMPBELL, L. C. J.: "The moral weight of such evidence in any individual case would no doubt be great. But the law is a system of general rules; and it does not admit such evidence, because of the inconvenience which would result from it." Mr. *Pickering*, for the prosecution: "But in several analogous cases the law does admit such evidence, notwithstanding the inconvenience; and there the inconvenience, which is confessedly the only ground of exclusion, is tolerated in order that justice may not be defeated. The inconvenience is put upon two grounds; first, that of the prisoner being taken by surprise; secondly, of many different issues being raised." CAMPBELL, L. C. J.: "Yes; that is so." Mr. *Pickering:* "If in such cases [as previous utterings of forgeries to show intent] justice is not permitted to be defeated by the argument drawn from the inconvenience of raising different issues, why should it in the present case?" . . . CAMPBELL, L. C. J.: "It would have been evidence of the prisoner being a bad man, and likely to commit the offences there charged. But the English law does not permit the issue of criminal trials to depend on this species of evidence."

for here the trial was for perjury, and the evidence was offered as "proofs to the credit of Faulconer", *i.e.*, rather looking upon him as a witness to be impeached. Lord Campbell, on the other hand (Lives of the Chief Justices, III, 24), erroneously gives Harrison's Trial, in 1692 (cited *post*) as the first case of exclusion. But at any rate the older practice died hard and slowly: 1695, R. *v.* Hains, Comb. 337 ("If the defendant give evidence of a general reputation, it may be answered by particular instances on the other side for the King").

Yet it is odd to find the following anachronistic remark in a judgment of Lord Mansfield, in 1742 (Clark *v.* Periam, 2 Atk. 339): "If there is a criminal prosecution, and the prisoner in order to strengthen the evidence for his character enters into particular facts to support it, this is called a challenge to the prosecutor, and then he may likewise examine to particular facts."

[2] When Campbell visited Paris, in 1819, and the French lawyers "laughed at our strictness" in excluding hearsay, "I retorted by pointing out the injustice of their practice" in character-evidence (Life of L. C. Campbell, I, 364).

For some examples of French trials, see Stephen's History of the Criminal Law, I, Appendix: Wigmore's Select Cases on the Law of Evidence, 2d ed. 1914, pp. 58–62; and the citations *post*, § 2251, note 12.

In some of the opinions in R. *v.* Bond, 1906, 2 K. B. 389, 408, reference is made to the contrasting French principle.

1865, WILLES, J., in *R.* v. *Rouvton*, L. & C. 520, 541: "[Evidence of particular acts] is excluded, partly for the reason [irrelevancy] already given, and partly because no notice has been given to the other side that such an inquiry is going to be made. . . . The impossibility of giving such notice with respect to the prisoner's conduct would exclude such evidence, even if it were not excluded by general rules of policy."

1858, Mr. John Norton *Pomeroy*, arguing in *People* v. *Stout*, 4 Park. Cr. 97: "In its administration of criminal jurisprudence, the civil law allows and requires such evidence. It investigates the antecedent character, disposition, habits, associates, business, — in short, the entire history of an accused person, to discover whether it is probable that he would commit the alleged crime. English and American criminal law, in its practical administration, confines itself to the investigation of the very crime charged, and restricts judicial evidence to circumstances directly connected with and necessary to elucidate the issue to be tried. These two systems are diametrically opposed to each other, and whatever may be said of their comparative merits, the rule of the common law is so firmly established that it lies at the very foundation of criminal procedure, as an inseparable element of trial by jury. Trained judicial minds may be able to eliminate from a mass of irrelevant and general criminative facts those which directly bear upon the crime charged against the prisoner; but the very character of juries, and the theory of trial by jury, require that all prejudicial evidence tending to raise in their minds an antipathy to the prisoner, and which does not directly tend to prove the simple issue, should be carefully excluded from them."

1873, ALLEN, J., in *Coleman* v. *State*, 55 N. Y. 70: "A person cannot be convicted of one offence upon proof that he committed another, however persuasive in a moral point of view such evidence may be. It would be easier to believe a person guilty of one crime if it was known that he had committed another of a similar character, or indeed of any character. But the injustice of such a rule in courts of justice is apparent. It would lead to convictions upon the particular charge made by proof of other acts in no way connected with it, and to uniting evidence of several offences to produce conviction of a single one."

1882, DEVENS, J., in *Com.* v. *Jackson*, 132 Mass. 20: "The objections to the admission of evidence as to other transactions, whether amounting to indictable crimes or not, are very apparent. Such evidence compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defence, raises a variety of issues, and thus diverts the attention of the jury from the one immediately before it; and by showing the defendant to have been a knave on other occasions, creates a prejudice which may cause injustice to be done him."

1887, THAYER, J., in *State* v. *Saunders*, 14 Or. 300, 309, 12 Pac. 441: "Place a person on trial upon a criminal charge, and allow the prosecution to show by him that he has before been implicated in similar affairs (no matter what explanation of them he attempts to make), it will be more damaging evidence against him and conduce more to his conviction than direct testimony of his guilt in the particular case. Every lawyer who has had any particular experience in criminal trials knows this, — knows that juries are inclined to act from impulse, and to convict parties accused, upon general principles. An ordinary juror is not liable to care about such a party's guilt or innocence in the particular case, if they think him a scapegrace or vagabond. That is human nature."

1903, Hon. A. C. PLOWDEN, "Grain or Chaff; the Autobiography of a Police Magistrate", c. XI, p. 142: "Another circuit hero carved a niche for himself in the temple of Fame by a splendid disregard of what I might call the ordinary conventions of a criminal court. B— was not remarkable for too much devotion to his profession. . . . On a certain occasion at Gloucester, B— was instructed to prosecute a man for burglary. Now if there is one elementary principle in criminal procedure more widely known and sacredly more observed than another, it is that the antecedents of a prisoner, if unfavorable, should be religiously kept a secret from the jury, until after they have delivered their verdict. . . . Of this sacred rule B— quickly showed, to the consternation of the prisoner, that he was

profoundly ignorant. Having touched on the main features of the charge, he proceeded: 'And now, gentlemen, I come to a very important fact. I am sorry to tell you, though it must make your duty easier, that the prisoner has been previously convicted —' The judge who was trying the case — Baron Bramwell — hastily interposed: 'Mr. B —, you must not say that!' 'Oh, but' retorted the unabashed counsel, 'I can prove it, my lord.' 'Mr. B —,' again interposed the learned judge sternly, 'I am amazed at you! I forbid your doing anything of the kind!' Whereupon B—, even more amazed than the judge, exclaimed reproachfully, 'But here they are!' And before he could be stopped, he held up to the jury, amid much laughter from the Bar, a long list of convictions, with the prisoner's photograph at the top; at the same time casting a withering glance of reproof both at the Bench and at the Bar for what he considered had been a most unmeaning interruption. Needless to say that, in spite of an appeal from the learned judge to the jury to disregard these damning proofs, the jury in double quick time returned a verdict of 'Guilty'; and the prisoner had just reason to regret that his fate had been placed in the hands of a counsel who, with all his sporting instincts, had not grasped the truth that a prisoner, however bad, is entitled to have a run for his money."

1921, BRICKEN, P. J., in *Dennison* v. *State*, 17 Ala. App. 674, 88 So. 211 (larceny of an automobile): "The rule, which requires that all evidence which is introduced shall be relevant to the guilt or the innocence of the accused, is always applied with considerable strictness in criminal proceedings. The wisdom and justice of this, at least from the defendant's standpoint, are self-evident. The defendant can with fairness be expected to come into court prepared to meet the accusations contained in the indictment only, which in this case was the larceny of the Dodge automobile. On this account, all the evidence offered by the State should consist wholly of facts which were within the range and scope of the allegations contained in the indictment upon which he is being tried. The evidence introduced over the defendant's objection relating to other offenses than that charged in the indictment no doubt alarmed the suspicions of the jury, or at least it may have had that effect, and inclined them the more readily to believe in the guilt of the defendant of the offense charged, and rendered the jury less inclined to listen or give proper weight and consideration to whatever was offered or said in his defense. For it is well known, in fact a matter of common knowledge, that the large majority of persons of average intelligence are untrained in logical methods of thinking, and are therefore prone to draw illogical and incorrect inferences and conclusions without foundation. It is also a matter of common knowledge that from such persons jurors are selected. And like others they will very naturally believe that a person is guilty of the offense with which he is charged if it is proved to their satisfaction that he has committed a similar offense, or any offense of an equally heinous character. So, as before stated, the general rule in this connection forbids the introduction of evidence which will show, or tend to show, that the accused has committed any crime wholly independent of the offense for which he is on trial."[3]

The reasons thus marshalled in various forms are reducible to three: (1) The over-strong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts; (2) The tendency to condemn, not because he is believed guilty of the present charge, but because he has escaped unpunished from other offences; both of these represent the principle of Undue Prejudice (*post*, § 1904);

[3] See also a good opinion by Dodge, J., in Paulson *v.* State (1903), 118 Wis. 89, 94 N. W. 771.

That the jurors' knowledge of an accused's criminal record would in actual experience, not merely in theory, affect their conclusions, and that the guilty and the innocent are alike affected by this ignorance of the jurors, or by their knowledge if incidentally obtained, may be seen from the instances collected in Mr. Arthur Train's invaluable book, "The Prisoner at the Bar", pp. 155–169 (1906).

(3) The injustice of attacking one necessarily unprepared to demonstrate that the attacking evidence is fabricated; this represents the principle of Unfair Surprise (*post*, § 1849). It is also said, by some judges, (4) that the Confusion of new Issues is a reason for avoiding such evidence; but this can play but a small and cumulative part, since this reason could be obviated, as it is with witnesses (*post*, § 979), by excluding extrinsic testimony and allowing proof by a record of prior conviction, or cross-examination, where the defendant waives his privilege by taking the stand; yet these means are never allowed. Thus it seems clear that the doctrine of Confusion of Issues (*post*, §§ 1863, 1904), while it would operate to the extent of excluding extrinsic testimony, is nevertheless not in itself controlling and does not account for the full scope of the rule. The other reasons are the vital ones.

These reasons, it may be noted, represent general policies and constant quantities in our law of Evidence, and reappear individually in other parts of it.[4] For example, the third — but not the first or the second — reappears in the use of particular misconduct against a witness; but it is there allowed to be satisfied by forbidding extrinsic testimony, while admitting judgments of conviction and cross-examination of the witness himself (*post*, § 979). Again, the first two reasons apply also, though not in equal strength, to the prosecution's use of general character against a defendant (*ante*, § 57); and accordingly that is forbidden except where the defendant has himself challenged inquiry into his character. Again, the third reason finds an analogy in the law of criminal pleading, in the rule that on an indictment charging only a single offence the issue must be confined to that offence, and no election is allowed to lay before the jury a number of such offences from which they are to select the one best proved.[5]

Furthermore, it is to be noted, the judicial exposition of these reasons shows the fallacy of supposing, as some do, that the object of the rule is merely to *show mercy to the guilty one*, to give him a final chance for life and liberty by artificially handicapping the prosecution, — thus importing into courts of justice the notions of sportsmanship. On the contrary, the object is to prevent a person not guilty of the present charge from being improperly found guilty of it. If it be said that nevertheless this is still a spirit of kindness to the guilty, seeking to prevent his being punished now for what he has formerly done, the answer is that we are nevertheless protecting a person who is theoretically innocent of the present charge from being now found guilty of a past crime which he was not aware would be charged against him and which he has no opportunity to show to be fabricated. There is quite enough maudlin pity for criminals in our law in other respects; and we ought not to give sup-

[4] Compare the general principles examined *post*, §§ 1863, 1904.

[5] See U. S. *v.* Mitchell, 2 Dall. 348, 357; State *v.* Bates, 10 Conn. 372, where the similarity of the reasons may be noticed. In these cases of course there is no attempt to argue evidentially from one offence to the other.

port to that tendency by claiming on such grounds the doctrine here involved, — a doctrine which is in truth mainly designed to protect the innocent and not the guilty.

The rule of exclusion thus expounded is so firmly established that it would be held to prevail even in jurisdictions where no express enunciation of it has been made.[6] It is constantly assumed or laid down in the rulings which

[6] The practical bearing of the rule, it is to be noted, is to exclude this class of facts *on rebuttal by the prosecution;* for the use of bad character in any form is already forbidden to the prosecution until the defendant has opened the subject (*ante*, § 57);

CANADA: 1888, R. *v.* Triganzie, 15 Ont. 294, 299 (excluding a prior conviction for a similar crime).

UNITED STATES: *Alabama:* 1856, Franklin *v.* State, 29 Ala. 20; 1859, Dupree *v.* State, 33 Ala. 388 (that the defendant was an escaped convict); 1887, Steele *v.* State, 83 Ala. 25, 3 So. 547; 1889, Moulton *v.* State, 88 Ala. 116, 6 So. 758; Morgan *v.* State, 88 Ala. 224, 6 So. 761; 1895, Murphy *v.* State, 108 Ala. 10, 18 So. 557 (that the witness, as sheriff, had often had a warrant out against the defendant); *California:* 1888, People *v.* Dye, 75 Cal. 108, 112, 16 Pac. 537; 1898, People *v.* Lynch, 122 Cal. 501, 55 Pac. 248; 1900, People *v.* Lee Dick Lung, 129 Cal. 491, 62 Pac. 71; *Illinois:* 1869, McCarty *v.* People, 51 Ill. 231; 1871, Sutton *v.* Johnson, 62 Ill. 209; *Indiana:* 1895, Griffith *v.* State, 140 Ind. 163, 39 N. E. 440; *Iowa:* 1887, State *v.* Sterrett, 71 Ia. 387; 32 N. W. 387; 1890, State *v.* McGee, 81 Ia. 17, 19, 46 N. W. 764; 1895, State *v.* Tippet, 94 Ia. 646, 63 N. W. 445; 1905, State *v.* Thompson, 127 Ia. 440, 103 N. W. 377; *Kansas:* 1901, State *v.* Kirby, 62 Kan. 436, 63 Pac. 752; 1918, State *v.* Smith, 103 Kan. 148, 174 Pac. 551 (murder); *Kentucky:* 1882, White *v.* Com., 80 Ky. 485; 1898, Ballowe *v.* Com., — Ky. —, 44 S. W. 646; *Louisiana:* 1893, State *v.* Donelon, 45 La. An. 744, 754, 12 So. 922; 1903, Cook *v.* State, 111 La. —, 35 So. 665 (but a character for violence when drinking is not within the prohibition of specific acts); *Massachusetts:* 1807, Com. *v.* Hardy, 2 Mass. 317 (Parsons, C. J.: "in such case there can be no examination as to particular acts"); 1876, Com. *v.* O'Brien, 119 Mass. 342 (here, a good character for peace and quiet, attempted to be disproved by showing a conviction for assault); *Michigan:* 1878, Brownell *v.* People, 38 Mich. 732, 736; *Minnesota:* 1921, State *v.* Nelson, 148 Minn. 285, 181 N. W. 850 (murder); *Mississippi:* 1890, Kearney *v.* State, 68 Miss. 233, 238; 8 So. 292; *Missouri:* 1866, State *v.* Harrold, 38 Mo. 497; 1882, State *v.* Turner, 76 Mo. 351; *Nebraska:* 1881, Olive *v.* State, 11 Nebr. 1, 27, 7 N. W. 444; 1894, Patterson *v.* State, 41 Nebr. 538, 59 N. W. 917; 1895, Basye *v.* State, 45 Nebr. 261, 63 N. W. 811; *New Hampshire:* 1844, State *v.* Renton, 15 N. H. 174; *New Jersey:* 1900, Bullock *v.* State, 65 N. J. L. 557, 47 Atl. 62; *New Mexico:* 1904, U. S. *v.* Densmore, 12 N. M. 99, 75 Pac. 31; *New York:* 1832, Townsend *v.* Graves, 3 Paige, Ch. 453, 455; 1835, People *v.* White, 14 Wend. 113; 1887, People *v.* Sharp, 107 N. Y. 427, 457, 467, 14 N. E. 319; 1888, People *v.* Greenwall, 108 N. Y. 301, 15 N. E. 404; 1904, People *v.* Rodawald, 177 N. Y. 408, 70 N. E. 1 (specific acts excluded, "because each specific act shown would create a new issue"; apparently unsound, because here the record of conviction for assault was offered, and the defendant's knowledge that the deceased had been in the State prison, though not a knowledge of the nature of his crime); 1908, People *v.* Jones, 191 N. Y. 291, 84 N. E. 61 (former conviction, excluded); 1918, People *v.* Richardson, 222 N. Y. 103, 118 N. E. 514 (keeping a disorderly house; cited more fully *post*, § 987); *North Carolina:* 1822, State *v.* Twitty, 2 Hawks 248, 258; 1855, Bottoms *v.* Kent, 3 Jones L. 156; 1877, State *v.* Laxton, 67 N. C. 218; 1888, State *v.* Bullard, 100 N. C. 486, 488, 6 S. E. 191 (but confusing the question with that of impeaching a witness' character); *Oregon:* 1897, State *v.* Moore, 32 Or. 65, 48 Pac. 468; *Rhode Island:* 1892, State *v.* Ellwood, 17 R. I. 763, 766, 24 Atl. 782; *South Carolina:* 1905, State *v.* Dean, 72 S. C. 74, 51 S. E. 524 (specific acts of prior violence on others, excluded); 1906, State *v.* Andrews, 73 S. C. 257, 53 S. E. 423 (specific acts of violence, excluded, unless admissible on the principle of § 248, *post*); *Wisconsin:* 1895, Fosdahl *v.* State, 89 Wis. 482, 62 N. W. 185 (prior convictions).

The only modern instance of a contrary view seems to be the following, which must be regarded as a casual inadvertence: 1840, Story, J., in Bottomley *v.* U. S., 1 Story 135, 145, 1 Fed. 688 (importation of goods by bribery of the deputy-collector; other false entries were admitted as tending to overcome the "ordinary presumption of law in favor of . . . [the official's] general character being elevated above" such a fraud, so that "he who has the baseness to accept a bribe . . . in one case, withdraws from himself all the sanctity of his official character in other cases of a similar nature").

Compare the distinctions of § 988, *post* (accused's bad reputed acts, on cross-examination of a witness to good repute).

But as a sign of the times, revealing a willingness to allow inroads on the rule, see

expound all the ensuing distinctions arising from the use of conduct to evidence Intent, Plan, or some other fact than Moral Character.

§ 194*a*. **Same: Exceptions under English Criminal Evidence Act of 1898.** The English Criminal Evidence Act of 1898, in removing the accused's incompetence to testify (*post*, § 488), made a broad exception, in spirit, to this traditional rule about character. The effect of that statute is that under certain conditions the accused's record of prior penal convictions does get before the jury, and is considered by them as character evidence affirmatively pointing to guilt. The statute does not *say* that the penal record is to be considered for that purpose, but the statute-makers *knew* that it *would* be so considered. Nominally, then, the prior penal record is admitted either to rebut and disprove the testimonial good character of the accused or for some other evidential purpose; but these purposes are supposed to be so limited that safeguards are set against the unlimited use and unsafe misuse of such evidence against an habitual offender.

What are those purposes? The statute (set out in full, *post*, § 488) thus enumerates them:[1]

§ 1, Sub-section (*f*): "A person *charged and called as a witness* in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he [X] has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or [Y] is of bad character, unless —

"(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

"(ii) he has personally or by his advocate [A] asked questions of the witnesses for the prosecution with a view to establish his own good character, or [B] has given evidence of his good character, or [C] the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or

"(iii) he has given evidence against any other person charged with the same offence."

Here are five distinct evidential purposes:

(1) The first, that of par. (i), is the ordinary use of *other offences to show intent*, motive, plan, etc. (*post*, §§ 300–416). Such evidence would have been admissible in any event; the statute merely avoids any doubt as to the propriety of asking for it from the accused himself.[2]

(2) The second purpose, that of the first clause of par. (ii), clause [A], is the present principle, *i.e.* the *rebuttal of his alleged good character* by the fact of former specific bad acts. Here a definite change is made in the prior law, insofar as the accused has taken the stand. The distinction between this and the French rule is that this rule does not permit the use of prior offences

the dissenting opinion of McBride, C. J., in State *v.* Start, 1913, 65 Or. 178, 132 Pac. 512 (cited more fully *post*, § 360, n. 2).

§ 194*a*. [1] St. 61–2 Vict. c. 36, § 1.

[2] Note that whenever such prior offences are thus relevant, the further objection to asking the accused himself about them, that he is *privileged not to criminate himself*, is expressly met and removed by sub-section *e* (quoted *post*, § 2276, n. 5).

The cases under this section are placed elsewhere under the respective rules of Admissibility which they invoke, chiefly the rule for admitting other offences to evidence Intent, Plan, etc. (*post*, §§ 318–367).

until and unless the accused invokes an alleged good character. Nevertheless, the jury's use of such evidence is likely go beyond that of mere rebuttal, and to weigh the probability that a prior offender would again offend.

(3) The third purpose, that of the second clause of par. (ii), clause [B], is not a novelty in principle; it enables the prosecution to *contradict his witnesses* to good reputed character, but by *specific bad acts*, and not merely by contrary repute.[3] This is effected in American practice by cross-examination of his witnesses to good repute (*post*, § 988); but the English rule is much broader in scope.

(4) The fourth purpose, that of the third clause of par. (ii), clause [C], is also a novelty in the law; it allows the accused's general character to be impeached by prior bad acts, whenever he raises the issue of the *credibility of the prosecution's witnesses* as affected by their character. This is already permissible in the United States (*post*, § 987), but only to affect the accused's character as a witness. The statute's permission is much narrower, in that it applies only when the character of the prosecution's witnesses has been impeached; and is somewhat broader (than in many of the United States), in that it permits any former offence to be inquired about, regardless of the grade of the crime.[4]

[3] The cases construing this part of the statute are as follows: 1851, R. *v.* Shrimpton, 2 Den. Cr. C. 319, 5 Cox Cr. 387 (under St. 1836, c. 111, quoted *post*, § 196, n. 1; the phrase "give evidence of his good character" includes testimony of good character obtained from an opposing witness on cross-examination); 1909, Solomon's Case, 2 Cr. App. 80 (evidence as to recent employment is not evidence of character; whether telling the arresting officer, "I am a respectable man", etc., and putting that in evidence, is evidence of character, not decided); 1910, R. *v.* Ellis, 2 K. B. 747 (meaning of par. (ii) as to "good character", carefully expounded); 1920, The King *v.* Wood, 2 K. B. 179 (indecent assault; there were two counts, the assaults being on different persons; that of the first count was later in time than that of the second; on trial of the second count, under sect. 1*f*, sub-sect. ii, held that the conviction for an offence later in time was admissible); 1921, The King *v.* Beecham, 3 K. B. 464 (manslaughter by a motor-car; defendant, taking the stand, on cross-examination answered that he "did not care for driving at a high rate of speed"; prior convictions for driving at excessive speed were then evidenced to discredit him, under sect. 1*f*, sub-sect. ii; held improper; unsound).

[4] The cases construing this part of the statute are as follows: *Eng.* 1904, R. *v.* Rouse, 1 K. B. 184, 20 Cox Cr. 592 (false pretences; the accused, on cross-examination, answered alleging the prosecutor to be a liar; further cross-questions as to the accused being convicted of drunkenness, etc., were held improper; but the Chief Justice added that "we are not laying down any general rule"); 1905, R. *v.* Bridgwater, 1 K. B. 131, 20 Cox Cr. 737 (on a charge of stealing, cross-examination to a prior conviction was held not justified, on the facts, by the clause as to "imputations on the character of the witnesses for the prosecution"); 1909, Preston's Case, 2 Cr. App. 24, 1 K. B. 568 (cross-examination to previous convictions, not allowed where the defendant's testimony discredited the prosecution's witnesses only in regard to the trustworthiness of an identification); 1909, Stratton's Case, 3 Cr. App. 255 (answer by the accused, referring to a prosecutor: "Then you say he is not telling the truth? — He is not", does not justify cross-examination to character; L. C. J. Alverstone: "There could have been no unfairer instance of cross-examination"); 1909, Grout's Case, 3 Cr. App. 64 (defendant's asserting that the constable is "telling lies", held not to entitle prosecution to cross-examination to previous convictions); 1909, Jones' Case, 3 Cr. App. 67 (rape on defendant's daughter; defendant's assertion that his wife induced the children to trump up the story, held on the facts to entitle prosecution to such cross-examination); 1910, Wright's Case, 5 Cr. App. 131 (under St. 1898, § 1 (*f*), the accused's testimony that he was cajoled into signing a confession, held an imputation against the prosecution's witness, so as to permit cross-examination to prior convictions; the ruling is totally unsound, and the opinion by Darling, J., superficially dismisses the prior rulings); 1910, Morgan's Case, 5 Cr. App. 157 (cross-examination to another crime, held on

(5) The fifth purpose, that of par. (iii), is a novelty, in form, but it is virtually another use of the fourth purpose, viz. it aims to throw light on the *accused's character*, whenever he raises an issue as to the credibility of an *accomplice*. Theoretically, this par. (iii) should have been included in the third clause of par. (ii).

The use made of an accused's record under the modern English statute is well illustrated in the following case:

1911, *Steinie Morrison's Trial*, p. 277 (Notable English Trials Series, 1922); the accused, charged with a brutal murder, was an old offender in burglaries and the like; as the defence had discredited the character of the prosecution's witnesses, the prosecution had used its right, under the Act, to show the accused's former convictions.

Mr. Muir—"Your lordship indicated that with regard to the question of previous convictions you would address some observations to the jury by way of caution."

Mr. Justice Darling—"I am much obliged to the learned counsel for the prosecution. I did say that I would refer to the question of previous convictions. . . . That was done because he insisted, and his counsel insisted, upon an attack upon the character of a witness, possibly of more than one witness, for the Crown, an attack which brought the defence into the position that they had lost the protection given to the prisoner by the Criminal Evidence Act of 1898. If it had not been for those attacks you would have known nothing about this . . . Gentlemen, the caution I meant to give you is this: It must not be allowed to prejudice or warp your judgment, and, believe me, no one is more conscious than I am of the danger that such knowledge as you now have should warp the judgment not only of you but of myself. It is almost impossible to put as good a construction now upon the most innocent thing that that man may do as it was when you believed him to be an unconvicted man. But, gentlemen, bear in mind that the only use to be made of these previous convictions is to show that when you have to rely upon his word as contradicting something stated by somebody else, or as alleging something which is not corroborated, you have not the word of a person who has done nothing wrong, who has never told any lie, and who has never broken the laws of England; you have only the word of a man whose past career has been what you know it to have been."

the facts not to be justified by any imputation on the prosecution's witness); 1911, Seigley's Case, 6 Cr. App. 106 (cross-examination to prior convictions allowed); 1911, Rappolt's Case, 6 Cr. App. 106 (cross-examination to prior convictions allowed, where the defendant testified that the prosecuting witness was a "horrible liar"); 1911, Morrison's Case, 6 Cr. App. 159, 169 (similar, where a principal witness' character was "violently attacked"); 1912, Westfall's Case, 7 Cr. App. 176 (cross-examination to drunkenness of prosecuting witness, etc., held not an imputation entitling to cross-examination to defendant's prior convictions); 1912, R. *v.* Hudson, 7 Cr. App. 256, 2 K. B. 464 (larceny; when the defendant through counsel has accused the prosecution's witnesses of having themselves committed the act charged, he may be cross-examined to prior convictions; prior cases examined and distinguished); 1913, Watson's Case, 8 Cr. App. 249 (rule applied); 1914, Cohen's Case, 10 Cr. App. 91, 99 (subornation of perjury; rule applied to allow cross-examination to prior conviction when an attack is made on an accomplice's character "upon matters other than those which had been opened by the prosecution"); 1920, R. *v.* Biggin, 1 K. B. 213 (murder; defence, improper solicitation by the deceased; questions to the accused on cross-examination as to a criminal mode of livelihood, held not admissible, the deceased not being the prosecutor; this seems an unsound reason; the sufficient reason is that the questions had nothing to do with the deceased's character). An able criticism of the fairness of this part of the Act is made by Mr. H. F. Moulton in his edition of Steinie Morrison's Trial in 1911 (Morrison's Trial, Introd. p. xvii, Notable English Trials Series, 1922; the ruling that gave rise to the criticism is reported at pp. 173–180).

The practice under the Statute of 1898 is critically discussed by Messrs. E. E. Williams and H. Cohen in an article entitled "Prisoners' Evidence and Previous Offences" (1917, Law Quart. Rev., XXXIII, 53).

In *Pennsylvania*, a statute has dealt with the same subject in provisions closely following the English Act in part.[5] But the model is not to be recommended for further imitation; its modifications of the common-law rules do not reveal themselves without careful study and would in the United States lead to complex technicality and confusion in their interpretation.

§ 195. **Particular Good Acts, to show Defendant's Character.** Do any of the foregoing reasons apply to exclude the use by the defendant of his own particular good acts to evidence the good character which he is allowed to invoke? They do not seem to; and the propriety of the defendant's use of such evidence has been more than once judicially commended:

1786, *R.* v. *Brecknock*, McNally's Evidence, 322; indictment for murder; the witness, a clergyman, "being examined to the character of the prisoner, said he believed him to be the last man in the world who would have a thirst of blood, and he would give particular instances"; these instances being objected to, the offering counsel's argument was sustained, that "this rule as to particular instances does not hold when you call a witness to support a man's character, for then . . . the witness may give his reasons for entertaining a good opinion of him."

1852, PRESTON, *J.*, in *State* v. *Parker*, 7 La. An. 88: "It appears to me so reasonable and humane that I cannot think it inconsistent with the rules of evidence. The effort to avoid collateral issues seems sometimes to have excluded from the jury-box what every juryman would wish to learn, and to have trenched closely upon the principles of humanity. It is but the just reward of many good actions that they should be of some avail to a man in his utmost need, especially when by invoking their aid he throws himself open to all the opprobrium that can be cast upon him by the character he has acquired by his evil deeds."

That such was the practice up to the close of the 1700s is clear.[1] But, after a time, two of the reasons already noted, surprise and confusion of issues, came to be thought applicable to a defendant's evidence of particular acts in his own favor:

1660, *Peters' Trial*, 5 How. St. Tr. 1116, 1137; murder of King Charles. *Peters*: "I have here a seal that the earl of Norwich gave me to keep for his sake for saving his life, which I will keep as long as I live." L. C. B. BRIDGMAN: "I am not willing at all to inter-

[5] Pa. St. 1911, Mar. 15 (quoted *post*, § 488); 1915, Com. *v.* Garanchoskie, 251 Pa. 247, 96 Atl. 513 (murder; "other crimes not connected with the case on trial", admitted on cross-examination of accused, under St. 1911, Mar. 15, § 1, the accused having called witnesses to his good reputation; but the opinion misunderstands the scope of the statute, by referring to it as changing the rule of certain former opinions excluding former convictions "for the purpose of affecting his credibility"; the statute includes former acts tending to show bad character as an accused; the opinion also forbids proof of the acts by other witnesses, under the statute).

§ 195. [1] 1696, Lowick's Trial, 13 How. St. Tr. 292 (how the defendant once heroically saved people's lives); 1742, Mansfield, L. C. J., in Clarke *v.* Periam, 2 Atk. 339; 1753, Murphy's Trial, 19 How. St. Tr. 725 (Mr. *Laroche:* "This is the second time I have come from Bristol to London to speak to Mr. Noads' character [jointly indicted]. I knew him at Bristol; . . . he behaved so well there that the gentleman recommended him to my brother-in-law, Mr. Henry Casamaijor, to transact his great affairs"; Mr. Alderman *Ironside:* "Mr. Noads has been concerned in an affair where I am interested, in which he has always acted with great diligence and prudence. I have trusted him with large sums of money; it has been in his power to have injured us, but I never had any occasion or room to doubt his honesty"); 1786, R. *v.* Brecknock, Ire. (cited *supra*).

rupt you or hinder you; [but] that which you speak of, doing good services, is not at all to the point. We do not question you for what good you have done, but for the evil you have done."

1794, EYRE, L. C. J., in *Horne Tooke's Trial*, 25 How. St. Tr. 359 (rejecting certain specific instances of conduct "in respect of the particularity of it"): "General character is general character; and it is not a collection of many moral or religious acts of a man's life, but the result of all. General character may be opposed by evidence; but if you are on the part of the prisoner to go into all the particulars of his life which are in his favor, you will have an undue advantage in that respect, because the crown cannot be prepared to oppose that evidence. We have very often gone into too many particulars upon evidence of general character; but whenever that point has been discussed, it has been found that the true way of examining to character was to the general character."

1808, *Alexander Davison's Trial*, 31 How. St. Tr. 187; fraud in public accounts by a former commissary-general. Lord *Moira* sworn (formerly general-in-command): "I never had the remotest ground for suspicion. . . . Shall I state the particulars?" L. C. J. ELLENBOROUGH: "One is very unwilling to diminish the scope of these inquiries, but the general inquiry is as to the general character." *John Martin Leake* sworn; examined by Mr. *Holroyd:* "I believe you are one of the comptrollers of the army accounts?" I am"; "In that character have you at any time had Mr. Davison's accounts before you?" "Yes"; "Have those been examined by you?" L. C. J. ELLENBOROUGH: "I really must interfere. It would be dangerous as a precedent to permit particular instances to be given in evidence where there can have been no notice. General evidence of general character is admissible; but this is certainly contrary to all rule." Mr. *Holroyd:* "I ask this question to show Mr. Leake's means of knowledge." L. C. J. ELLENBOROUGH: "You ask as to his knowledge of the examination of public accounts. Now would it be proper to try a collateral issue for which the other side cannot be prepared? It is as clear a rule of evidence as can be that you must not examine to particular facts." . . . Mr. *Holroyd:* "I ask this only as introductory of general character." L. C. J. ELLENBOROUGH: "If you mean only to ask whether the witness has had such means of knowing him as to form the judgment he is about to give, I have no objection to that." Mr. *Holroyd:* "Had you opportunities, from examining Mr. Davison's accounts, of knowing his general character?" "I have seen many of his accounts, and many of them were extremely regular; in the years 1794, 1795, and 1796, they were before the comptrollers." L. C. J. ELLENBOROUGH: "I cannot admit this; you must go into general character."

By the opening of the 1800s, this had become established as the law of England.[2] Nevertheless (as illustrated in the last passage above), the orthodox doctrine, that a witness to character could speak from personal knowledge of his disposition (*post*, § 1981), was conceded to allow such a witness, to

[2] 1787, Buller, J., in J'Anson *v.* Stuart, 1 T. R. 754; 1794, Horne Tooke's Trial, 25 How. St. Tr. 359 (L. C. J. Eyre intimates that the former practice is now definitely abandoned); 1798, O'Connor's Trial, 27 How. St. Tr. 31 (Earl of Moira: "I do not feel myself at all competent to speak to Mr. O'Connor's general character [for loyalty] from the little acquaintance I have had with him, but from a particular occasion —"; Mr. Garrow: "His lordship cannot state any particular fact"; Mr. Plumer argued for admitting the conversations as an expression of opinion; Buller, J.: "Suppose a man were indicted for murder, and he could bring a person to prove a particular act of humanity, you could not conceive that would be evidence"); 1808, Davison's Trial (quoted *supra*); 1809, Jones' Trial, 31 How. St. Tr. 309, 310; 1865, R. *v.* Rowton, Leigh & C. 541 (Willes, J.: "Evidence of particular acts is excluded, because a robber may do acts of generosity, and the proof of such acts is therefore irrelevant to the question whether he was likely to have committed a particular act of robbery"; yet Cockburn, C. J., more correctly said: "The prisoner cannot give evidence of particular facts, although one fact would weigh more than the opinion of all his friends and neighbors").

some extent, to explain his reasons for his estimation of character by stating whatever striking conduct within his knowledge evinced the settled trait of character. Unfortunately, this orthodox and wise doctrine has itself been discarded in all but a few jurisdictions, and with it the availability of the present sort of facts given as the ground of such knowledge. Were the orthodox doctrine again to prevail, such evidence commends itself as valuable and just, for the reasons above stated by Mr. J. Preston; and the objections of Surprise and Confusion of Issues would be practically obviated by the limitations under which it would thus be used.

There is in this country some early authority for its use;[3] but most Courts would to-day undoubtedly forbid it.[4] If, however, the prosecution has improperly used specific acts of misconduct against the defendant, the defendant should certainly be allowed to deny or explain it, on the principle of curative admissibility (*ante*, § 15).[5] Moreover, there are other principles by which a defendant may occasionally avail himself of conduct as evidence in his favor, — in particular, of conduct indicating *consciousness of innocence* (*post*, § 293), of *utterances* asserting his innocence (*post*, §§ 1142, 1731, 1732, 1785), and, in *sedition* charges, of conduct indicating a loyal state of mind (*post*, § 369).

§ 196. **Particular Misconduct of the Defendant (1) to Impeach his Credit as a Witness, or (2) to Increase his Sentence; (3) Juvenile Delinquents.** (1) Where the defendant chooses to *take the stand as a witness*, he occupies two positions, — that of a defendant and that of a witness. In the former aspect, particular bad acts of his, as exhibiting character, cannot be used at all, whether shown by extrinsic testimony or brought out by cross-examination. But in the latter aspect such acts may be brought out (under certain limitations) by his cross-examination or by record of conviction (*post*, § 979–981). The question arises whether when he takes the stand, he should be treated as defendant or as witness, — whether policy requires that the former or the latter capacity should prescribe the rule for his treatment. This ques-

[3] 1810, Swift, Evidence, 141; 1830, Com. *v.* Robinson, Thacher Cr. C. 236, Thacher, J., *semble;* 1852, State *v.* Parker, 7 La. An. 83, 88 (murder of a woman; per Preston, J., only, evidence that he was "one of the last men who would willingly shed a woman's blood" received, with such good acts as form the "reasons of the witness for testifying to the good character", following R. *v.* Brecknock, which with the others "I do not find overruled"; but the majority speak of "general character" as alone admissible).

[4] 1888, Hussey *v.* State, 87 Ala. 133, 6 So. 420 (that he was a church member, excluded; this ruling is intelligible enough from either standpoint); 1898, State *v.* Ferguson, 71 Conn. 227, 41 Atl. 769 (assault with intent; questions by defendant's counsel as to never having been in quarrels before, excluded); 1897, Smalls *v.* State, 102 Ga. 31, 29 S. E. 153 (peaceable character of defendant while in jail, excluded), 1901, State *v.* Dexter, 115 Ia. 678, 87 N. W. 417; 1882, White *v.* Com., 80 Ky. 485 (good acts excluded, for the reasons of small probative value, confusion of issues, and surprise to the Commonwealth); 1913, People *v.* Bollman, 178 Mich. 159, 144 N. W. 537 (seduction); 1899, State *v.* Brooks, 23 Mont. 146, 57 Pac. 1038 (that the defendant had preached in church, excluded); 1920, Baker *v.* State, 87 Tex. Cr. 305, 221 S. W. 607 (manslaughter; defendant's "intense patriotism", leading up to the affray, excluded on the facts); 1900, State *v.* Coates, 22 Wash. 601, 61 Pac. 726.

[5] 1881, Olive *v.* State, 11 Nebr. 1, 27, 7 N. W. 444 (murder; why the defendant had on another occasion drawn a revolver on some one, allowed). *Contra:* 1895, Griffith *v.* State, 140 Ind. 163, 39 N. E. 440, *semble.*

tion can best be examined in dealing with the rules for *witnesses' character* (*post*, § 890).

Furthermore, the act of taking the stand in his own favor is to some extent a *waiver of his privilege against self-crimination*. Wherever it is treated as not being a waiver of the privilege so far as former crimes are asked after, this privilege alone would suffice to exonerate him from answering; and some Courts dispose of the question from this point of view alone (*post*, § 2277). But this (as noted in that place) is a superficial and inadequate way of disposing of it, for two reasons: (1) The privilege merely allows the defendant to decline to answer; it does not say whether the matter can be asked after, or whether it can properly be used even if the privilege is not claimed; which is the present question. (2) The privilege covers only criminating matters; while the present rule, if it applies, forbids inquiring into or using any misconduct whatever, whether criminal or not, as a source of exhibiting character Hence the whole question must be determined independently of the bearing of a waiver of privilege.

(2) Under enlightened modern legislation for habitual criminals, the tribunal is authorized to *increase the sentence* of one whose offence, when established, is found to be the *second* or a *later offence* of the sort. The proof of the prior offence for that purpose does not militate against the rule forbidding the use of prior misconduct to evidence character, provided the purpose is kept distinct. But there are three types of these statutes.

(*a*) One of these, observing the spirit of the character-rule, permits the fact of prior conviction to be found by the judge or the jury upon proof *reserved until a verdict* of *guilty* has first been found by the jury:[1]

§ 196. [1] ENGLAND: The practice prior to the statute of 1836 is to be seen from R. *v.* Jones, 6 C. & P. 391; then follows: 1836, St. 6 & 7 W. IV, c. 111 reciting that by a statute of 7 & 8 Geo. IV, c. 28, § 11, increased punishment was allowed for the subsequent felony, "and whereas since the passing of the said act the practice has been on the trial of any person for any such subsequent felony to charge the jury to inquire at the same time concerning such previous conviction, and whereas doubts may be reasonably entertained whether such practice is consistent with a fair and impartial inquiry as regards the matter of such subsequent felony, and it is expedient that such practice should from henceforth be discontinued", it is enacted that the jury shall not "inquire concerning such previous conviction until after they shall have inquired concerning such subsequent felony and shall have found such person guilty of the same", and that the reading of the statement of prior conviction in the indictment shall also be deferred; provided however that "if upon the trial of any person for any such subsequent felony as aforesaid, such person shall give evidence of his or her good character, it shall be lawful for the prosecutor in answer thereto to give evidence of the indictment and conviction of such person for the previous felony." This statute was reenacted in St. 14 & 15 Vict. c. 19, § 9, which was repealed and replaced in 1861 by St. 24 & 25 Vict. c. 96, § 116, and c. 99, § 37, which substitutes "offence" for felony; the provision was construed in the following cases: 1851, Anon., 5 Cox Cr. 268; 1851, R. *v.* Shrimpton, 2 Den. Cr. C. 319, 5 Cox Cr. 387 (the statute phrase "if such person shall give evidence of his good character" includes testimony of good character obtained from an opposing witness on cross-examination).

The subject is now governed by St. 1908, 8 Edw. VII, c. 59 (Prevention of Crime Act) § 10: "In the proceedings on the indictment the offender shall in the first instance be arraigned on so much only of the indictment as charges the crime, and if on arraignment he pleads guilty or is found guilty by the jury, the jury shall, unless he pleads guilty to being a habitual criminal, be charged to inquire whether he is a habitual criminal, and in that case it shall not be necessary to swear the jury again: Provided that a charge of being a habitual criminal shall not be inserted in an

1890, BELCHER, C. C., in *People* v. *Sansome*, 84 Cal. 449, 451, 24 Pac. 143: "The evident purpose of the provision of the Code above quoted was to keep from the jurors all knowledge that the person on trial before them had been previously convicted of criminal offence; and this is based upon the well-settled and familiar principles of law and right. In the first place, it is elementary law that every one accused of crime is presumed to be innocent until proved to be guilty, and is entitled to a fair and impartial trial before an unbiased jury. In the next place, it is well known that ordinary jurors are more ready to believe the accused guilty if it be understood by them that he has suffered a previous conviction for a similar offence."

indictment (*a*) Without the consent of the Director of Public Prosecutions; and (*b*) Unless not less than seven days' notice has been given to the proper officer of the court by which the offender is to be tried, and to the offender, that it is intended to insert such a charge; and the notice to the offender shall specify the previous convictions and the other grounds upon which it is intended to found the charge."

The procedure under this statute is elaborately discussed in Turner's Case, 1909, 3 Cr. App. 103, [1910] 1 K. B. 346.

It will be noticed that the concluding provision of St. 1836, permitting the prosecution to show prior conviction on the issue of Not Guilty when the accused offers good character, has been here omitted, and is transferred into the Criminal Evidence Act 1898; for its construction under that Act, see *ante*, § 194*a*.

CANADA: *Dom.* Rev. St. 1906, c. 152, § 128 (offences under the Temperance Act; procedure of proving prior offences prescribed), Crim. Code 1892, § 676, R. S. 1906, c. 146, §§ 963, 964 (substantially like the preceding, for criminal cases generally); *Man.* Rev. St. 1913, c. 117, § 206 (liquor offences; like Ont. R. S. 1914, c. 215, § 88; *N. Br.* 1912, R. *v.* Matheson, N. Br. S. C., 2 D. L. R. 835 (liquor offences; other rulings collected); *N. W. Terr.* Cons. Ord. 1898; c. 89, § 105 (like Ont. R. S. 1914, c. 215, § 88); *N. Sc.* St. 1918, c. 8, § 47 (liquor offences); *Ont.* Rev. St. 1914, c. 215, § 88 (in trials for liquor offences, prior convictions shall not be inquired into till after conviction for the subsequent offence; procedure prescribed), 1888, R. *v.* Triganzie, 15 Ont. 294 (statute construed); 1917, R. *v.* Harris, 40 D. L. R. 684, Ont. (illegal keeping of liquor; the trial Court held not authorized to consider another offence for the purpose of increasing the sentence); *P. E. I.* St. 1918, c. 1, § 108 (like Ont. 1914, c. 215, § 88); *Saskatchewan:* R. S. 1920, c. 194, § 84 (liquor offences; like Ont. R. S. c. 215, § 88); *Yukon:* St. 1920, c. 9, § 7 (liquor offences).

UNITED STATES: *California:* P. C. 1872, § 1093, par. 1 ("If the indictment or information be for felony, the clerk must read it, and state the plea of the defendant to the jury; and in cases where it charges a previous conviction, and the defendant has confessed the same, the clerk in reading it shall omit therefrom all that relates to such previous conviction"); § 1025 (a defendant on pleading must be asked as to prior convictions; if he "pleads not guilty, and answers that he has suffered the prior conviction, the charge of the previous conviction must not be read to the jury, nor alluded to on the trial"); 1890, People *v.* Sansome, 84 Cal. 449, 24 Pac. 143 (where the trial judge alluded to it; see quotation *supra*); 1891, People *v.* Wheatley, 88 Cal. 117, 26 Pac. 95; 1895, People *v.* Thomas, 110 Cal. 42, 42 Pac. 456; 1904, People *v.* Smith, 143 Cal. 597, 77 Pac. 449; *Hawaii:* Rev. L. 1915, § 3818 (after plea of guilty or conviction, a previous conviction of the same offence may be proved; except that if on the main trial good character is offered, the prosecutor is entitled "in answer thereto to give evidence of the conviction of such person for the previous offence or offences before such verdict of guilty shall be returned; and the jury shall enquire concerning such previous conviction or convictions at the same time that they enquire concerning such subsequent offence"); *Oklahoma:* Comp. St. 1921, § 2771 ("after a plea or verdict of guilty . . . the Court upon the suggestion of either party that there are circumstances which may properly be taken into view, either in aggravation or mitigation of the punishment, may in its discretion hear the same summarily at a specified time and upon such notice to the adverse party as it may direct"); 1899, Walburn *v.* Terr., 9 Okl. 23, 59 Pac. 972 (under Stats. § 5286, allowing facts of aggravation to be considered by the judge after plea or verdict of guilty, evidence of misconduct, given before verdict and without instructions to disregard, is improper); *Texas:* 1914, Williamson *v.* State, 74 Tex. Cr. 290, 167 S. W. 360 (theft; cross-examination to various arrests of defendant, allowed, before the jury's retirement for the general verdict, to affect a plea for suspension of sentence but not to affect credit as a witness); *Washington:* St. 1903, c. 86, R. & B. Code 1909, § 2178 (the prior conviction is to be inquired into after plea or conviction of guilt of the subsequent offence; procedure prescribed); *West Virginia:* Code 1918, c. 32 A, § 3; 1920, State *v.* Savage, 86 W. Va. 655, 104 S. E. 153 (statute applied; but here the defendant's admission of the prior conviction was excluded on a technicality not inferior to the superstitious formalism of the Middle Ages).

(*b*) The other type of statute, apparently formed by the supposed requirements of the unwise rule (existing in some jurisdictions) which allows the jury to fix a criminal sentence, permits the fact of prior conviction to be considered by the jurors *before verdict*;[2] this method is decidedly an inferior one.

1899, DuRelle, J., in *Hall* v. *Com.*, 106 Ky. 894, 51 S. W. 804: "It is earnestly urged that it was error to permit the introduction of evidence of former convictions at all until the jury should have first found her guilty under the charge for which she was then being tried; that it amounted to the admission of testimony to impeach her general character, which she had not put in issue, and enabled the commonwealth to show her to the jury in the light of a common thief, and rebut the presumption of innocence which the law gives her by evidence in chief upon a trial for grand larceny. It is painfully apparent that, with the circumstances shown as to the loss of the money, and evidence of two former convictions for grand larceny, the accused, who is an ignorant negro woman, had not the slightest chance that an average jury would entertain a reasonable doubt of her guilt, while, without the evidence of former convictions, there was a possibility that they might do so. There is a considerable force, therefore, in the proposition urged, that this procedure denied the accused a fair trial of the offence whereof she was accused. But the statute as to habitual criminals (Ky. St. § 1130) seems to have created an additional and higher degree of offence, viz. the commission of a felony, having been theretofore twice convicted of a felony, etc. To show the accused guilty of this degree of the offence charged, it is necessary to show the former convictions; and this, of course, is bound to prejudice the accused, — just as evidence showing malice is bound to prejudice the defendant in a murder case, — but it may be shown to make out a higher degree of the offence, which authorizes the severer punishment. . . . The statute requires the jury to find the fact of the former convictions. There is no provision for a separate trial of the fact of former conviction, nor do we think the statute intended there should be one. The law seems to work a hardship, but it is a hardship the Legislature alone can remedy."

(*c*) A third type of statute applies to *juvenile offenders* only, and in juvenile courts forbids any subsequent use of the proceedings, for this or other purpose, except in the same court on a later appearance of the same delinquent.[3]

[2] *Federal:* 1922, Massey *v.* U. S., 8th C. C. A., 281 Fed. 293 (liquor offence; the information, charging a prior conviction, allowed to be ready; cases collected); *Illinois:* Rev. St. 1874, c. 38, § 473, Laws 1883, p. 76 ("On any trial for any of said offences", burglary, etc., a former conviction "may be used in evidence against such party", provided the judgment is "set forth in apt words in the indictment"); § 477, Laws 1889, p. 112 (the prison record and criminal history of any one indicted under the foregoing statute "may be given in evidence upon any trial . . . for the purpose of proving a former conviction"); *Iowa:* Code 1919, § 9046 (burglary, etc.); *Kentucky:* Stats. 1915, § 1130 (where sentence is to be increased for former conviction, "judgment in such cases shall not be given for the increased penalty unless the jury shall find, from the record and other competent evidence, the fact of former convictions"); 1899, Hall *v.* Com., 106 Ky. 894, 51 S. W. 804 (see quotation *supra*); *Maryland:* Ann. Code 1914, Art. 27, § 662 (record of former convictions may be proved on an indictment under the habitual criminal act); *New York:* C. Cr. P. 1881, § 513 (against a person adjudged an habitual criminal and afterwards charged with crime, previous character may be proved as if he had first offered evidence thereon); 1898, People *v.* Sickles, 156 N. Y. 541, 51 N. E. 288 (the fact of former conviction may be put in before verdict rendered, because "the prior conviction enters as an ingredient into the criminality of the prisoner"; Bartlett, J., dissenting); *Virginia:* 1909, Wright *v.* Com., 109 Va. 847, 65 S. E. 19 (in capital cases, prior convictions are not admissible under the statute; Keith, P., dissenting in a careful opinion); *Wisconsin:* 1909, Howard *v.* State, 139 Wis. 529, 121 N. W. 133 (under St. 1898, § 4736, providing that the accused may admit the former convictions; they should not afterwards be evidenced nor commented on before the jury).

[3] *Alabama:* Code 1907, § 6464, as amended by St. 1915, No. 510, p. 577, § 14 (juvenile court; statements, etc., of a child under 14, "or any statement made by any person, officer, or the Court, shall never be legal or competent

This measure is a deduction from the modern enlightened principle of reforming the juvenile offender and then protecting him from afterwards being dragged back into the criminal class by the automatic operation of the law for habitual offenders.

§ 197. **Rumors of Misconduct, as testing a Witness supporting Character.** When the defendant offers his good character and a witness testifies to the *defendant's good reputation* for the trait in question, one way of testing the honesty and accuracy of the witness' assertion of the prevalence of this reputation is to find out from him whether this or that rumor of flagrant misconduct has come to his notice. If one or more such rumors are known

evidence against the child" in any court; no adjudication shall disqualify for civil service, etc., nor be denominated a conviction); *Colorado:* Comp. L. 1921, § 654 (delinquent children; "a disposition of any child under this Act, or any evidence given in such cause", shall not in any other proceeding "be lawful or proper evidence against such child for any purpose whatever, except in subsequent cases against the same child under this Act"); *Connecticut:* St. 1921, c. 336, §§ 18, 19 (juvenile court; the adjudication shall not be deemed a conviction of crime; the disposition of a child, and the evidence, except in certain cases, "shall be inadmissible in any criminal proceedings against such child"); *D. Columbia:* Code 1919, p. 394, U. S. St. 1916, Apr. 27 (juvenile court judgment against a child shall not "be denominated a conviction"); *Hawaii:* Rev. L. 1915, § 2284; *Idaho:* Comp. St. 1919, § 1010 (like S. D. Rev. C. § 9972); *Kentucky:* Stats. 1915, § 331e (the disposition shall not be evidence against such child "in any civil, criminal, or other cause . . . for any purpose whatsoever"); *Me.* Rev. St. 1916, c. 144, § 8 (commitment to State juvenile school shall not be "used as a criminal record against him"; *Mass.* Gen. L. 1920, c. 119, § 60 (delinquent juveniles; disposition of the child, or any evidence given, shall not be evidence against him in any other proceeding except as a juvenile); *Michigan:* Comp. L. 1915, § 2011 (juvenile delinquent; "a disposition of any child under this Act, or any evidence given in any such cause", is not thereafter admissible against him, except in proceedings under this Act); *Minnesota:* Gen. St. 1913, § 7162 (juvenile court; disposition of a child under this Act shall not "be lawful or proper evidence against such child for any purpose", except under this Act); St. 1917, c. 397, § 19 (same); *Missouri:* Rev. St. 1919, § 1135 (juvenile court; "any disposition of any delinquent child under this article", or any evidence given, shall not be admitted in any other court against him); *Nevada:* Rev. L. 1912, § 728 (juvenile court; the "disposition of any child under this act, or any evidence given in such cause, shall not, in any civil, criminal, or other cause or proceeding whatever, be lawful or proper evidence against such child", except in similar proceedings); *New Hampshire:* St. 1917, c. 31 (juvenile court; the fact of arrest shall not be admissible in any subsequent proceeding, except while the juvenile is on probation or within 2 years after discharge from institution; "every such record of proceedings shall become a sealed record and no longer accessible to any person"); *New Jersey:* Comp. St. 1910, Crim. Proc. § 207 (juvenile courts; fact of conviction shall not be admissible in evidence, except during period of probation or in subsequent proceedings in juvenile court); St. 1916, c. 212, Mar. 18 (no conviction of juvenile offender in juvenile court "shall be admissible in evidence" in any proceeding except during period of probation or within two years after discharge); 1919, Kozler *v.* New York Tel. Co., 93 N. J. L. 279, 108 Atl. 375 (applying the foregoing statute to exclude the record of conviction for theft of telephone property, in an action to recover a reward for information; the statute held valid both as an evidence statute and as an amnesty statute); *North Carolina:* Consol. L. 1919, § 5042 (juvenile court; no adjudication of a child therein shall "be denominated a conviction"); *Porto Rico:* St. 1915, Mar. 11, No. 37, § 24 (juvenile court; no judgment, etc., or evidence shall be "legal or proper evidence against such child for any purpose whatsoever", except in subsequent cases against the same child under this Act"); *So. Dak.* Rev. C. 1919, § 9972 (juvenile court; "the disposition of any child under this article, or any evidence given in such cause, shall not in any civil, criminal, or other cause or proceeding, in any court, be lawful or proper evidence against such child for any purpose, except in subsequent cases against the same child under this article"); *West Virginia:* St. 1919, c. 111, § 1 (juvenile court; "a deposition [Sic? disposition] of any child under this Act of [or?] any evidence given in such cause shall not, in any civil, criminal or other cause or proceeding whatever in any court be lawful or proper evidence against such child", except in another case in this court).

to him, obviously his broad assertion of the prevalence of good reputation is more or less inconsistent with his knowledge of such rumors. The purpose of the inquiry is to show that one knowing of certain rumors has nevertheless rashly asserted a reputation inconsistent with the rumors. Thus, the defendant's misconduct is not inquired after as a fact, to show his character; but as a rumor, to discredit the witness' assertion. A question, therefore, which does not expressly refer to the witness' hearing of the conduct as rumored, is improper, because it aims apparently at the conduct as a fact showing the defendant's character.

Precisely the same principle is applicable to the cross-examination of one testifying to a *witness' reputed character;* and the precedents are dealt with under that head (*post,* § 988).

2. Conduct to show Character of Other Persons evidentially used

It has been seen (*ante,* §§ 62–68) that a person's character, as evidential to show his doing of an act, may occasionally be used for others than the accused in a criminal case. When character is thus evidential, may it be evidenced by particular acts of the person whose character is to be proved?

§ 198. **Character of Deceased, in Homicide, from Particular Acts of Violence.** When the turbulent character of the deceased, in a prosecution for homicide, is relevant (*ante,* § 63), there is no substantial reason against evidencing the character by *particular instances of* violent or quarrelsome *conduct.* Such instances may be very significant; their number can be controlled by the trial Court's discretion; and the prohibitory considerations applicable to an accused's character (*ante,* § 194) have here little or no force.[1]

§ 198. [1] *Accord:* 1902, State *v.* Beird, 118 Ia. 474, 92 N. W. 694 (good opinion, by McClain, J.); 1907, State *v.* Blee, 133 Ia. 725, 111 N. W. 19 (recent assault by the deceased, admitted; citing seven cases from other jurisdictions, but not State *v.* Beird, *supra*); 1899, State *v.* McIver, 125 N. C. 645, 34 S. E. 439 (an unmerciful beating to an employee on the same morning, admitted); 1906, McQuiggan *v.* Ladd, 79 Vt. 90, 64 Atl. 503 (battery; plea, self-defence, the plaintiff being intoxicated and in that condition quarrelsome, his repute being known to defendant; prior instances of quarrelsomeness when intoxicated, admissible, though not known to defendant); 1912, State *v.* Waldron, 71 W. Va. 1, 75 S. E. 558 (murder; violent acts of deceased, just beforehand, unknown to defendant, admitted; careful opinion by Miller, J., approving the above text; Williams, J., diss.).

Contra: Ala.: 1915, Bullington *v.* State, 13 Ala. App. 61, 69 So. 319 (homicide; deceased's "specific acts", excluded); 1915, Pollard *v.* State, 12 Ala. App. 82, 68 So. 494; 1916, Smith *v.* State, 197 Ala. 193, 72 So. 316; *Ga.* 1899, Thornton *v.* State, 107 Ga. 683, 33 S. E. 673; 1903, Andrews *v.* State, 118 Ga. 1, 43 S. E. 852; 1918, Fountain *v.* State, 23 Ga. App. 113, 98 S. E. 178; *Mich.* 1904, People *v.* Farrell, Mich. 127, 100 N. W. 264; *Minn.* 1904, State *v.* Ronk, 91 Minn. 419, 98 N. W. 334 (acts of violence towards third persons, excluded); *Miss.* 1868, Com. *v.* Andrews, Davis' Rep. 128, 156 (murder, said by defendant to have been committed in defence from an assault by the deceased for the purpose of buggery; evidence of the deceased's conduct indicating a passion and disposition to sodomy and buggery was excluded, except so far as it involved prior attempts by deceased on defendant); *N. Y.* 1886, People *v.* Druse, 103 N. Y. 655, 8 N. E. 733 (instances of treating his domestic animals with cruelty, excluded); 1903, People *v.* Gaimiri, 176 N. Y. 84, 68 N. E. 112 (specific acts of violence to a third person, excluded); *Oh.* 1907, State *v.* Roderick, 77 Oh. 301, 82 N. E. 1082, *semble* (inadmissible).

Distinguish the use of such instances to show the *accused's apprehensions of violence* (*post* § 248).

§ 199. Negligence of Party in Civil Cases, from Particular Negligent Acts. It has been seen (*ante*, § 65) that in a few jurisdictions the character of a *defendant* (or of his employee) or of a *plaintiff* for *negligence* or *prudence* may be used to show that he probably was not or was careful on a given occasion. Is it proper to evidence that character by *particular instances* of the trait?

The reason of Undue Prejudice, which applied to a defendant in a criminal case (*ante*, § 194), has here a corresponding application, though a less dangerous one. The reason of Unfair Surprise is also applicable; for the party charged cannot even guess the time, place, and occasion that may be predicated for his supposed act, and has no means of showing the testimony to be fabricated. The reason of Confusion of Issues also operates, for disputes over other carelessness would soon obscure the main issue. Add to this that a careless act or two may be done by the most prudent person, and that particular instances, unless repeated and emphatic, throw little light on the general disposition. For these reasons, almost all Courts exclude such evidence, whatever their views may be (*ante*, § 65) as to the propriety of using the character, if otherwise evidenced, to show the probability or improbability of carelessness on a particular occasion.[1]

§ 199. [1] *Federal:* 1894, Southern Bell T. & T. Co. *v.* Watts, 13 C. C. A. 579, 66 Fed. 460 (negligence in adjusting a telephone wire; former similar carelessness by the same employee of the defendant, excluded, except to contradict his testimony as to the possibility of certain harm); 1896, Central Vt. R. Co. *v.* Ruggles, 21 C. C. A. 575, 75 Fed. 953 (fire caused by heated bearings; the stoppage of the oil-pipes by carelessness three years before, not admitted to show former carelessness, but admitted to show a tendency of the machinery);
Arkansas: 1894, Little R. & M. R. Co. *v.* Harrell, 58 Ark. 454, 468, 24 S. W. 883, 25 S. W. 117 (prior negligent acts of the defendant's enployee, not admissible to show negligence at the time); 1899, St. Louis, I. M. & S. R. Co. *v.* Stroud, 67 Ark. 112, 56 S. W. 870 (former misconduct by defendant's employee, excluded);
California: 1896, Pacheco *v.* Mfg. Co., 113 Cal. 541, 45 Pac. 833 (the faulty breaking of other shears in the same way as that by which the plaintiff was injured, excluded); 1896, Howland *v.* R. Co., 115 Cal. 487, 47 Pac. 255 (another collision, wholly unconnected, excluded);
Columbia (District): 1914, Fountaine *v.* Washington R. & E. Co., 42 D. C. App. 295 (plaintiff's frequent prior acts of jumping on a car while in motion, excluded);
Connecticut: 1874, Morris *v.* East Haven, 41 Conn. 252, 254 (contributory negligence; former instances of care or negligence, inadmissible); 1897, Laufer *v.* Traction Co., 68 Conn. 475, 37 Atl. 379 (street-railroad injury; carefulness of defendant at other times, excluded); 1903, Munroe *v.* Hartford St. R. Co., 76 Conn. 201, 56 Atl. 498 (collision of a street-car with a wagon; the motorman's negligence when employed on another line, excluded); 1921, Richmond *v.* Norwich, 96 Conn. 582, 115 Atl. 11 (injury by rifle shots from a guard placed in war-time by defendant at the reservoir; specific acts of the guard, not admitted to show his incompetence);
Georgia: 1890, Augusta S. R. Co. *v.* Randall, 85 Ga. 297, 11 S. E. 706 (previous care in selecting drivers, excluded, because the issue was as to a specific act of the driver); 1898, Atlanta C. S. R. Co. *v.* Bates, 103 Ga. 333, 30 S. E. 41 (injury in alighting from a car; instances of plaintiff's careless alighting at other times, excluded);
Idaho: 1894, Rumpel *v.* R. Co., 4 Ida. 13, 35 Pac. 700 (blockading of streets by the same railroad at other times, not admitted to show negligence);
Indiana: 1871, Pittsburg, F. W. & C. R. Co. *v.* Ruby, 38 Ind. 295, 311 (excluding former acts of a railroad employee, to show negligence at a particular time);
Iowa: 1901, Dalton *v.* R. Co., 114 Ia. 257, N. W. 272 (injury while driving across a railroad track; prior instances of plaintiff's having slept while riding in his buggy, excluded, partly because there were eye-witnesses);
Kansas: 1890, Southern Kans. R. Co. *v.* Robbins, 43 Kan. 145, 149, 23 Pac. 113 (former acts of negligence inadmissible to show contributory negligence);
Kentucky: 1906, Lexington R. Co. *v.* Herring, — Ky. —, 96 S. W. 558 (injury on a street-car while entering; that the plaintiff had been "frequently seen getting on and off street-cars while in motion", excluded);

Certain other possible uses of particular acts of negligence or carefulness are here to be distinguished:

(1) Where the character is not offered evidentially to prove an act, but is *already in issue* as a material proposition under the pleadings — as where the incompetency of an employee is for a fellow-servant the ground of the employer's liability, or where a physician is sued because though incompetent he held himself out as competent, — particular instances of carelessness or the reverse may conceivably be resorted to. The answer there need not be the same as here, because here the jury might be too apt to infer directly from the former careless act to the present one, while there the sole object is to prove the general trait and the proof stops there. The doctrine is examined elsewhere (*post*, § 208).

Maryland: 1886, Baltimore Elev. Co. *v.* Neal, 65 Md. 438, 452, 5 Atl. 338 (former acts of negligence, excluded);
Massachusetts: 1856, Robinson *v.* F. & W. R. Co., 7 Gray 92, 95 (negligence of the defendant's servants; prior negligent acts in running the train on other occasions, excluded, as involving collateral and confusing issues, and as "having no legal or logical tendency to prove the point in issue"); 1874, Maguire *v.* R. Co., 115 Mass. 239 (negligent stopping of street-car; former negligent stopping by the same driver, excluded); 1885, Whitney *v.* Gross, 140 Mass. 232, 5 N. E. 619 (former negligent overloading of a wagon excluded, to show negligent overloading on this occasion); 1887, Hatt *v.* Nay, 144 Mass. 186, 10 N. E. 807 (specific acts of negligence excluded on the grounds of surprise and of confusion of issues); 1894, Connors *v.* Morton, 160 Mass. 333, 35 N. E. 860 (same); 1896, Lewis *v.* Gaslight Co., 165 Mass. 411, 43 N. E. 178 (negligent laying of gaspipes in one place to show negligent laying in the case in hand, inadmissible); 1897, Olsen *v.* Andrews, 168 Mass. 261, 47 N. E. 90 (while "specific acts of negligence cannot be introduced to show the incompetency of a servant", yet "when conduct tending to show his qualifications or his physical fitness or unfitness for his work is properly before a jury upon one of the issues of the case", they may "consider it on the question of his competency"; here admitting evidence of nervous conduct and other singular behavior shortly before the accident, the foreman having testified to notice to the superintendent of this conduct); 1920, Kodra *v.* Middlesex & B. S. R. Co., 235 Mass. 176, 126 N. E. 278 (injury to the plaintiff's horse, said to have been negligently allowed to stray in the highway; that the horse had been "loose in the highway a great many times that summer", excluded; distinguishing the principle of § 201, *post*);
Michigan: 1868, Detroit & M. R. Co. *v.* Van Steinburg, 17 Mich. 111 (former negligence inadmissible; but here admitted to rebut the defendant's evidence of his employee's good character); 1881, Michigan C. R. Co. *v.* Gilbert, 46 Mich. 176, 179, 9 N. W. 243 (yard-master's negligence; former acts of negligence not admitted to show negligence at the time in question); 1899, People *v.* Thompson, 122 Mich. 411, 81 N. W. 344 (negligent management of boiler; negligent absence of defendant from boiler-room on other occasions, inadmissible, except as showing that he had been warned of the danger of absence);
Minnesota: 1898, Fulmore *v.* R. Co., 72 Minn. 448, 75 N. W. 589 (motorman's negligent management shortly before the act charged, perhaps admissible);
New Hampshire: 1879, Plummer *v.* Ossipee, 59 N. H. 59 (Allen, J.: "The defendants claimed that the plaintiff's husband was a fast and careless driver, and introduced in evidence particular instances of his fast and careless driving. The plaintiff was permitted to testify to other instances of his careful driving. . . . The evidence was relevant to the question of the husband's character for driving safely or otherwise"); 1903, Stone *v.* R. Co., 72 N. H. 206, 55 Atl. 359 (injury at a railroad crossing; that the plaintiff had on former occasions driven carefully at the crossing, admitted);
New Jersey: 1920, Quellmalz *v.* Atlantic Coast El. R. Co., 94 N. J. L. 474, 110 Atl. 914 (blowing out of a controller-box; defendant's failure to purchase any new boxes for three years prior, excluded);
New York: 1871, Warner *v.* R. Co., 44 N. Y. 465, 471 (former neglect or drunkenness of a flagman on duty, held inadmissible); 1874, Baulec *v.* R. Co., 59 N. Y. 360 (*semble*, excluded; see quotation, *post*, § 250); 1911, Engel *v.* United Traction Co., 203 N. Y. 321, 96 N. E. 731 (that the motorman had been discharged for another negligent act, excluded);
Ohio: 1882, Desbrack *v.* State, 38 Oh. St. 365 (murder by poisoning; the attending physician's mistake was set up as the real cause of death; a druggist who had supplied the physician having testified to his carefulness, the defendant was allowed to show, on cross-

(2) Where a person's character is required, by the law of the case, to be *known to a defendant* in order to make the latter liable, the doing by the former of a careless act may be thought to be sufficient, if known to the defendant, to put him upon inquiry and charge him with notice of the former's incompetency. This is not inconsistent with rejecting particular acts as evidence of the objective fact of incompetency; for while a single act might be unsatisfactory evidence of a general trait, yet, if this general trait is otherwise proved, the same single act might well suffice to warn the defendant and put him upon inquiry and thus charge him with notice of the other person's incompetency. This use of single acts as involving notice is dealt with elsewhere (*post*, § 250).

(3) A person's *habit* (*ante*, § 98, *post*, § 375) or *capacity* to act (*post*, § 219) may be evidenced by particular instances of conduct which are liable to be confused with conduct indicating moral character.

§ 199*a*. **Character of Third Persons, from Particular Acts.** In other issues, wherever the moral character of a *third person* would be relevant under § 68, *ante*, may that character be evidenced by particular instances? There is no reason for making here an inflexible rule; sometimes such evidence would be valuable and unobjectionable.[1]

examination that on several occasions prescriptions had been sent to him by the physician with mistakes such as "would have killed the patient", that he had returned them, and that the physician had admitted the mistakes and made corrections);
Oklahoma: 1917, Oklahoma R. Co. *v.* Thomas, 63 Okl. 219, 164 Pac. 120 (personal injury to a mine employee; his prior acts of negligence, excluded);
Oregon: 1913, Gynther *v.* Brown & McCabe Co., 67 Or. 310, 134 Pac. 1186 (former mistakes of an engineer in interpreting signals, admitted to show the signal-system defective, but not to show the negligence of the engineer);
Pennsylvania: 1898, Woeckner *v.* Motor Co., 187 Pa. 206, 41 Atl. 28 (loss of services of child; to show negligent guarding by the plaintiff, previous "disconnected" acts excluded); 1896, Baker *v.* Irish, 172 Pa. 528, 532, 33 Atl. 558 (cited *ante* § 98, n. 1); 1906, Veit *v.* Class & N. B. Co., 216 Pa. 29, 64 Atl. 871 (explosion of a boiler, the pump and valve having been plugged and tied, and the deceased being an employee about the engine; the fact that he had several times before plugged the pump, etc., excluded; unsound);
Rhode Island: 1903, Dyer *v.* Union R. Co., 25 R. I. 221, 55 Atl. 688 (defendant's failure to signal at other street-crossings, inadmissible);
South Carolina: 1898, Mack *v.* R. Co., 52 S. C. 323, 29 S. E. 905 (injury on a track not at a crossing; failure of the engineer to sound warning at previous crossings, admitted to show recklessness);
Texas: 1895, Cunningham *v.* R. Co., 88 Tex. 534, 31 S. W. 629 (excluding evidence of specific acts of negligence as showing negligent habits; but perhaps this case means only to admit such evidence where the character is in issue on the pleadings; see quotation, *post*, § 208); 1898, Missouri, K. & T. R. Co. *v.* Johnson, 92 Tex. 380, 48 S. W. 568 (plaintiff engineer's previous negligent conduct, excluded; certain exceptions recognized);
Utah: 1896, Sullivan *v.* Salt Lake, 13 Utah 122, 44 Pac. 1039 (former careless management of freight cars in the same way, excluded); 1899, Stoll *v.* Daly Min. Co., 19 Utah 271, 57 Pac. 295 (prior accidents to plaintiff in a mine, excluded); 1900, Konold *v.* R. Co., 21 Utah 379, 60 Pac. 1021 (railroad employee's entries: incorrectness on other occasions, by him or other employees, excluded);
Virginia: 1906, Southern R. Co. *v.* Blanford's Adm'x, 105 Va. 373, 54 S. E. 1 (negligence of a switchman; cited more fully *post*, § 987, n. 1);
Washington: 1893, Christensen *v.* U. T. Line, 6 Wash. 75, 82, 32 Pac. 1018 (that a motorman had run at too high speed at other times, excluded); 1902, Atherton *v.* Tacoma R. & P. Co., 30 Wash. 395, 71 Pac. 39 (similar to Christensen *v.* U. T. Line, *supra*).

§ 199*a*. [1] 1912, Noyes *v.* Boston & Maine R. Co., 213 Mass. 9, 99 N. E. 457 (action for value of a house-loss by fire set from the defendant's locomotive; the origin of the fire being disputed, the defendant offered to show numerous instances of the incendiary disposition of the plaintiff's son, as tending to show him to be the author; excluded; this is a good example of the unsound rigidity of the character rule).

§ 200. **Character of Complainant in Rape, etc., from Particular Acts of Unchastity.** It is generally accepted (*ante*, § 62) that the bad character for chastity of the complainant in a rape charge is relevant and admissible to show the probability of her consent to the intercourse. In evidencing this character, may *particular* acts of the woman's unchastity be resorted to, as showing her to be a person more prone than another to have consented?

No question of evidence has been more controverted. The relevancy of the fact is seldom doubted; but the arguments of Unfair Surprise, Undue Prejudice, and Confusion of Issues (*post*, § 1863) are thought to form serious objections. The classical opinion in favor of admissibility is the following:

1838, COWEN, J., in *People* v. *Abbot*, 19 Wend. 194: "The prosecutrix is usually, as here, the sole witness to the principal facts, and the accused is put to rely for his defence on circumstantial evidence. Any fact tending to the inference that there was not the utmost reluctance and the utmost resistance is always received. . . . The connection must be absolutely against the will; and are we to be told that previous prostitution shall not make one among those circumstances which raise a doubt of assent? That triers should be advised to make no distinction in their minds between the virgin and a tenant of the stew, — between one who would prefer death to pollution, and another who, incited by lust and lucre, daily offers her person to the indiscriminate embraces of the other sex? And will you not more readily infer assent in the practised Messalina in loose attire, than in the reserved and virtuous Lucretia? . . . [After referring to evidence of common prostitution as admissible,] It has been repeatedly adjudged that in the same view you may also show a previous voluntary connection between the prosecutrix and the prisoner. Why is this? Because there is not so much probability that a common prostitute or the prisoner's concubine would withold her assent as one less depraved; and may I not ask, does not the same probable distinction arise between one who has already submitted herself to the lewd embraces of another, and the coy and modest female severely chaste and instinctively shuddering at the thought of impurity? Shall I be answered that both are equally under the protection of the law? That I admit, and so are the common prostitute and the concubine. If either have in truth been feloniously ravished, the punishment is the same. But the proof is quite different. It requires that stronger evidence be added to the oath of the prosecutrix in one case than in the other."

The reasoning of the exclusionary rule is represented in the following passages:

1857, STRONG, J., in *People* v. *Jackson*, 3 Park. Cr. 398 (here the question was asked whether the prosecutrix had had intercourse with Dr. M. her betrothed, while on the voyage to New York, and the Court called attention to the circumstances as being peculiar; but added): "In any case, a single aberration from virtue, in one whose general character for chastity is otherwise unimpeachable, would raise so slight an inference, if any, of non-resistance to a brutal outrage from a person (or indeed any one except him to whom she had already yielded) that it would not justify a departure from the ordinary rules of evidence. Besides, if proof of particular instances should be admissible, rebutting evidence would be allowable, and thus there might be one or more collateral issues to occupy the time and divert the attention of the jury. Such would be the evils if the prosecution could require previous and timely notice of the particulars of the intended attack upon the conduct of the complainant; but as no such notice can be exacted, there would be no means of meeting the evidence, often of the dissolute companions of the accused, however mistaken or corrupt it might be, and thus the character of an innocent and greatly abused female might be sacrificed and the ends of public justice be defeated."

1895, SIDDON, J., in *Rice* v. *State*, 35 Fla. 236, 17 So. 286: "The fact that a woman may have been guilty of illicit intercourse with one man is too slight and uncertain an indication to warrant the conclusion that she would probably be guilty with any other man who sought such favors of her. If she was a woman of general bad reputation for chastity, or had been guilty of acts of lewdness with the defendant, the case would be different. In the first instance, the evidence would bear directly upon the question as to whether such a woman would be likely to resist the advances of any man; and, in the second, as to whether having yielded once to the sexual embraces of the defendant, she would not be likely to yield again to the same person. The greatest objection to such testimony is that it introduces collateral issues, which have no direct bearing upon the defendant's guilt."

The better view seems to be that which admits the evidence. Between the evil of putting an innocent or perhaps an erring woman's security at the mercy of a villain, and the evil of putting an innocent man's liberty at the mercy of an unscrupulous and revengeful mistress, it is hard to strike a balance. But, with regard to the intensity of injustice involved in an erroneous verdict, and the practical frequency of either danger, the admission of the evidence seems preferable. In the opposing judicial opinions the writers respectively assume that the man is innocent and that the woman is wronged; and on these inconsistent assumptions, the conclusion reached by each is fair enough. But the real question is, Which state of fact is the commoner and the one most needing our protection? The answer to this must depend more or less on the experience and the sentiments of each community.

The English precedents were for some time opposed to the use of such evidence; but it now seems to be admissible, subject to a limitation intended to avoid the objections of Unfair Surprise and Confusion of Issues, *i.e.* by allowing only the inquiry on cross-examination of the complainant, and by excluding extrinsic testimony.[1]

§ 200. [1] *England:* 1812, R. *v.* Hodgson, R. & R. 211, by all the judges (that the prosecutrix had had connection with another man a year before; excluded on the ground of surprise; but apparently treated only as affecting her testimonial discredit); 1817, R. *v.* Clarke, 2 Stark. 243, Holroyd, J. (same; but perhaps meant only as a ruling on testimonial discredit); 1834, R. *v.* Martin, 6 C. & P. 562, Williams, J. (whether the prosecutrix had previously had intercourse by consent with the accused, allowed: "I must say I never could understand the case of R. *v.* Hodgson, . . . it does appear to me to be not quite in strict accordance with the general rules of evidence"); 1843, R. *v.* Tissington, 1 Cox Cr. 48, Abinger, C. B. (citing Wood, B.; acts of solicitation by her to other men, rejected); 1843, R. *v.* Robbins, 1 Cox Cr. 55; 2 Moo. & Rob. 512 (former connection with other men, admitted; Coleridge, J., with Erskine, J., after the citation of the conflicting rulings: "It is not immaterial to the question whether the prosecutrix has had this connection against her consent, to show that she has permitted other men to have connection with her, which on cross-examination she has denied"; used as "a fact from which the jury may draw conclusions as to the probabilities of her story"); 1846, R. *v.* Page, 2 Cox Cr. 133 (rape by a father; former intercourse of the daughter with the father without making complaint, admitted); 1870, R. *v.* Cockcroft, 11 Cox Cr. 410, Willes, J., and Martin, B. (excluded; but Willes, J., would allow the question to be put on cross-examination); 1871, R. *v.* Holmes, 12 Cox Cr. 137 (before five judges; the question may be put to the prosecutrix, subject to her privilege not to answer; but no other evidence may be received; the reason given is that of surprise; but the Court confuses the question with that of discrediting a witness, and speaks of "contradictions" on collateral matters as not allowable); 1887, R. *v.* Riley, 16 Cox Cr. 191 (excluded).

Canada: 1877, Laliberté *v.* R., 1 Can. Sup. 117, 131, 139, 142, 144 (the prosecutrix may be asked as to connection with other men, but a negative answer cannot be contradicted; 1897, Gross *v.* Brodrecht, 24 Ont. App. 687 (allowable on cross-examination only; here, indecent assault); 1910, R. *v.* Muma, 22 Ont.

The state of the law in the various jurisdictions of this country is not uniform; but the exclusionary rule prevails, in some form, in the greater number of jurisdictions.[2]

L. R. 225, 229 (rape on Jan. 31; defence, consent; on Feb. 8 the woman, before then unmarried, was married to V.; cross-examination of the prosecutrix as to having lived with V. as his wife prior to Feb. 8, was held improper; the above cases ignored, and no authority cited; truly the perversity of some courts in some plain things transcends belief).

[2] *Alabama:* 1887, McQuirk *v.* State, 84 Ala. 435, 438, 4 So. 775 (excluded); 1908, Griffin *v.* State, 155 Ala. 88, 46 So. 481 (cross-examination to intercourse subsequent to the date charged, excluded, on the facts; *Arkansas:* 1855, Pleasant *v.* State, 15 Ark. 624, 643 (excluding outside testimony, because of the particular-act rule; and excluding cross-examination, because of the witness' disgrace-privilege, thus admitting in the latter case if the privilege is waived); 1904, Plunkett *v.* State, 72 Ark. 409, 82 S. W. 845 (excluded, on a charge of rape under age); *California:* 1856, People *v.* Benson, 6 Cal. 221 (admitting "particular acts of lewdness"); 1898, People *v.* Kuches, 120 Cal. 566, 52 Pac. 1002 (habitual telling of lewd stories, not accompanied by lewd demeanor, not admissible); 1900, People *v.* Benc, 130 Cal. 159, 62 Pac. 404 (excluded, even on cross-examination); 1904, People *v.* Stratton, 141 Cal. 604, 75 Pac. 166 (excluded, on a charge of incest); *Connecticut:* 1877, State *v.* Shields, 45 Conn. 256, 257, 260, 263 (former intercourse with others admitted, but on no clear principle); *Florida:* 1895, Rice *v.* State, 35 Fla. 236, 17 So. 286 (excluded); 1915, Tully *v.* State, 69 Fla. 662, 68 So. 934 (rape; cross-examination of complainant to loose conduct with other men, excluded); *Georgia:* 1904, Black *v.* State, 119 Ga. 746, 47 S. E. 370 (acts of intercourse with a third person T., offered by his testimony, excluded); *Idaho:* 1911, State *v.* Henderson, 19 Ida. 524, 114 Pac. 30 (excluded); *Illinois:* 1873, Shirwin *v.* People, 69 Ill. 56 (inadmissible; but admitted here to explain away the fact that the prosecutrix lacked the physiological marks of virginity, — a reason which would seem to be equally available in all such cases); 1876, Dimick *v.* Downs, 82 Ill. 533 (obscure); 1919, People *v.* Allen, 289 Ill. 218, 124 N. E. 329 (rape; whether specific acts of unchastity evidenced by other witnesses, were admissible, not decided; but such acts must be prior to the date of the intercourse charged); *Indiana:* 1861, Wilson *v.* State, 16 Ind. 393 (admitted); 1884, South Bend *v.* Hardy, 98 Ind. 582 (same); 1888, Bedgood *v.* State, 115 Ind. 275, 278, 17 N. E. 621 (question evaded; such intercourse with a member of the defendant's party here admitted, as tending to contradict on a material point); *Iowa:* 1897, State *v.* McDonough, 104 Ia. 6, 73 N. W. 357 (excluded); 1907, State *v.* Blackburn, — Ia. —, 110 N. W. 275 (rape under age; excluded on the principle of § 1001, *post*, without noticing the present principle); *Kansas:* 1895, State *v.* Brown, 55 Kan. 766, 42 Pac. 363 (excluded); *Kentucky:* 1892, Cargill *v.* Com., 93 Ky. 578, 581, 20 S. W. 782 (excluded; but here also because the charge was of detaining for prostitution against her will; the latter ground of distinction is unsound); 1897, Brown *v.* Com., 102 Ky. 227, 43 S. W. 214 (undue liberties allowed to others, received); 1911, Stewart *v.* Com., 141 Ky. 522, 133 S. W. 202 (detaining with intent to rape; "specific acts of adultery by the prosecutrix with other men. . . . either by other witnesses or by her on cross-examination if he can", held admissible); 1919, Gravitt *v.* Com., 184 Ky. 429, 212 S. W. 430 (lewd acts with third parties, shortly before, admitted); *Louisiana:* 1903, State *v.* DeHart, 109 La. 570, 33 So. 605 (incest; carnal intercourse by the woman with other men, held inadmissible); 1906, State *v.* Romero, 117 La. 1003, 42 So. 482 (carnal knowledge with consent; the prosecutrix' unchaste conduct, not admitted for the defendant; this is a curious ruling, for it excludes for the defendant that which would have been relevant for the prosecution); *Massachusetts:* Com. *v.* Regan, 105 Mass. 593, *semble* (excluded); 1872, Com. *v.* McDonald, 110 Mass. 405 (undecided); 1880, Com. *v.* Harris, 131 Mass. 336 (excluded); 1893, Miller *v.* Curtis, 158 Mass. 127, 131, 32 N. E. 1039 (excluded); *Michigan:* 1871, Strang *v.* People, 24 Mich. 1, 6 (inadmissible, *semble*, by outside evidence; but questions to the prosecutrix are proper); 1888, People *v.* McLean, 71 Mich. 309, 38 N. W. 917 (approving the preceding; but also stating, without noting the conflict, that the question cannot be put on cross-examination); 1893, People *v.* Abbott, 97 Mich. 484, 486, 56 N. W. 862 (excluded); *Mississippi:* 1859, Anon., 37 Miss. 58, *semble* (inadmissible); 1895, Brown *v.* State, 72 Miss. 997, 17 So. 278 (undecided); *Missouri:* 1898, State *v.* Whitesell, 142 Mo. 467, 44 S. W. 332 (excluded, on a charge of rape under the age of consent); *New Hampshire:* 1861, State *v.* Forschner, 43 N. H. 89 (excluded); 1863, State *v.* Knapp, 45 N. H. 154, *semble* (same); *New Mexico:* 1899, Terr. *v.* Pino, 9 N. M. 598, 58 Pac. 393 (excluded); *New York:* 1838, People *v.* Abbot, 19 Wend. 192, 194 (admissible; see quotation *supra*); 1857, People *v.* Jackson, 3 Park. Cr. 398 (inadmissible); 1874, Woods *v.* People, 55 N. Y. 517 (undecided); *North Carolina:* 1846, State *v.* Jefferson, 6 Ired. 305 (kissing and other liberties, excluded); 1857, State *v.* Henry, 5 Jones L. 65, 70 (an act of lewdness, excluded,

In actions for *indecent assault*, it would seem that the same principles apply; and the same attitudes would be taken upon this as upon rape.[3] In *bastardy* or *seduction*, where pregnancy is a part of the issue, similar evidence may be used for another purpose (*ante*, § 133). In *rape under age*, the female's consent being immaterial, her unchaste conduct is for that reason immaterial, on grounds independent of those stated in the text above; and this is generally conceded (*ante*, § 133, note 5). In *seduction*, where the statute makes "prior chaste character" a part of the issue, the fact of prior intercourse may become admissible (*post*, § 205).

The following distinctions are here important:

(1) Historically, the vacillation and the obscurity in the English precedents, and the misconception in some American rulings, were due to the failure to distinguish a second question which usually presents itself at the same time, viz., How far may the character of the woman *as a witness* be attacked by particular instances of unchaste conduct? In the early 1800s it was already settled (1) that particular acts of misconduct presented by outside testimony could not be used, but were available through cross-examination only (*post*, § 979); and it was just being settled (2) that only misconduct affecting veracity-character could be so used against a witness (*post*, §§ 922, 982). Thus the effect of the first rule would be to exclude all extrinsic testimony of particular misconduct of the woman; while the effect of the second

because not known to the defendant); 1868, State *v.* Cherry, 63 N. C. 32 (whether she had not been delivered of a bastard child, and whether she had not had intercourse with other men, admitted, as affecting credibility, on the doctrine of State *v.* Patterson, § 982, *post*, and without noticing State *v.* Jefferson, *supra;* but in the Jefferson case the cross-examination was not objected to and it was extrinsic evidence that was excluded, while here both question and extrinsic evidence were held proper; so that the two cases may be reconciled); *Ohio:* 1858, McCombs *v.* State, 8 Oh. St. 643, 646 (excluded); 1862, McDermott *v.* State, 13 Oh. St. 332 (same); *Oregon:* 1901, State *v.* Ogden, 39 Or. 195, 65 Pac. 449 (inadmissible, even on cross-examination); *Porto Rico:* 1910, People *v.* Español, 16 P. R. 203 (rape; cross-examination to intercourse with other men, before and after, allowable); *Rhode Island:* 1893, State *v.* Fitzsimon, 18 R. I. 236, 240, 27 Atl. 446 (excluded); *South Dakota:* 1904, State *v.* Smith, 18 S. D. 341, 100 N. W. 740 (excluded, on cross-examination, on a charge of rape under age of consent, and *semble*, also of rape generally); *Tennessee:* 1874, Titus *v.* State, 7 Baxt. 132 (admissible); *Texas:* 1905, Nolen *v.* State, 48 Tex. Cr. 436, 88 S. W. 242 (admissible); *Vermont:* 1856, State *v.* Johnson, 28 Vt. 512 (not allowed with extrinsic evidence, on the usual ground of surprise; but allowed on cross-examination, because "she is able to give satisfactory explanations, if such explanations can be made"; Bennett, J., dissented, because "no such presumption [of general unchastity] should be allowed to arise from a particular instance of an illicit connection with another person", *i.e.* the ground of irrelevancy); 1867, State *v.* Reed, 39 Vt. 417 (admissible); 1894, State *v.* Hollenbeck, 67 Vt. 34, 30 Atl. 696 (same); 1905, State *v.* Stimpson, 78 Vt. 124, 62 Atl. 14 (cross-examination of the prosecutrix to former acts of prostitution, not allowed on a charge of rape under age, consent being immaterial); *Washington:* 1913, State *v.* Holcomb, 73 Wash. 652, 132 Pac. 416 (excluded, even on cross-examination); *West Virginia:* 1919, State *v.* Kittle, 85 W. Va. 116, 101 S. E. 70 (rape; former acts of intercourse with other men, admissible to evidence character; rule settled for this State); *Wisconsin:* 1864, Watry *v.* Forbes, 18 Wis. 500, 502 (civil action for rape; intercourse with others, admissible as "tending to disprove the probability of the use of force"; whether admissible on the criminal charge, not decided).

[3] 1889, Gore *v.* Curtis, 81 Me. 403, 17 Atl. 314 (indecent assault and battery and solicitation to adultery; the plaintiff's prior acts of unchastity excluded); 1893, Miller *v.* Curtis, 158 Mass. 127, 129, 32 N. E. 1039 (same, *semble*). But not on a charge of carnal abuse of a female under age: 1921, Davis *v.* State, 150 Ark. 500, 234 S. W. 482.

rule might be to exclude even on cross-examination any inquiry into acts of unchastity. Moreover, the rule forbidding collateral contradiction (*post*, § 1003) was thought to have a bearing. Having regard to what was then passing in the minds of English judges, the earlier exclusion of the present class of evidence seems to have proceeded from the point of view of the rules about impeaching witnesses. Later, the consideration that there was another point of view became clearer to them, and thus the rulings changed. That the two points of view differ practically in their results is obvious. If regard is had solely to the witness-character of the woman, and we ignore her chastity-character as bearing on consent, the evidence will be excluded in two situations in which it would otherwise be admissible, viz., (*a*) where the woman does not take the stand as a witness, and (*b*) where she does take the stand in a jurisdiction (*post*, § 922) in which veracity-character and not general bad character of a witness is admissible, except in jurisdictions (*post*, § 982) where acts of unchastity in a woman are regarded as relevant to veracity-character. But modern psychology warns us to be liberal in investigating the moral attributes of women who make complaints of sexual outrages (*ante*, § 62).

(2) It has been seen (*ante*, § 62) that the general character of the woman for unchastity is in such cases almost universally received. The question then arises whether the fact of being a *professional prostitute* is to be assimilated to such a general character; or whether it is to be regarded merely as particular misconduct, and therefore in most jurisdictions inadmissible. With reference to its real significance, and the absence of the dangers of Unfair Surprise and Confusion of Issues, it ought to take the former rank; and this is the general conclusion (*ante*, § 62).

(3) Other *intercourse with the defendant himself* is sometimes offered in such cases, but involves in truth a different principle. Such conduct is not intended to show a general willingness or disposition to commit acts of unchastity, but merely an emotion towards the particular defendant tending to allow him to repeat the liberty; it is thus not only more cogent as evidence, but is not open to the objections advanced against evidence of intercourse with third persons; and its admissibility has always been conceded (*post*, §§ 399, 402).

§ 201. **Disposition of an Animal, from its Behavior in Particular Instances.** However correct the notion may be psychologically, we are usually more inclined, in the case of animals, to trust individual instances of conduct as illustrating disposition. "In proportion to the element of personality, of the interjection of the free will of a human being, we become more certain of the effects of the causative force and more ready to admit it."[1] Moreover, the doctrines of auxiliary policy (*ante*, § 199) are less applicable to such evidence. The doctrine of Undue Prejudice (*ante*, § 194) does not apply; for we do not recognize the animal as entitled to that careful protection from unfair con-

§ 201. [1] Mr. Barrows, in 14 Amer. L. Rev. 358.

demnation which we accord to the accused human being. The doctrine of Unfair Surprise offers less of an objection than otherwise, because the possible range of the evidence is much smaller. The doctrine of Confusion of Issues still remains applicable, but the new issues that might be involved are in no way capable of the complexity and variety that are involved in proving the character-acts of a human being. For these reasons it is generally conceded that, in proving the disposition of an animal, particular instances of its conduct are admissible:[2]

1864, BIGELOW, C. J., in *Todd* v. *Rowley*, 8 All. 51, 58 (to show the timid and unsafe character of the plaintiff's horse, instances were admitted of his having shied so frequently, before and after the time of the injury, as to indicate a vicious habit): "The habit of an animal is in its nature a continuous fact, to be shown by proof of successive acts of a similar kind. Evidence having been first offered to show that the horse had been restive and unmanageable previous to the occasion in question, testimony that he subsequently manifested a similar disposition was competent to prove that his previous conduct was not accidental or unusual, but frequent and the result of a fixed habit at the time of the accident."

3. Conduct to show Character in Issue

§ 202. **General Principle.** In the numerous classes of cases in which Character may be established, not as evidential of the doing of an Act (*ante*,

[2] *Eng.* 1866, Worth *v.* Gilling, L. R. 2 C. P. 3 (attempts of a dog to bite, to show its ferocious nature admitted); *U. S. Ill.* 1913, Mithen *v.* Jeffery, 259 Ill. 372, 102 N. E. 778 (after plaintiff's evidence of two instances of vicious conduct, defendant was allowed to offer, through various witnesses, the conduct of the dog on numerous occasions, amounting to an offer of uniform good disposition); *Ky.* 1911, Mayfield Lumber Co. *v.* Lewis' Adm'r., 142 Ky. 727, 135 S. W. 420 (horse's bad conduct after an accident, admitted); *Me.* 1873, Whiteley *v.* China, 61 Me. 202 (conduct of a horse in similar places immediately before and after an accident, admitted to show injury to his temper and amiability to control); *Mass.* 1864, Todd *v.* Rowley, 8 All. 51 (see quotation *supra*); 1878, Maggi *v.* Cutts, 123 Mass. 535 (admitting a horse's vicious conduct); 1897, Broderick *v.* Higginson, 169 Mass. 482, 48 N. E. 269 (habit of an animal may be shown by "frequent observation of particular instances"); 1905, Palmer *v.* Coyle, 187 Mass. 136, 72 N. E. 844 (injury by a vicious horse; former vicious acts of the horse, admitted); *Mont.* 1885, Kennon *v.* Gilmer, 5 Mont. 257, 265, 5 Pac. 847, affirmed in 131 U. S. 22, 9 Sup. 696 (injury by a carrier using horses alleged to be unsafe; evidence of the horses shying before and after the time in question, admitted); *N. H.* 1861, Chamberlain *v.* Enfield, 43 N. H. 356, 360 (acts of skittishness, admitted); 1865, Whittier *v.* Franklin, 46 N. H. 23, 26 (vicious acts, admitted); 1868, East Kingston *v.* Towle, 48 N. H. 57, 65 (the issue being whether the defendant's dog had killed the plaintiff's sheep, evidence of former sheep-killings by the dog was not admitted; Doe, J., dissenting; this ruling would probably not be followed in this jurisdiction to-day); *Or.* 1915, Marks *v.* Columbia Co. L. Co., 77 Or. 22, 149 Pac. 1041 (injury by a skittish horse; subsequent conduct of the horse, admitted); *R. I.* 1898, Stone *v.* Langworthy, 20 R. I. 602, 40 Atl. 832 (conduct of the horse when driven by another, the day before, admitted to show his traits); 1899, Stone *v.* Pendleton, 21 R. I. 332, 43 Atl. 643 (a horse's prior conduct during the same drive, admitted to show its gentle disposition); 1900, Buckley *v.* Express Co., 22 R. I. 358, 48 Atl. 7 (prior instance of a horse's propensity to run away, admitted); *Vt.* 1898, Dover *v.* Winchester, 70 Vt. 418, 41 Atl. 445 (sheep-killing; defendant's evidence that his dogs did not kill any of his own sheep, and plaintiff's evidence that sheep-killing dogs never killed their owner's sheep, admitted).

As to the *range of time* of such acts, the trial Court's discretion should control, having regard to the time of probable permanency of disposition: 1878, Maggi *v.* Cutts, 123 Mass. 535 ("the limit of time within which such misbehavior may be proved must depend largely upon the discretion of the presiding judge").

For the use of an animal's acts to show the *owner's notice of his propensity*, see *post*, § 251; for the use of an animal's acts to show the *frightening quality of an external object*, see *post*, § 458.

For the use of an animal's *general disposition*, as evidencing his probable conduct on a particular occasion, see *ante*, § 68.

§§ 55–68) nor as affecting Notice or Belief (*post*, §§ 246–258), but because by the principles of substantive law it is one of the propositions in issue (*ante*, §§ 70–80), the reasons which affect the use of *particular acts to evidence the character* may not apply as they do to such acts used as evidence of a defendant's or of other persons' character used evidentially (*ante*, §§ 192–201).

It is indispensable to examine the precise application of these reasons to this class of cases. (1) The doctrine of probative value, or Relevancy, remains the same; conduct is here as elsewhere a legitimate basis for inference to disposition or character. (2) The doctrine of Undue Prejudice disappears (except in a few instances), since there is no defendant (except in those instances) to be condemned penally and therefore likely to suffer unjustly for past misdeeds. Moreover, the risk of hasty and unjustifiable inference from one past act to the present act charged (*ante*, § 194) is wanting, since the ultimate thing to be proved is not the doing of an act, but a disposition. (3) The doctrine of Unfair Surprise remains the same, in one aspect, and yet not the same. Its application is not the same, in the sense that there is no prior notice that character would be offered evidentially; for here the law of the case warns beforehand that character will be an issue in it. But its application does remain the same, in the sense that there can be no anticipation as to the time, place, and kind of act that will be predicated as showing the character; and thus the impossibility of being prepared to disprove fabricated testimony and the unfairness of such a situation (*ante*, § 194, *post*, § 1849) remain precisely the same. It is this double aspect of the surprise-argument that causes most of the conflict of rulings upon this subject. (4) The doctrine of Confusion of Issues (*ante*, § 194, *post*, § 1904) is no longer so serious an objection, because, since a specific character is usually the issue, the use of particular instances of such a character keeps the general trend of the investigation within the lines of that issue as marked out by the substantive law of the case, and does not tend to such diversion of attention as would be possible in proving (for example) the character of an accused person. (5) There is a greater practical necessity for the use of specific instances of conduct, in this class of cases. In the preceding topics, where character is merely evidential of the act in issue, there will always be a dozen other and more cogent facts evidencing this act, and the restriction of the evidence of Character to reputation-evidence cuts off only a trifling portion of the total available evidence for the main issue. But where Character itself is the main issue (or one of them), the exclusion of the particular instances of conduct would leave the proving party restricted solely to reputation-evidence as the single evidential source available for getting at the main issue (or one of the issues) in the case (since Opinion is excluded, *post*, § 1980); and the generally indecisive and inferior nature of reputation-evidence makes it an unsatisfactory source to serve as the exclusive one available. Thus, there is here, as there is not in the former topics, a certain necessity for the use of particular acts or conduct, *i.e.* the loss of it would be felt as it would not be in the other cases.

It may be seen, then, that (apart from the doctrine of Unfair Surprise) everything points towards the propriety of allowing the use of particular instances of conduct to prove character wherever character is by the law of the case a proposition to be proved. This was the orthodox common-law view, enunciated in general and unequivocal terms:

1742, L. C. HARDWICKE, in *Clark* v. *Periam*, 2 Atk. 337 (cross-bill to cancel a bond because given 'ex turpi causa', to wit, for criminal conversation with a lewd woman, the plaintiff): "The counsel insist . . . that the plaintiff is not entitled to examine to anything but her character in general, because it is impossible for Mrs. C. to be prepared to give an answer to the particular facts charged; for though everybody is supposed to be ready, to support a general character, yet not a particular fact. . . . As to the reason of the thing: In criminal prosecutions it comes in only collaterally and incidentally and is not the particular thing to be tried; and when that is the case, they are not supposed to be prepared with evidence. But compare this with cases where the character is the particular issue to be tried; suppose in the case of an indictment for keeping a common bawdy-house, without charging any particular fact; though the charge is general, yet at the trial you may give in evidence particular facts and the particular time of doing them; the same rule as to keeping a common gaming-house. This is the practice in all cases where the general behavior or quality or circumstance of the mind is in issue; as for instance, in 'non compos mentis', it is the experience of every day, that you give particular acts of madness in evidence, and not general only, that he is insane; so where you charge that a man is addicted to drinking, and liable to be imposed upon, you are not confined in general to his being a drunkard, but particular instances are allowed to be given. . . . Wherever the general life or conversation is put in issue, it is notice to the person who is charged that she should be prepared to take off the weight of that evidence; but where it comes in collaterally you shall be confined to general evidence. This seems to me to be the distinction, and the grounds of it; and if I was of a different opinion, I should overturn the constant course of this court and make the greatest confusion."

1811, ROANE, J., in *Fall* v. *Overseers*, 3 Munf. 495, 505: "In all cases in which the general character or behavior is put in issue, evidence of particular facts may be admitted; for whatever is material to the issue each party must come prepared to prove or to deny."[1]

The doctrine is found constantly repeated in these broad terms, though seldom expressly decided except in connection with the particular classes of cases ensuing. It represents a general policy and tendency, which connects, supports, and explains the various instances in which such evidence is admitted.

Nevertheless, it cannot be stated in these broad terms as an invariable rule. There are one or two settled exceptions to it; and there are other disputed instances in which some Courts refuse to accept it. This opposing tendency has occasionally, in modern times, gone so far that even the general validity of the doctrine is repudiated, — chiefly on the ground that it involves all the serious dangers protected against by the doctrine of Unfair Surprise:

1893, KNOWLTON, J., in *Miller* v. *Curtis*, 163 Mass. 127, 131, 32 N. E. 1039: "It is a general rule, which has been adhered to with great strictness in this Commonwealth, that when character is in issue, it may be shown only by evidence of general reputation, and not

§ 202. [1] *Accord:* 1767, Buller, Trials at Nisi Prius, 295; 1835, People *v.* White, 14 Wend. 113 (because character is not collateral, and "it is impossible without particular facts to prove the charge"; no examples mentioned).

by proof of specific acts. . . . The principal reason for this rule is that a multiplicity of issues would be raised if special acts, covering perhaps a lifetime, could be shown. It might be necessary to go into the circumstances attending each act before it could be determined what its nature was and what effect should be given to it. It would be impossible for the opposing party to come prepared to meet evidence upon matters in regard to which he had no notice, and great injustice might be done by bearing biased and false testimony to which no answer could be made."

This passage is assuredly unsound as a statement of the general rule. The common law began rather with the doctrine of Lord Hardwicke as the general rule; and the exceptions, whether universally or only locally recognized can hardly be said to justify a statement that the general rule favors exclusion rather than admission. The only satisfactory mode of decision is to consider by itself each instance where character may be in issue, note the application of the various reasons, and solve the problem for that instance; bearing always in mind these two general tendencies or policies operating respectively for admission and for exclusion.

The various instances fall into a natural grouping according as character is an issue (1) by the substantive law of the case, *i.e.* as involved in the *cause of action*, or (2) by the remedial law, *i.e.* as affecting the *mitigation of damages*. In the latter group the various instances are apt to have something in common; in the former group the peculiar substantive law of each case is of prime consequence.

§ 203. **"Common" Offender (Cheats, Liquor-sellers, Barrators, Gamblers, Drunkards, etc.).** The typical case, to which Lord Hardwicke's rule applies, and for which it is as good law to-day as it ever was, is that of a charge of being a "common" offender of one sort or another, — a common cheat, a common gambler, a common drunkard, and the like. The peculiarity of the issue is that it involves not so much the inward disposition or trait of the person charged as his habitual doing of certain outward acts; and thus, while the issue is traditionally said to involve "character", it really involves rather a repetition of conduct as the thing to be proved. Thus, while reputation as to this course of conduct may be an admissible sort of evidence (*post*, § 1620), the most natural and cogent sort will be a series of particular acts of the kind charged. The only question would be as to the sufficiency of the number of these acts to justify the epithet of "common" or "habitual"; and this will not affect the admissibility of any particular instance (unless so far as the statute specifies a minimum number), but will be a matter for the jury, under instructions of law from the judge. The objection of surprise may sometimes be a serious one; but the necessity of the situation must control, and in some instances the danger of surprise is obviated by requiring prior notice of the alleged instances that will be relied on.

For this purpose, then, evidence of particular acts is always admissible.[1]

§ 203. [1] *England:* 1767, Buller, Nisi Prius, 296; 1802, McNally, Evidence, 324 (both these writers declare the general doctrine; in barratry, notice of the specific acts charged is necessary); 1808, R. *v.* Roberts, 1 Camp. 399 (indictment for "conspiracy to carry on the

There may also be analogous instances in which the issue is practically the same, though not arising in a criminal charge against the person as defendant.[2] Distinguish here the use of particular instances to prove Habit in the strict sense, as not involving character (*post*, § 376).

§ 204. **House of Ill-fame.** It has already been seen (*ante*, § 78) that, apart from statutes constituting the repute of the house as the sole element of the crime of professional pandering, the *character* or use of the *house* and the character or occupation of the *inmates* may come into issue. Two questions having a bearing here are thus presented. (1) May *particular instances* of prostitution *in the house* be offered, as showing its habitual use or character? (2) May *particular acts* of prostitution *by the inmates* be offered, as showing their occupation or character as prostitutes? Both these questions should be answered in the affirmative, for the same reason as in the preceding class of cases; the considerations affecting the question are practically identical.[1]

business of a common cheat"; "cumulative instances are necessary to prove the offence").

United States: 1920, McNutt *v.* U. S., 8th C. C. A., 267 Fed. 670 (carrying on illegal liquor business without paying tax; "one or two sales of liquor are not sufficient"); 1922, Lewinsohn *v.* U. S., 7th C. C. A., 278 Fed. 421 (injunction against a liquor nuisance; one sale may suffice); 1864, Ingram *v.* State, 39 Ala. 247, 253 (doctrine recognized for a common barrator, common seller of liquor, etc.); 1911, Martin *v.* State, 2 Ala. App. 175, 56 So. 64 (keeping a gaming table for gaming); 1895, Wright *v.* Crawfordsville, 142 Ind. 636, 642, 42 N. E. 227 (habit of intoxication, provable by specific acts); 1834, Com. *v.* Moore, 2 Dana Ky. 402 (common gambler); Com. *v.* Hopkins, 2 Dana Ky. 419 (same); 1904, State *v.* Behan, 113 La. 701, 37 So. 607 (keeping a house for illegal faro-banking; dealing faro in the same place ten or fifteen days before, admitted); 1878, World *v.* State, 50 Md. 49, 54 (under St. 1864, c. 38, on a charge of being a "common thief", acts other than of stealing are not admissible, nor any acts done before the statutory period); 1855, Com. *v.* Whitney, 5 Gray Mass. 85 (common drunkard; no particular number of instances are necessary or sufficient); 1873, Com. *v.* McNamee, 112 Mass. 285 (in proving the defendant a "common drunkard", the facts of intoxication five to seven times within four months, sufficient to support a finding of "habitual drunkenness").

Compare the cases cited *post*, § 367, n. 3 (prior offences to show intent in illegal gaming).

[2] 1876, Smith *v.* State, 55 Ala. 11 (where a statute forbade selling liquor to a person of "known intemperate habits"); 1852, McMahon *v.* Harrison, 6 N. Y. 443, 447 (incompetency as administrator because of professional habits of gambling; his habits in November, 1348, when last heard from, "presumptive evidence" of similar habits in July, 1850).

§ 204. [1] (1) Acts of prostitution to show *the use of the house:* 1900, Howard *v.* People, 27 Colo. 396, 61 Pac. 595 (keeping a house of ill-fame; acts of any time within the statutory period, admitted, the offence being a continuing one; former convictions for similar offences, admitted); 1846, Caldwell *v.* State, 17 Conn. 467, 473 (resort by particular prostitutes); 1918, People *v.* Berger, 284 Ill. 47, 119 N. E. 975 (keeping a house of ill-fame; conversations of inmates, not admissible; here received, however, on the principle of § 1071, *post*); 1896, Egan *v.* Gordan, 65 Minn. 505, 68 N. W. 103 (in an action to recover rent); 1860, State *v.* M'Gregor, 41 N. H. 407, 412 (acts of prostitution); 1920, State *v.* Morris, 94 N. J. L. 19, 108 Atl. 765 (keeping a disorderly house; "acts of a disorderly character by persons in the house, and what was said by them at the time as a part of those acts", admitted); 1863, Harwood *v.* People, 26 N. Y. 190 (repeated arrests, at the house, of persons before convicted as prostitutes); 1863, Kenyon *v.* State, 26 N. Y. 203, 209 ("particular facts, . . . such as the harboring of unchaste persons"); 1896, Lanpher *v.* Clark, 149 N. Y. 472, 44 N. E. 182; ("such specific acts of immorality and impropriety" on the keeper's part "as tend to furnish a reasonable inference as to the real character of the place"); 1903, People *v.* Glennon, 175 N. Y. 45, 67 N. E. 125 (admitted, on a charge of the defendant patrolman's neglect of duty in failing to arrest the persons keeping such a house); 1846, State *v.* Patterson, 7 Ired. N. C. 70.

(2) Acts of prostitution to show the *occupation of persons* resorting to the house: *Accord:* 1915, State *v.* Koettgen, 88 N. J. L. 51, 95 Atl. 747 (keeping a disorderly house; "acts and sayings", admitted, "to show the character of the people, and hence of the place where they gather; . . . thieves and prostitutes do not gather at a church"); *Contra:* 1861, Com. *v.* Gannett, 1 All. Mass. 7; 1908,

§ 205. **Seduction; Statutory Action or Prosecution.** Where by statute the seduction of an unmarried woman is made a crime against the State or a cause of civil action for the woman, the character of the woman is usually treated by the statute as affecting the crime or wrong, and becomes a proposition to be proved (*ante*, § 79). Under such statutes several questions arise, involving the present principle:

(1) Where the statute applies to women of "chaste character", does this signify the *actual* inward *character* or disposition? If so, particular acts of unchastity are certainly relevant to disprove this actual character. Although the objection of Unfair Surprise is here as elsewhere a serious one, the practical necessity for resorting to this kind of evidence, and its cogency if believed, are perhaps greater than in any of these kindred topics. Accordingly, it is generally conceded that such instances may be offered by the defendant.[1]

(2) Where the statute applies to women of "good repute for chastity", it is clear that by the statutory terms the *reputation* is the thing in issue; and a particular act is obviously irrelevant to show reputation. Such acts are therefore inadmissible under these statutes.[2]

State *v.* Baans, 77 N. J. L. 123, 71 Atl. 111 (conviction of several inmates, excluded; the opinion is valueless, confusing obviously distinct things, and apparently prepared in a great hurry; the only point that could properly have been made, namely, that of § 1270, *post*, is not noticed); 1915, State *v.* Littman, 88 N. J. L. 392, 96 Atl. 66 (keeping a disorderly house; "conduct and conversation" of persons frequenting it, held admissible only because such acts of misconduct were charged in the indictment, but not to evidence the reputation of the frequenters; the Court of Errors and Appeals here corrects the rule declared by the Supreme Court in State *v.* Littman, 86 N. J. L. 453, 92 Atl. 580; nothing said about State *v.* Koettgen, *supra*).

§ 205. [1] *Iowa:* 1857, Andre *v.* State, 5 Ia. 389; 1865, State *v.* Carron, 18 Ia. 372, 375; 1871, State *v.* Shean, 32 Ia. 88, 92 ("It will not do if she possesses a reputation for chastity; she must be really so"); 1871, State *v.* Higdon, 32 Ia. 252 (same); 1880, West *v.* Druff, 55 Ia. 335, 336, 7 N. W. 636 ("conversations, acts, and associations are manifestations of character, and constitute the true index of the heart"); 1905, State *v.* Hummer, 128 Ia. 505, 104 N. W. 722 (nature of chastity defined); 1922, State *v.* Davis, — Ia. —, 187 N. W. 692 (but here also admitting for the defendant the woman's illicit relations with specific other men after the alleged seduction, to disprove the fact of her reliance on the promise to marry); *Minnesota:* 1860, State *v.* Timmens, 4 Minn. 325, 334 (since there may be reformation); *Missouri:* 1892, State *v.* Biize, 111 Mo. 464, 471, 20 S. W. 210; *Nebraska:* 1904, Woodruff *v.* State, 72 Nebr. 815, 101 N. W. 1114 ("specific acts of lewdness" are admissible); *New York:* 1853, Crozier *v.* People, 1 Park. Cr. 453 (*contra*, Safford *v.* People, 1 Park. Cr. 478, and Carpenter *v.* People, 8 Barb. 608, on the ground that the statutory term "chaste" may still be appropriately used of a woman who has had one act of illicit intercourse; but these are now practically repudiated by the next case); 1863, Kenyon *v.* State, 26 N. Y. 203, 203 ("specific acts of lewdness", admissible); *Oklahoma:* 1909, Marshall *v.* Terr., 2 Okl. Cr. 136, 101 Pac. 139 ("chaste" is "a condition actually existing"); 1911, Hast *v.* Terr., 5 Okl. Cr. 162, 114 Pac. 261; *Tennessee:* 1873, Love *v.* Masoner, 6 Baxt. 24, 33; *Washington:* 1910, State *v.* Dacke, 59 Wash. 238, 109 Pac. 1050 (rape under age); 1911, State *v.* Workman, 66 Wash. 292, 119 Pac. 751 (statutory rape).

For the use of *reputation* in *rebuttal* in such cases, see *post*, § 1620. Of course, the women may *call other witnesses to deny* such acts insinuated on her cross-examination: 1922, Polk *v.* State, — Tex. Cr. —, 238 S. W. 934.

[2] 1885, State *v.* Bryan, 34 Kan. 63, 69, 8 Pac. 260 (because the statute affects "any female of good repute"); 1907, Russell *v.* State, 77 Nebr. 519, 110 N. W. 380 (excluded); 1881, Zabriskie *v.* State, 43 N. J. L. 640, 646 ("There is a distinction between actual personal virtue and 'good repute for chastity' as used in our statute; . . . it does not necessarily follow that they are co-existent"); 1896, Foley *v.* State, 59 N. J. L. 1, 35 Atl. 105 ("where the legislative language is unmistakably clear, it is the duty of the Court to enforce it in that sense"); 1907, State *v.* Slattery, 74 N. J. L. 241, 65 Atl. 866 (Foley *v.* State followed); 1876, Bowers *v.* State, 29 Oh. St. 542, 545 (the statute applied to "any female of good repute for chastity"; other illicit intercourse excluded; Welch, C. J.: "If she has repented of

(3) Where the statute prescribes nothing expressly as to the woman's chastity, shall a requirement of *actual chastity be implied* into the statutory elements of the crime or the wrong? Having regard to the purpose of the statute and to the singular consequences of omitting such a requirement, it seems highly proper to make the implication:[3]

1876, MARSTON, J., in *People* v. *Clark*, 33 Mich. 112, 118: "In most of the States their statute makes the seduction of a woman of 'previous chaste character' an indictable offence, while there are no such words, nor any of like import, in ours; and the Courts [in those States] have held that the words 'previous chaste character' mean that she shall possess actual personal virtue, in distinction to a good reputation, and that a single act of illicit connection may therefore be shown on behalf of the defendant. . . . The object of this statute was not to punish illicit cohabitation; its object was to punish the seducer who by his arts and persuasions prevails over the chastity of an unmarried woman. . . . If, however, she had already fallen, [there is no seduction.] . . . Then the chastity of the female at the time of the alleged act is in all cases involved."

1883, SMITH, J., in *Polk* v. *State*, 40 Ark. 482, 486 (a statute punished "carnal knowledge of any female by virtue of any feigned or pretended marriage", etc.): "In every prosecution for seduction the character of the seduced female is involved in the issue; and character means in this connection, not her general reputation in the community, but the possession of actual personal chastity; . . . the Legislature never intended to send a man to the penitentiary for having had illicit connection with a prostitute or a woman of easy virtue where she had consented, even under a promise of marriage."

(4) In the first and third cases preceding, does a "chaste character" mean merely the *physical condition* of virginity, or does it signify the moral disposition to be chaste? If the former, then nothing short of intercourse would be relevant; if the latter, then any lewd behavior would be relevant. The latter interpretation is generally accepted:[4]

her past error and by her upright walk acquired an unimpeachable reputation for chastity, the law protects her against the man who overcomes her good resolves by a promise of marriage").

In Missouri the opposite view is now taken: 1883, State *v.* Brassfield, 81 Mo. 151, 157 ("There is a material difference between our statutes and those statutes under which such evidence has been held admissible in other States"); 1885, State *v.* Patterson, 88 Mo. 88, 95, 100 ("Our statute is worded a little differently, but in substance and effect is the same" as the others; in State *v.* Brassfield "we went too far"; Henry, C. J., diss., in a good opinion); 1888, State *v.* Wheeler, 94 Mo. 252, 7 S. W. 103 (preceding case approved).

[3] *Alabama:* 1883, Wilson *v.* State, 73 Ala. 527, 533 (the statute applied to "any unmarried female"; held that "the statute is for the protection of the chastity of unmarried women, and the existence of the virtue at the time of the intercourse is a necessary ingredient of the offence"; but here an amendment had expressly so provided); 1888, Hussey *v.* State, 86 Ala. 34, 36, 5 So. 484; 1888, Munkers *v.* State, 87 Ala. 94, 97, 6 So. 357; 1896, Bracken *v.* State, 111 Ala. 68, 20 So. 636, *semble;* 1898, Smith *v.* State, 118 Ala. 117, 24 So. 55 (inquiry is as to actual chastity; in rebuttal, good character since the time of seduction is inadmissible); 1898, Suther *v.* State, 118 Ala. 88, 24 So. 43; *Arkansas:* 1883, Polk *v.* State, Ark. (quoted *supra*); 1903, Walton *v.* State, 71 id. 398, 75 S. W. 1; *Hawaii:* 1896, Woodward *v.* Republic, 10 Haw. 416 (admitting particular acts); *Iowa:* 1913, State *v.* McClure, 159 Ia. 351, 140 N. W. 203; *Michigan:* 1873, People *v.* Brewer, 27 Mich. 133, 135, *semble;* 1876, People *v.* Clark, 33 Mich. 112, 118 (holding, nevertheless, that there may be a reformation, and thus that "if she has repented of that act and reformed, she may again be seduced"); 1879, People *v.* Knapp, 42 Mich. 267, 268, 3 N. W. 927; 1882, People *v.* Squires, 49 Mich. 487, 488, 13 N. W. 828 (maintaining that there may be a reformed chastity); *South Carolina:* 1909, State *v.* Turner, 82 S. C. 278, 64 S. E. 424 (seduction: under St. 1905, Feb. 22, the State need not prove chastity).

[4] *Accord:* 1888, Hussey *v.* State, 86 Ala. 34, 36, 5 So. 484, *semble* (acts of indecency); 1883, Polk *v.* State, 40 Ark. 482, 487 ("particular acts of immorality or indecorum"); 1857, Andre *v.* State, 5 Ia. 389, 395 (quoted *supra*);

1857, WOODWARD, J., in *Andre* v. *State*, 5 Ia. 389, 395: "The statute is for the protection of the pure in mind, for the innocent in heart, who may have been led astray. . . . [Obscenity of language, indecency of conduct, and undue familiarity with men] serve to indicate the true character; they become exponents of it; and a defendant is not punished for an act with one whose conversation and manners may even have suggested the thought, and opened the way to him, as he would be for the same act with one innocent in mind and manners."

(5) In any case, acts of unchastity *after the seduction* have no relevancy.[5]

§ 206. **Excuse for Breach of Promise of Marriage.** The unchaste character of the promisee, whether existing and concealed before the promise or supervening after the promise, may be treated as the breach of a condition or representation, and therefore as an excuse for refusal to fulfil the promise of marriage. In such a case, the unchaste character may be shown by a *particular act* of intercourse with another or by other lewd behavior, for the same reasons as in the preceding topic.[1] The use of such conduct as affecting the *mitigation of damages* (*post*, § 213) raises slightly different questions.

§ 207. **Justification of Defamation of Character.** Where a defendant in an action for defamation pleads the truth of his charge, and the charge is not of a specific act of misconduct, but of a general bad character or trait or habit or course of dealings, the proper mode of proof for him, is often not an easy matter to discern. On the one hand, it is clear that, where he charges a *habit or occupation* or course of dealings, he must be allowed to use specific instances of it as cumulatively assisting to substantiate the general charge; and this, on the principle of § 202, *ante*, seems to be conceded generally.[1] On the other

1865, State *v.* Carron, 18 Ia. 372, 375; 1871, State *v.* Shean, 32 Ia. 88, 90 ("acts of lewdness and immodesty"); 1871, State *v.* Higdon, 32 Ia. 262, 264 *semble*.

Contra: 1898, People *v.* Kehoe, 123 Cal. 224, 55 Pac. 911 (seduction; "unchaste character" may be shown only by intercourse, not by mere indecencies).

[5] 1896, Bracken *v.* State, 111 Ala. 68, 20 So. 637; 1883, Polk *v.* State, 40 Ark. 482, 478; 1897, People *v.* Wade, 118 Cal. 672, 50 Pac. 841; 1913, Bray *v.* U. S., 39 D. C. App. 600 (seduction; the woman's intercourse with others subsequent to the seduction, excluded here on the facts); 1898, Keller *v.* State, 102 Ga. 506, 31 S. E. 92; 1876, People *v.* Clark, 33 Mich. 112, 117; 1905, People *v.* Cordova, 9 P. R. 311; 1914, State *v.* Jones, 80 Wash. 585, 142 Pac. 35 (criminal seduction; subsequent intercourse with another man, excluded).

Other intercourse *with the defendant himself* may also be admissible as throwing light upon the incidental question, which arises under some statutes, whether the seduction was upon a promise of marriage (*post*, §§ 399, 401).

For particular acts as admissible to mitigate *damages* in the *parent's action for seduction*, see *post*, § 210.

On a charge of *adultery*, the woman's previous intercourse with others than the defendant is of course immaterial: 1879, People *v.* Knapp, 42 Mich. 267, 268, 3 N. W. 927.

§ **206.** [1] 1801, Foulkes *v.* Sellway, 3 Esp. 236 (the plaintiff's bad character in defence to an action on a promise of marriage; evidence of an act of gross misconduct received); 1796, Woodard *v.* Bellamy, 2 Root Conn. 354 ("particular instances of unchastity" admitted); 1873, Sheahan *v.* Barry, 27 Mich. 217, 221 (considered here from the point of view both of excuse and of mitigation); 1895, Stratton *v.* Dole, 45 Nebr. 472, 63 N. W. 87 (same).

§ **207.** [1] ENGLAND: 1880, R. *v.* Labouchere, 14 Cox Cr. 419, 428, 43 (libel charging that the prosecutor gained his livelihood in 1878 by card-sharping; evidence admitted of his having so gained a living in 1876 and 1877; to show this habit in given years, evidence of two instances of card-sharping was received, and it was left to the jury to say whether they would infer that the prosecutor, as charged, "lived by card-sharping"); 1915, Maisel *v.* Financial Times, 3 K. B. 336 (libel, with justification; the statement being that plaintiff was of a character and repute to misappropriate funds of the O. T. G. Co., particular acts of a similar kind within 2 or 3 months after publication were held admissible; earlier cases not cited);

hand, so far as his charge concerned, not merely some outward course of conduct, but the plaintiff's *inward and moral disposition* — character, in the strict sense — he is met by a doctrine which tells him (from the point of view of the surprise-argument) that this is unfair, that no plaintiff can be prepared to meet evidence ranging over his whole life, and that a simple and just mode of adducing the supposed facts is to plead them specifically as supporting the truth of the charge.[2] The difficulty is to draw the line between the two rules, and to determine when the charge involves disposition or trait of character and when it involves merely a habit or course of dealings. No Court seems yet to have furnished a satisfactory solution of this difficulty.

It is after all chiefly one of pleading, for no one can doubt that, to prove a bad trait of character as charged, specific instances of its exhibition are relevant, and a mode of pleading which avoids the objection of unfair surprise would obviate the only impropriety of such evidence.[3]

UNITED STATES: *Ill.* 1905, Dowie *v.* Priddle, 216 Ill. 553, 75 N. E. 243, *semble* (the proof under the plea, held here not to meet the defamatory statements sued for); *Ky.* 1896, Ratcliff *v.* Courier-Journal, 99 Ky. 416, 36 S. W. 177 (libel; to prove a charge that the plaintiff "has been in more rows than any other one man in this country", evidence was admitted of "many instances of quarrels and disturbances" in which he had taken part); *N. Y.* 1896, Lampher *v.* Clark, 149 N. Y. 472, 44 N. E. 182 (a charge of keeping a disorderly house; "such specific acts of immorality and impropriety on the part of the plaintiff as to furnish a reasonable inference as to the real character of the place", admitted); 1911, McKane *v.* Howard, 202 N. Y. 181, 95 N. E. 642 (particular instances of fornication, admissible).

Contra: 1907, Colburn *v.* Marble, 196 Mass. 376, 82 N. E. 28.

[2] *England:* 1822, Jones *v.* Stevens, 11 Price 235 (charge of being a disreputable attorney; particular acts excluded on the ground of surprise, the reason being the same as under § 71, *ante*, where a quotation is given; the Court went even further, and declined to allow a truth-justification of a general charge to be supported by general evidence of bad character, its policy being to force all justifications of general slander to plead specific acts of the nature charged; these acts if thus pleaded, could be used to prove the charge true); 1882, Scott *v.* Sampson, 8 Q. B. D. 491 (libel for charging that the plaintiff had obtained £500 from G. under a threat of publishing certain facts, and had systematically abused his position as a dramatic critic and a journalist for the purpose of extorting money; the question was asked the plaintiff whether he had used his position as critic of the Daily Telegraph to injure or annoy an actor; Cave, J.: "Mr. Willes supported the question on the ground that it was material to the justification, as showing that the plaintiff had abused his position as critic for other purposes than that of extorting money; viz., for the purpose of grossly abusing a man whom he personally disliked. Lord Coleridge held — as I think rightly — that the question was not admissible as tending to prove justification; the natural meaning of the libel being that the witness abused his position as a critic for the purpose of extorting money. Mr. Willes now contends that it was also admissible as evidence tending to show the plaintiff's general bad character. I am of opinion that . . . as evidence of particular facts tending to show the plaintiff's disposition, it is therefore inadmissible"); Eng. Rules of Supreme Court, 1883, Order XXXVI, Rule 37 (quoted *post*, § 209).

Ireland: 1904, Hewson *v.* Cleeve, L. R. 2 Ire. 536, 542 (on a general charge of swindling, justified, particulars must be notified; J'Anson *v.* Stuart, cited *ante*, § 73, and subsequent cases and statutes, commented on).

United States: 1899, Swan *v.* Thompson, 124 Cal. 193, 56 Pac. 878 (charge of being a drunkard; specific acts of drunkenness "not included within the lines marked out by the plea of justification", excluded); 1899, McGee *v.* Baumgartner, 121 Mich. 287, 80 N. W. 21 (specific acts excluded); 1907, Smithy *v.* Pinch, 148 Mich. 670, 112 N. W. 686 (charge of being a "low woman"; on a plea of truth, specific acts excluded); 1906, Pier *v.* Speer, 73 N. J. L. 633, 64 Atl. 161 (slanderous charge of fornication and bastardy; under a plea of justification, an offer to prove the plaintiff to have had gonorrhœa, not admitted on the facts); 1914, State *v.* Jones, 80 Wash. 588, 142 Pac. 35 (here allowed on cross-examination).

[3] In the following instances there were such specific instances pleaded: 1902, Cunningham *v.* Underwood, 53 C. C. A. 99, 116 Fed. 803, 809 (libel charging the plaintiff with "im-

§ 208. **Incompetence of Employee.** In evidencing the incompetency of an *employee*, as a fact which if known to the employer may make him liable for injury to a fellow-employee, there is not always the same necessity for evidence of particular acts of incompetence, because in many jurisdictions personal opinion of those who know him is received (*post*, § 1984). Moreover, the possible range of the evidence is greater, and emphasizes the argument of Unfair Surprise, as well as that of Undue Prejudice (*ante*, § 94). Finally, there may be a limitation from the point of view of Relevancy, since an act of mere negligence does not in itself show incompetence, nor does a single act of any sort necessarily show a lack of the general trait in question. These reasons have led some Courts to forbid this mode of proof:

1887, DEVENS, J., in *Hatt* v. *Nay*, 144 Mass. 186, 10 N. E. 807: "Because a servant may have been guilty of negligence on certain specified occasions, it by no means follows . . . that he might not ordinarily be a careful and skilful workman and properly employed as such. The investigation of other individual acts of alleged carelessness on the foreman's part would necessarily have a tendency to confuse the case by collateral inquiries, to protract it infinitely if those inquiries were carefully made, and to mislead and distract a Court or jury from the true issue."

There is, however, much to be said for the opposite view. A single act may signify little, but two or three of an extreme quality would signify everything. Fabricated testimony could be exposed, if notice were required and time were allowed. Proof by reputation is inconclusive, and needs to be reenforced. There is a danger of being too cautious in excluding evidence:

1895, DENMAN, J., in *Cunningham* v. *R. Co.*, 88 Tex. 534, 31 S. W. 629: "The pleadings and evidence, however, raise the issue as to Rownie's competency as a car inspector, which involves, first, his skill; and, second, his attentiveness to duty. If he was lacking in either of these qualities, he could not be said to be competent to perform the important duties required of him. It is a matter of common knowledge that some persons are by nature inattentive or thoughtless, and, as a result thereof, frequently neglect the performance of important duties, without an intention so to do. This mental quality can only be evidenced by the outward acts of the person, and, where its existence or nonexistence is in issue, evidence of such acts is admissible. If Rownie was an inattentive or thoughtless person, such mental quality was a relevant fact upon the issue as to whether he probably inspected the cars on the particular morning of the accident. . . . Thus it seems that frequent failures to perform this duty at different times would be competent evidence tending to prove this mental condition, and we see no reason why such omissions subsequent to the time of the accident would be less competent than similar omissions prior to the time of the accident. The question here is the existence or nonexistence of a mental condi-

moral", "dishonest", and "dishonorable" conduct; defendant allowed, on a plea of truth, to prove "specific instances of just such conduct as a defence, the justification having been pleaded with sufficient particularity); 1868, Talmadge *v.* Baker, 22 Wis. 625 (Cole, J.: "The plaintiff in effect says, 'You have defamed my character by charging me generally with a propensity to steal [the charge was, "He is in the habit of picking up things"]'. 'True,' the defendant replies, 'I have so charged, and I propose to make good my words by showing that you have been guilty of various larcenies mentioned in my answer' "); 1906, Earley *v.* Winn, 129 Wis. 291, 109 N. W. 633 (slander that plaintiff whipped her mother; particular other violent acts to her mother, excluded; but this seems inconsistent with Talmadge *v.* Baker, *supra*, which is not cited).

For the use of other instances of *adultery or incest*, where such conduct has been charged by the defendant in defamation, see *post*, § 400.

tion or quality of the servant; inattentiveness or thoughtlessness, rendering him incompetent, such incompetency being direct evidence on the main issue in the case. We see no reason why specific acts cannot be given in evidence upon such issue, just as they could upon the issue of testamentary or contractual capacity."

The latter view seems on the whole the better; but the direct rulings are comparatively few.[1]

The state of the law is complicated by the frequent failure to distinguish two other related questions: (1) Whether, when character is offerable *evidentially to prove the negligent act* of a defendant or a plaintiff or a defendant's employee, this character may be shown by particular negligent acts (*ante*, § 199); the evidence here is of a narrower scope, but is offerable upon more numerous issues, than in the above case; (2) Whether particular acts of an employee may be used to show *knowledge* of his incompetency *by his employer*

§ 208. [1] *California:* 1892, Smith *v.* Whittier, 95 Cal. 279, 292, 30 Pac. 529 ("Previous negligent acts", admissible); 1893, Holland *v.* Southern P. Co., 100 Cal. 240, 34 Pac. 666 (specific acts of an engineer, held admissible to show incompetence; but a single act is insufficient of itself); *Delaware:* 1901, Giordano *v.* Brandywine Granite Co., Del., 3 Pennewill 423, 52 Atl. 332 (admissible); *Illinois:* 1899, Consolidated Coal Co. *v.* Seniger, 170 Ill. 370, 53 N. E. 733 (mine-engineer's competency; his prior conduct admitted to show his "fitness or unfitness"); 1903, Metropolitan W. S. E. R. Co. *v.* Fortin, 203 Ill. 454, 67 N. E. 977 (motorman of an elevated railroad; "that he had run past signals, had jerked the train he was pulling, and had been laid off and reprimanded" on former occasions, admitted); 1905, Staunton Coal Co. *v.* Bub, 218 Ill. 125, 75 N. E. 770 (injury in a mine by an engineer's negligence in hoisting the cage; the engineer's habitual hoisting of the cage without signal, admitted to show his incompetence); 1906, Joseph Taylor Coal Co. *v.* Dawes, 220 Ill. 145, 77 N. E. 131 (injury to a mine-workman by the lowering of the cage at a speed exceeding the statutory rate; that "the engineer repeatedly lowered the cage" at excessive speed, held not admissible on the present principle, but admissible to show a knowing and wilful violation of the statute, on the principle of § 367, *post*); *Maine:* 1916, Wing *v.* Bradstreet & Sons Co., 115 Me. 394, 99 Atl. 36 (incompetency of a fellow-servant; a prior accident 5 years before, held insufficient); *Maryland:* 1893, Baltimore *v.* War, 77 Md. 593, 598, 27 Atl. 85 (two or three accidents to the employee's elevator-cage the day before, excluded; no authority cited); *Massachusetts:* 1885, Keith *v.* N. H. & N. Co., 140 Mass. 175, 179, 3 N. E. 28 (admissible sometimes; here, the acts of a car-inspector, to show incompetency); 1887, Hatt *v.* Nay, 144 Mass. 186, 10 N. E. 807 (specific acts of negligence excluded; see quotation *supra*); 1893, Kennedy *v.* Spring, 160 Mass. 203, 205, 35 N. E. 779 (inadmissible; following Hatt *v.* Nay); 1894, Connors *v.* Morton, 160 Mass. 333, 35 N. E. 860 (same); 1910, Grebenstein *v.* Stone & Webster Eng. Co., 205 Mass. 431, 91 N. E. 411 ("evidence of a specific act of negligence" of a fellow-servant, not admissible); 1911, Leary *v.* Webber Co., 210 Mass. 68, 96 N. E. 136 (Hatt *v.* Nay followed); *Minnesota:* 1898, Morrow *v.* R. Co., 74 Minn. 480, 77 N. W. 303 (former conduct admitted to show incompetency); *New Jersey:* 1897, State *v.* Swett, 61 N. J. 457, 38 Atl. 969 (incompetency to produce good material, set up as defence to an action for discharging an employee; good similar work by the plaintiff in another factory, admitted, citing Baulec *v.* R. Co., N. Y., *post*, § 250); *New York:* 1897, Youngs *v.* R. Co., 154 N. Y. 764, 77 Hun 612, 49 N. E. 1106 (specific acts, receivable to show incompetency); 1898, Park *v.* R. Co., 155 N. Y. 215, 49 N. E. 674 (same); *Pennsylvania:* 1911, Rosenstiel *v.* Pittsburg R. Co., 230 Pa. 273, 79 Atl. 556; 1917, Brown *v.* Westinghouse E. & M. Co., 256 Pa. 403, 100 Atl. 970; *Texas:* 1888, Houston & T. C. R. Co. *v.* Patton, — Tex. —, 9 S. W. 175 (repeated acts of carelessness by employee, admitted); 1895, Cunningham *v.* R. Co., 88 Tex. 534 (see quotation, *supra*); 1898, Galveston H. & S. A. R. Co. *v.* Davis, 92 Tex. 372, 48 S. W. 570 (single instances of a conductor's incompetence, excluded); *Washington:* 1902, Green *v.* Western Amer. Co., 30 Wash. 87, 70 Pac. 310 ("specific acts of incompetency of the pit boss", held admissible); 1905, Conover *v.* Neher R. Co., 38 Wash. 172, 80 Pac. 281 (two prior acts of an engineer, admitted to show incompetence); 1905, Dossett *v.* St. Paul & T. L. Co., 40 Wash. 276, 82 Pac. 273 (similar); 1914, Johansen *v.* Pioneer Mining Co., 77 Wash. 421, 137 Pac. 1019 ("numerous acts" of negligence by defendant's employee, admitted).

(*post*, § 250). In the former case the evidence is inadmissible in most jurisdictions; in the latter, it is admissible in most jurisdictions; while in the present case it is admitted in the majority of courts.

§ 208*a*. **Incompetence of Physician or other Professional Person.** Where the *unskilfulness* of a *physician*, or other professional person bound to furnish a certain quality of skill, is in issue as a part of the substantive law, it would seem that the foregoing considerations apply, and that specific instances, if sufficiently marked, should be receivable.[1]

§ 209. **Mitigation of Damages**: (1) **Defamation.** It has already been seen that, exceptions and conditions apart, the reputed character of a plaintiff in an action of defamation is generally admissible in mitigation of damages, as involving the amount of his harm suffered (*ante*, §§ 70–73). So long as proof of Character is made by reputation only, the true nature of the situation does not call for more accurate analysis; because, whether the reputation is itself the material fact or is merely evidence of actual character, in either case it is receivable. But when particular acts of misconduct are offered in mitigation of damages, it then becomes necessary to determine whether *actual Character*, or *Reputation* (*ante*, § 52), is the ultimate fact in respect of which the harm is suffered; for if it is the latter, then particular acts of misconduct are irrelevant; they have no bearing on reputation.

That Reputation is the ultimate fact seems clear. The harm for which compensation is asked is the loss of social relations, as involved in the diminished reputation of the plaintiff. The condition of that reputation shows the extent of his loss. In this view, particular acts of misconduct, if they have not affected his reputation, have no bearing on the issue; and if they have affected it, the reputation alone suffices to show this.—It might be argued that the injury is also regarded as in part the wound to the feelings, the mental suffering, and that a person guilty of misconduct could not suffer as deeply as an innocent person from a false charge of like misconduct. This argument, however, has never been advanced. It ignores the fact that the injury to feelings which the law of defamation recognizes is not the suffering from the mere making of the charge, but is that suffering which is caused by other people's conduct towards him in consequence of it; which brings the question back again to the point of view of reputation alone.

After all, then, the fundamental reason for the rejection of particular misconduct in mitigation of damages is that these facts of misconduct are wholly without bearing on the proposition in issue; that is, they show merely, in the neat phrase of Mr. Justice Cave, "not that the plaintiff has not, but that he ought not to have, a good reputation"; and no further reason need be sought.

It is important to recognize this; because other reasons, particularly those of Unfair Surprise and of Confusion of Issues, have also been advanced for the exclusion of such evidence, — reasons which assume that actual char-

§ 208*a*. [1] Compare the cases cited in the following places: *ante*, §§ 67, 87, *post*, § 221.

acter is in issue and that particular acts, though relevant, are excluded by these considerations of Auxiliary Policy. But if these were true and effective reasons, they would also operate to exclude similar evidence when offered in other cases to mitigate damages where actual character, and not reputation, was really in issue, — as in the topics of the ensuing sections, where nevertheless evidence of such particular misconduct is concededly proper. Thus, if actual character for chastity is not to be proved, in mitigation of damages, by particular acts in an action for defamation, the same reasons should presumably impel the same Court to exclude the same evidence offered for the same purpose in an action for seduction; yet the same Court constantly excludes in the former action what it admits in the latter. The inevitable conclusion, and the true solution of the apparent inconsistency, is that different reasons are operating. In the action for defamation, the true and controlling reason is the immateriality of particular acts of misconduct. Thus a Court which excludes such evidence in that action, while it might or might not also exclude it in the other actions, is not inconsistent in admitting it in the latter.

In actions of defamation, then, such evidence is universally regarded as improper.[1] The following passages illustrate the various reasons that have been judicially advanced:

§ 209. [1] Compare with the following cases the distinctions of those cited *ante*, § 73:

ENGLAND: 1716, Dennis *v.* Pawling, Vin. Abr., "Evidence", I, *b.* 16 ("The baron would not allow . . . any particular credit to be given of the plaintiff, but if the defendant had a mind to examine to this, the question must be general"); 1701, Smithies *v.* Harrison, Vin. Abr., "Evidence", I, *b.* 15, *semble* (same); 1767, Buller, Nisi Prius, 9, *semble* (same); 1797, Knobell *v.* Fuller, Peake Add. Cas. 139 (slander charging the obtaining money for procuring pardons; general issue; to mitigate the damages, Lord Kenyon, C. J., received evidence of facts pointing towards the plaintiff having done such things); 1822, Jones *v.* Stevens, 11 Price 235 (excluded; see quotation *supra*); 1836, Moore *v.* Oastler, 2 Stark. Ev. 641, note *e*, Lord Denman, C. J., and Parke, B. (excluded); 1859, Bracegirdle *v.* Bailey, 1 F. & F. 536, Byles and Willes, JJ. (same); 1882, Scott *v.* Sampson, L. R. 8 Q. B. D. 491 (same; see quotation *supra*); Rules of Court, 1883, Order XXXVI, Rule 37 ("In actions for libel or slander, in which the defendant does not by his defence assert the truth of the statement complained of, the defendant shall not be entitled on the trial to give evidence in chief, with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, without the leave of the judge, unless seven days at least before the trial he furnishes particulars to the plaintiff of the matters as to which he intends to give evidence").

UNITED STATES: *Conn.* 1792, Seymour *v.* Merrills, 1 Root 459 (excluded, "except those charged by the words", *i.e.* under a justification); *Del.* 1838, Waples *v.* Burton, 2 Harringt. 446 (excluded); *Ill.* 1858, Sheahan *v.* Collins, 20 Ill. 329 (excluded); *Ky.* 1880, Campbell *v.* Bannister, 79 Ky. 208 (excluded); *Me.* 1839, Smith *v.* Wyman, 16 Me. 14 (charge, "you are a whore"; the "utmost latitude of examination", as to the plaintiff's having lived in a house of ill-fame, etc., admitted); *Mass.* 1825, Bodwell *v.* Swan, 3 Pick. 376 (excluded, on the ground of surprise); 1863, Chapman *v.* Ordway, 5 All. 595 (excluded); 1863, Parkhurst *v.* Ketchum, 6 All. 406 (same); 1881, McLaughlin *v.* Cowley, 131 Mass. 70, 72 (charge of murder and adultery; the plaintiff's former plea of guilty to an indictment for cheating, excluded); 1893, Miller *v.* Curtis, 158 Mass. 127, 131, 32 N. E. 1039 (same); Mass. Gen. L. 1920, c. 231, § 94 (in defamation, defendant may show "in mitigation of damages and in rebuttal of evidence of actual malice, acts of the plaintiff which create a reasonable suspicion that the matters charged against him by the defendant are true"); *Mich.* 1877, Proctor *v.* Houghtaling, 37 Mich. 41, 44 (excluded); 1911, Wells *v.* Toogood, 165 Mich. 677, 131 N. W. 124 (excluded); *N. H.* 1833, Lamos *v.* Snell, 6 N. H. 413 (charge of stealing and being "thievish"; that the plaintiff harbored thieves, excluded); *N. J.* 1855, Sayre *v.* Sayre, 25 N. J. L. 235 (excluded); 1906, Pier *v.* Speer, 73 N. J. L. 633, 64 Atl. 161 (excluded); 1910, Fodor *v.* Fuchs, 79 N. J. L. 529, 76 Atl. 1081

1822, *Jones* v. *Stevens*, 11 Price 235, 265 (charge of being a disreputable and unprofessional attorney). RICHARDS, C. B.: "I cannot . . . allow defendants to impeach all the transactions of a man's life who may have occasion to seek redress in courts of justice and throw on him the difficulty of showing an uniform propriety of conduct during all his existence. It would be impossible for any man to come prepared to meet such a charge." WOOD, B.: "If, as contended for, you could call witnesses, upon the plea of not guilty, to contradict the general introductory words [of the declaration as to the plaintiff's good character], what would be the consequence? We should have counsel getting up and saying, 'The plaintiff has alleged', as in the present declaration, 'that he is a good, honest, just, and faithful subject of the realm. I propose to call twenty witnesses to prove that he is an immoral, dissolute man; twenty more to prove that he has committed acts of dishonesty; twenty more to prove that he is not a faithful subject, by proving that he has been guilty of sedition, treasonable practices, and even high treason.' Did any one ever hear such stuff as this? It might do in a farce upon the stage meant to excite laughter, but it surely cannot be tolerated in a court of justice."

1882, CAVE, J., in *Scott* v. *Sampson*, L. R. 8 Q. B. D. 491: "As to the third head, or evidence of facts and circumstances tending to show the disposition of the plaintiff, both principle and authority seem equally against its admission. At the most it tends to prove not that the plaintiff has not, but that he ought not to have, a good reputation; and to admit evidence of this kind is in effect, as was said in *Jones* v. *Stevens*, to throw upon the plaintiff the difficulty of showing an uniform propriety of conduct during his whole life. It would give rise to interminable issues which would have but a very remote bearing on the question in dispute, which is to what extent the reputation which he actually possesses has been damaged by the defamatory matter complained of."

1836, EARLE, J., in *Randall* v. *Holsenbake*, 3 Hill S. C. 177: "The defendant may justify and prove the plaintiff guilty of the crime imputed to him. If he be afraid to hazard that course, he may under the general issue (as from a masked battery), prove, in mitigation of damages, facts and circumstances going to show a ground of suspicion and belief. He may prove that the plaintiff was generally reported and suspected to be guilty of the crime imputed to him. And he may prove that the plaintiff is a person of general bad character, and although he may not have committed that particular crime, yet he is not entitled to damages. This, in all conscience, ought to satisfy the most voracious appetite for defamation. To allow the defendant, in an action for words imputing one crime, and under the general issue which simply denies the speaking, to prove that the plaintiff had been guilty of any other crime, even of the same nature, would be to deliver the plaintiff bound hand and foot to his adversary. It would render nugatory all the forms of practice and pleading which experience has found necessary for the investigation of truth and to promote the ends of justice; for the plaintiff never could know what hidden transactions the industrious malice of his adversary might be prepared to drag to light."

The same rule should apply in *malicious prosecution*, and in any analogous action, where reputation pure and simple is admissible in mitigation of damages.[2]

(excluded); *N.Y.* 1806, Foot *v.* Tracy, 1 Johns. 46 (excluded); 1827, Root *v.* King, 7 Cow. 635 (same); 1829, King *v.* Root, 4 Wend. 160, *semble* (same); 1904, Cudlip *v.* Journal Pub. Co., 180 N. Y. 85, 72 N. E. 925 (excluded); *N. Car.* 1802, Vick *v.* Whitfield, 2 Hayw. 222 (excluded); *Oh.* 1831, Dewit *v.* Greenfield, 5 Oh. 226 (excluded); 1846, Fisher *v.* Patterson, 14 Oh. 418, 425 (same); *Pa.* 1835, Henry *v.* Norwood, 4 Watts 347, 349 (excluded on the ground of surprise); *R. I.* 1896, Folwell *v.* Journal Co., 19 R. I. 551, 37 Atl. 6 (excluded); *S. Car.* 1820, Sawyer *v.* Eifert, 2 Nott & M. 511, 515 (excluded, qualifying Buford *v.* M'Luny, 1 Nott & M. 268, 271); 1836, Randall *v.* Holsenbake, 3 Hill S. C. 177 (same); *Wis.* 1871, Wilson *v.* Noonan, 27 Wis. 598, 603, 610 (excluded); 1890, Muetze *v.* Tuteur, 77 Wis. 236, 243, 46 N. W. 123 (destruction of credit alleged; the number of the plaintiff's creditors, excluded).

[2] 1920, Banfill *v.* Byrd, 122 Miss. 288, 84 So. 227 (action for unlawful search of plaintiff's hotel for intoxicating liquor; reputation of the house as a "place of evil resort", admitted in mitigation of damages, but not "specific acts

Distinguish the use of *prior libels* by the plaintiff upon the defendant, offered in mitigation.[3]

§ 210. **Same**: (2) **Father's Action for Seduction of Daughter.** The father's claim against the seducer of his daughter is based primarily on the loss of her services; but he is allowed to include also, in the items of his loss for which compensation may be claimed, (*a*) the impairment of the family honor or reputation, and (*b*) the mental suffering experienced by him in the loss of his daughter's chastity. Thus whatever affects either of these two elements is material to the issue, so far as the estimation of damages is concerned.

From the point of view of (*a*) the daughter's prior reputation, as involving the family reputation, is material (*ante*, § 75). From the point of view of (*b*) the daughter's prior actual chaste character, as affecting the prior condition of his feelings, is also material (*ante*, § 75). Now particular acts of unchastity of the daughter are not relevant to show her reputation, but they are relevant to show her actual character.[1] For the latter purpose, then, the only question is whether, from the point of view of the arguments of Unfair Surprise and Confusion of Issues (*ante*, § 194), such evidence should be excluded. It is generally conceded that these reasons do not stand in the way; and this conclusion seems just. *Particular acts* of unchastity by the *daughter* are therefore admissible.[2]

of evil conduct" therein by third persons, unless known to and acquiesced in by the defendant; the opinion ranges too indiscriminately over the other doctrines about specific acts, citing *e.g.* McQuiggan *v.* Ladd, Vt., and State *v.* Roderick, Oh., *ante*, § 198, whose theory is entirely different; and the qualification as to knowledge and acquiescence is unfounded in principle); 1891, Wolf *v.* Perryman, 82 Tex. 112, 120, 17 S. W. 772 (excluded).

[3] 1809, Finnerty *v.* Tipper, 2 Camp. 73 (defendant in his journal had charged the plaintiff with crime; plaintiff had proposed as a question in his debating society, "Whether the editor of S. journal or a notorious pickpocket were the greater nuisance to society"; and had caused boards announcing this to be carried through the street, and at the debate had argued in favor of the pickpocket; Mansfield, C. J.: "If a man is in the habit of libelling others, he complains with a very bad grace of being libelled himself. . . . But I cannot say that he loses his right to maintain an action"; though damages might thereby be mitigated).

§ 210. [1] 1873, Love *v.* Masoner, 6 Baxt. 24, 29, 33 (Nicholson, C. J.: "The injury complained of by the plaintiff was the loss of a virtuous daughter and of her companionship and example to the other children and the wound to the feelings of the parent produced by this injury; the rejected proof, however, would show that plaintiff was under a delusion as to the virtue of his daughter, that she had already surrendered her chastity before she yielded to the embrace of the defendant").

[2] ENGLAND: 1808, Bamfield *v.* Massey, 1 Camp. 460 (having a child by another man); 1814, Dodd *v.* Norris, 3 Camp. 519 (immodest conduct with defendant); 1823, Bate *v.* Hill, 1 C. & P. 100 (same, and improper company of others); 1837, Andrews *v.* Askey, 8 C. & P. 7, Tindal, C. J.; 1836, Verry *v.* Watkins, 7 C. & P. 308, Alderson, B. (particular acts of unchastity by the daughter with third persons); 1840, Carpenter *v.* Wall, 11 A. & E. 803 (that the daughter "went about in a light manner" speaking of the father of her child); 1850, Thompson *v.* Nye, 16 Q. B. 175.

UNITED STATES: *Ala.* 1830, Drish *v.* Davenport, 2 Stew. 266, 270, *semble; Del.* 1851, Robinson *v.* Burton, 5 Harringt. 335, 333 (improper conduct); *Ill.* 1874, White *v.* Murtland, 71 Ill. 250, 264 (acts "of immorality or indecorum"; but only be for the seduction, apparently because the father's loss then began); *Ind.* 1859, Shattuck *v.* Myers, 13 Ind. 50; 1868, Bell *v.* Rinker, 29 Ind. 269 (*contra* not citing the preceding case); Smith *v.* Yaryan, 69 Ind. 448, *semble* (*contra*); 1884, South Bend *v.* Hardy, 98 Ind. 580, 582 (going back to the first case); *Pa.* 1855, Zitzer *v.* Merkel, 24 Pa. 408, *semble;* 1863, Hoffman *v.* Kemerrer, 44 Pa. 452 (*contra;* either on cross-examination or by outside evidence; reputation is the only mode of proof); *Tenn.* 1858, Reed *v.* Williams, 5 Sneed 580, 582 (admissible, by outside testimony); 1858, Thompson *v.* Clendening, 1 Head 287, 295 (admitted); 1860, Lea *v.* Henderson, 1 Cold. 146, 150 (excluded, because the reputation is

That the *father's reputation*, as affecting his loss of reputation, is equally in issue, and that his *actual character*, as affecting the extent of his mental suffering, is equally in issue, has already been seen (*ante*, § 75). To show this actual character, *particular acts* of his own unchastity would seem to be receivable, for the same reasons as above.[3]

§ 211. **Same**: (3) **Husband's or Wife's Action for Crim. Con. Alienation of Affections.** In the *husband's* action for criminal conversation or for alienation of affections, the actual character both of his wife and of himself are material to the issue (*ante*, § 75). For the same reasons therefore as in the foregoing topic, her character may be evidenced by particular acts of unchaste conduct;[1] and his character may be evidenced in the same way.[2]

In the *wife's* action for alienation of affections, the same considerations would apply;[3] but not in her action for loss of pecuniary support.[4]

§ 212. **Same**: (4) **Indecent Assault.** In a civil action for assault, where the assault is claimed to have been made for indecent purposes, the actual chaste character of the woman is material as affecting the extent of the shock

foundation of the claim, and is not thereby necessarily injured); 1873, Love *v.* Masoner, 6 Baxt. 24, 33 (admissible, repudiating the preceding case).

Of the following rulings the second is of course the better: 1813, Dodd *v.* Norris, 3 Camp. 519 (loss of service by seduction: to explain away the improper conduct of the plaintiff's daughter, a witness, with the defendant, evidence of a prior promise of marriage by him was rejected, and evidence only of an honorable paying of addresses was admitted, since otherwise the promise might be taken as an element in the recovery; the ruling is anomalous and poor); 1851, Robinson *v.* Burton, 5 Harringt. Del. 335, 339, cited *supra* (to explain away acts of familiarity with the defendant by the daughter in an action for seduction, evidence was admitted that a promise of marriage had been made).

For particular acts of intercourse with others as explaining away the defendant's responsibility for her pregnancy, see *ante*, § 133.

Compare also the cases upon character as *motive* (*post*, § 390).

[2] 1851, Robinson *v.* Burton, 5 Harringt. 335, 338 (the dissolute character of the father allowed to be shown by "any facts showing him to be of dissolute habits", or "his general habits of association with improper persons", or "declarations or conversations").

Contra: 1858, Reed *v.* Williams, 5 Sneed 580, 582 (excluded: venereal disease); 1858, Thompson *v.* Clendening, 1 Head 287, 296 excluded; adultery).

§ 211. [1] 1767, Buller, Nisi Prius, 27 (the wife's misconduct before marriage, etc., admissible to show no loss of affection and thus mitigate damages); 1797, Elsam *v.* Faucett, 2 Esp. 563 (subsequent misconduct of a seduced wife not admissible in mitigation of damages); 1850, Thompson *v.* Nye, 16 Q. B. 175, per Erle, Coleridge, and Wightman, JJ. (admitted); 1906, Smith *v.* Hockenberry, 138 Mich. 129, 101 N. W. 207, 109 N. W. 23 (the wife's criminal intimacy with other men, before the act in question, but not afterwards, admissible; also her intimacy with lewd women); 1820, Terre *v.* Summers, 2 Nott & M. S. C. 269, 271 (both before and after leaving the husband; here, admitting intercourse with other men than the defendant).

Compare the cases cited *post*, § 390, n. 1 (character as *motive*).

[2] 1790, Hodges *v.* Windham, Peake 39 (here the husband's formerly suffering his wife's adultery with others was allowed to be an excuse for the defendant, — a doctrine probably unsound; but the admissibility of such conduct in mitigation would not have been doubted); 1801, Wyndham *v.* Wycombe, 4 Esp. 16 (the husband's open and notorious infidelity, admitted as a defence, — a doctrine going even further than the use of such facts in mitigation); 1802, Bromley *v.* Wallace, id. 237 (similar facts allowed in mitigation but not in excuse); 1811, Fall *v.* Overseers, 3 Mumf. 495, 505, *semble* (wife's adultery, admissible, per Roane, J.).

[3] 1900, Wolf *v.* Frank, 92 Md. 138, 48 Atl. 132 (wife's unchaste conduct before separation, admitted to mitigate damages in her action for loss of husband's society); 1904, Angell *v.* Reynolds, 26 R. I. 160, 58 Atl. 625 (wife's action for alienation of affections; the husband's unchaste conduct with other women, admitted).

[4] 1901, Kolb *v.* R. Co., 23 R. I. 72, 49 Atl. 392 (widow's action for husband's death; that plaintiff bore an illegitimate child since his death, not admitted in mitigation of damages).

to her feelings and thus the proper damages to be given (*ante*, § 75). The unchaste character of the woman may be shown by particular acts, for the same reasons as in the preceding topics.[1]

§ 213. **Same**: (5) **Breach of Promise of Marriage.** For the same reasons as before, the unchaste character of the *promisee of marriage*, which is admissible in mitigation of damages (*ante*, § 75), may be shown by particular acts of unchastity.[1] Their use as evidencing character when offered to *excuse* the breach has been already noticed (*ante*, § 206).

4. Conduct independently usable evidentially for Other Purposes than to show Character (Design, Intent, Motive, etc.)

§ 215. **General Principle.** Suppose A to be charged with robbing the till in a store of which he is a sale-clerk; and suppose the facts to be offered against him (1) of having stolen the key of the till in the preceding week; (2) of having falsified his sale-book recently; (3) of having suffered large losses in gambling. From the point of view of the foregoing subject, these acts would all tend to show that he was of a dishonest and reckless disposition, and therefore disposed to steal from the till if opportunity offered. But from that point of view such acts would be wholly inadmissible, either in proving the act charged in opening, or in rebutting his evidence of good character (*ante*, § 194).

But that is not the only possible point of view. These acts may be relevant in other ways to show the commission of the crime, without in any way employing or suggesting their inference as to his character. They may justify other inferences which go to show his doing of the act charged. Thus, the purloining of the key may found an inference of Design or Plan, — a plan to use the key in some unlawful way for obtaining access to the till; or it may show Knowledge, — knowledge of the whereabouts of the till and of its valuable contents. So the falsification of his sale-book may show a Motive, — the desire to prevent his larcenies from being discovered; or it may show Design, — a general design to obtain money from his employers unlawfully. So the gambling losses may show Motive in another way, — the need and desire of money at any cost, to pay his losses. Whatever tended ordinarily to show such Knowledge or Design or Motive would otherwise

§ 212. [1] *Accord:* 1882, Mitchell *v.* Work, 13 R. I. 645 (indecent assault; that "the plaintiff had been unchaste in her relations with men", admitted, as "specific acts"); 1864, Watry *v.* Ferber, 18 Wis. 500, 503 (same, *semble*); 1903, Barton *v.* Bruley, 119 Wis. 326, 96 N. W. 815 (acts of lewdness only, not beer-drinking, admissible).

Contra: 1889, Gore *v.* Curtis, 81 Me. 403, 405, 17 Atl. 314 (indecent assault and battery and solicitation; the plaintiff's prior intercourse with others, inadmissible); 1893, Miller *v.* Curtis, 158 Mass. 127, 130, 32 N. E. 1039 (indecent assault; whether particular acts of lewdness are admissible to show the plaintiff's character, as affecting the shock to her feelings; *semble*, inadmissible).

§ 213. [1] 1373, Sheahan *v.* Barry, 27 Mich. 217, 221; 1895, Stratton *v.* Dole, 45 Nebr. 472, 63 N. W. 875; 1915, Gerlinger *v.* Frank, 74 Or. 517, 145 Pac. 1069 (cross-examination to illicit intercourse with other men, allowed).

Contra: 1907, Colburn *v.* Marble, 196 Mass. 376, 82 N. E. 28, *semble* (including immodest conduct).

have been admissible; and these acts are merely instances, from a variety of evidence, of classes of facts which would be evidential for their respective purposes.

Now this double or multiple possibility of use is an extremely common feature of Evidence. The well established principle of Multiple Admissibility, applied in numerous ways, declares that the inadmissibility of an evidential fact for one purpose does not prevent its admissibility for any other purpose otherwise proper (*ante*, § 13). In other words, if one door of entrance is closed to it, this does not prevent its entrance by other doors which may still remain open. Any other result would be unpractical and unreasonable in the highest degree. It would be as singular as a prohibition to a lame man to become a bookkeeper or a physician because he was incapable of becoming a circus-rider.

This eligibility of evidence for one purpose, despite its ineligibility for another, is illustrated throughout the whole law of Evidence. Reputation may be used, if it is a fact in issue, although it might not be admissible as hearsay to prove the fact reputed (*ante*, § 78). The unchaste acts of a complainant in rape may be admitted to disclose her unchaste character as evidence of consent (*ante*, § 200), although the same acts could not be received to impeach her veracity as a witness (*post*, § 987). Acts of an employee may be received to show the employer's knowledge of his incompetency (*post*, § 250), although they might not be admissible to show the employee's negligent character (*ante*, § 199). The misconduct of a defendant testifying for himself may be asked about to impeach his character as a witness (*post*, § 890), although they would not be received to show his character as an accused (*ante*, § 194). The uncommunicated threats or the character of a deceased person may be received to show him the aggressor in an affray (*ante*, § 110), although they would be inadmissible to show the defendant's belief in an impending attack (*post*, § 247). A testator's remarks about his relatives would be received to show the normal state of his affections, although they might be inadmissible to show directly the fact of duress (*post*, § 1734). In scores of these instances the principle is illustrated and established. Our law of Evidence, as a workable system, would be impossible without it.

So far, then, as this general principle is concerned, the fact that a defendant's acts of misconduct would be inadmissible as showing his bad character does not in the slightest stand in the way of receiving the same acts in evidence if they are evidential for other purposes.

§ 216. **Criminality of Conduct Immaterial, if it is otherwise Relevant.** Is there, then, any reason why, for this particular class of facts, an exception should be made to the general canon of multiple admissibility, and facts relevant for some other purpose be rejected because they would be inadmissible if offered to show a bad character?

In the great majority of instances in which such an exception has been sought to be established, the facts of conduct thus objected to are crimes;

for obviously such conduct presents the clearest case in which the evidence is obnoxious to the character-rule, and the case in which the fact, if offered to show character, would most tellingly violate the spirit and the reasons of that rule. The question thus in effect becomes: Is the criminality of conduct a reason for excluding that conduct (when offered against an accused person) if it would be otherwise relevant and admissible?

Now the possibility of the abuse or misapplication of such evidence is no sufficient reason for making such an exception. This possibility exists equally for all the other cases above-mentioned; and it is always open to the opponent, here as there, to have the jury fully instructed in the limited purpose and use of the evidence. Such an instruction, it is always understood, is a safeguard against abuse or misunderstanding. If it be said that here, in the case of an accused person, where past crimes are offered, there is greater danger of such abuse and greater risks of harm in case of abuse, there are two answers. One is dogmatic, that there is no difference in the rules of evidence for criminals and for civil cases (*ante*, § 4). The other is practical, that an exception such as is here suggested would handicap the State in its prosecution of the man of cumulative criminal daring. The greater the criminal brought to bar, the more closely the traces of his crimes were involved in other misdeeds, the more stupendous his scheme of crime culminating in the act charged, so much the more safe and invulnerable would he have rendered himself, if the law were made thereby to lose this evidential material. By every spot of blood with which he taints the steps of his criminal progress, he succeeds in increasing the safety of his new crimes. This is an ample reason, if no other were even conceivable, for refusing to make an exception, already antagonistic to principle and obnoxious to practical procedure. "No man," in the neat phrase of Mr. Justice Brewer, "can by multiplying crimes diminish the volume of testimony against him."

It may be additionally noted that the chief reason for the character-rule, namely, the doctrine of Unfair Surprise (*ante*, § 194; *post*, § 1849) does not, after all, apply here; for it is plain that this class of facts does not range over the whole scope of the defendant's life (as character-evidence of particular misconduct would), but bears only on the immediate antecedents and concomitants in time of the act charged, — plan, knowledge, motive, intent, and the like; and there is thus ample warning beforehand of this scope of the inquiry.

This much attention to the suggested exception is called for, because the effort to secure it and the inclination to ask for it seems to be so persistent and so common at the Bar; and not because its validity has ever been recognized or implied. On the contrary, no fallacy has been more frequently or more distinctly struck at by denial, by argument, by explanation, on the part of the Courts. It has been rebuffed, rebuked, repudiated, discredited, denounced, so often that it ought by this time to have been abandoned for-

ever.[1] That it does still crop up again from time to time is apparently due in part to the inherent difficulty of distinguishing between conduct as showing character and conduct as showing other things; but also to the failure to appreciate that the rejection of past misconduct by the character-rule is never due simply to the incidental circumstance that it is misconduct, but to the fact that it is offered to show character and that herein consists its impropriety. If there is any other material or evidential proposition, for which it is relevant, and if it is offered for that purpose, it is receivable, and its quality as misconduct or crime does not stand in the way. The persistency of this fallacy, and its lack of foundation in law make it worth while to exhibit fully, from the utterances of the judges, their constant repudiation of the notion that the criminality of conduct offered for some relevant purpose is any objection to its reception:[2]

§ 216. [1] 1878, Lord Coleridge, C. J., in Blake *v.* Ass. Soc., 14 Cox Cr. 254 ("In any but an English court, and to any one but an English lawyer, the controversy whether this evidence is admissible or not, would seem, I imagine, supremely ridiculous; because it is admitted that it is most cogent and material to the plaintiff's claim").

[2] *Accord:* ENGLAND: 1804, R. *v.* Whyley, 2 Leach 4th ed. 985, 986; 1825, Burrough, J., in R. *v.* Moore, 2 C. & P. 235; 1836, R. *v.* Rooney, 7 C. & P. 517; 1843, Maule, J., in R. *v.* Tissington, 1 Cox Cr. 12; 1846, Maule, J., in R. *v.* Dosset, 2 C. & K. 306, 2 Cox Cr. 243; 1848, Erle, J., in R. *v.* Bleasdale, 2 Cr. & K. 765; 1849, Pollock, C. B., in R. *v.* Geering, 18 L. J. M. C. 215; 1861, R. *v.* Weeks, Leigh & C. 18, 21, by five judges; 1864, Willes, J., in R. *v.* Reardon, 4 F. & F. 79; 1878, Blake *v.* Assur. Co., L. R. 4 C. P. D. 94, 102.

UNITED STATES: *Federal:* 1893, Moore *v.* U. S., 150 U. S. 57, 61, 14 Sup. 26; 1900, Wolfson *v.* U. S., 41 C. C. A. 422, 101 Fed. 430; 1906, Thompson *v.* U. S., 144 Fed. 14, 18, C. C. A.; *Arkansas:* 1884, Melton *v.* State, 43 Ark. 367, 371; 1889, Billings *v.* State, 52 Ark. 303, 309, 12 S. W. 574 (disposing of the apparently contrary notion in Endaily *v.* State, 39 Ark. 280); *California:* 1865, People *v.* Frank, 28 Cal. 507, 515 (the fact that an indictment is pending on the other charge is immaterial); 1885, People *v.* Cunningham, 66 Cal. 668, 670, 4 Pac. 1144, 6 Pac. 700, 846; 1887, People *v.* Rogers, 71 Cal. 565, 567, 12 Pac. 679; 1894, People *v.* Lane, 101 Cal. 513, 517, 36 Pac. 16; 1894, People *v.* Tomlinson, 102 Cal. 19, 24, 36 Pac. 506; 1896, People *v.* Craig, 111 Cal. 460, 468, 44 Pac. 186; 1896, People *v.* Sanders, 114 Cal. 216, 46 Pac. 153; 1897, People *v.* Ebanks, 117 Cal. 652, 49 Pac. 1049; People *v.* Wilson, 117 Cal. 688, 49 Pac. 1054; 1897, People *v.* Winthrop, 118 Cal. 85, 50 Pac. 390; 1899, People *v.* Pette, 123 Cal. 373, 55 Pac. 993; 1905, People *v.* Cook, 148 Cal. 334, 83 Pac. 43; 1906, People *v.* Soeder, 150 Cal. 12, 87 Pac. 1016; 1920, People *v.* Nakis, 184 Cal. 105, 193 Pac. 92 (murder; stealing of the pistol by defendant on a prior occasion, admitted); *Florida:* 1898, Roberson *v.* State, 40 Fla. 509, 24 So. 474; *Illinois:* 1889, Farris *v.* People, 129 Ill. 521, 529, 21 N. E. 821; 1893, Painter *v.* People, 147 Ill. 463, 35 N. E. 64; 1897, Williams *v.* People, 166 Ill. 132, 46 N. E. 749; 1899, Schintz *v.* People, 178 Ill. 320, 52 N. E. 903; 1902, Henry *v.* People, 198 Ill. 162, 65 N. E. 120; 1903, Glover *v.* People, 204 Ill. 170, 68 N. E. 464; *Iowa:* 1899, State *v.* Wrand, 108 Ia. 73, 78 N. W. 788; *Kansas:* 1874, State *v.* Folwell, 14 Kan. 105, 109; 1878, State *v.* Adams, 20 Kan. 311, 319; 1904, State *v.* Franklin, 69 Kan. 798, 77 Pac. 588; *Kentucky:* 1908, Welch *v.* Com., — Ky. —, 108 S. W. 863 (motive); *Maine:* 1881, State *v.* Witham, 72 Me. 531, 534; *Massachusetts:* 1869, Thayer *v.* Thayer, 101 Mass. 114; 1870, Com. *v.* Choate, 105 Mass. 458; 1877, Com. *v.* Scott, 123 Mass. 235; 1878, Com. *v.* Bradford, 126 Mass. 17, 45; 1882, Com. *v.* Jackson, 132 Mass. 45; 1884, Com. *v.* Corkin, 136 Mass. 429; 1886, Com. *v.* Blood, 141 Mass. 570, 575, 6 N. E. 769; 1888, Com. *v.* Schaffner, 146 Mass. 515, 16 N. E. 280; 1902, Higlister *v.* French, 180 Mass. 299, 62 N. E. 264; *Michigan:* 1878, People *v.* Marble, 38 Mich. 117, 123; 1882, People *v.* Hensler, 48 Mich. 49, 52, 11 N. W. 804; 1896, People *v.* Macard, 109 Mich. 623, 67 N. W. 968; *Missouri:* 1866, State *v.* Harrold, 38 Mo. 497; 1879, State *v.* Nugent, 71 Mo. 136, 141; *Nevada:* 1905, State *v.* Roberts, 28 Nev. 350, 82 Pac. 100 (stolen coins, identifying the defendants charged with murder); *New Hampshire:* 1872, Darling *v.* Westmorland, 52 N. H. 401, 406 (quoted *post*); 1898, State *v.* Davis, 69 N. H. 350, 41 Atl. 267; *New Jersey:* 1838, State *v.* Robinson, 16 N. J. L. 508; 1905, State *v.* Hummer, 72 N. J. L. 328, 62 Atl. 388; *New Mexico:* 1900, Terr. *v.* McGinnis, 10 N. M. 269, 61 Pac. 208; *New York:* 1858, People *v.* Stout, 4 Park. Cr. 71, 114, 128, 138; 1874,

1860, WILLIAMS, J., in *R.* v. *Richardson*, 2 F. & F. 346: "There is no principle of law which prevents that being put in evidence which might otherwise be so, merely because it discloses other indictable offenses. . . . Evidence which is admissible for such a purpose is not the less so because it tends to prove the commission of other felonies by the prisoner."

1865, WILLES, J., in *R.* v. *Rowton*, Leigh & C. 520, 541: "There are cases in which it is allowable to go into the prisoner's antecedents, as for the purpose of showing that he has had opportunities of committing the offence, or that in a particular instance his act could not have been accidental. But these cases only establish the principle that a relevant fact which incidentally casts a slur upon the prisoner is not thereby rendered inadmissible when it is part of the direct evidence in the case."

1829, BROCKENBROUGH, J., in *Walker's Case*, 1 Leigh 576: "It is proper that the chain of evidence should be unbroken. If one or more links of that chain consist of circumstances which tend to prove that the prisoner has been guilty of other crimes than that charged, . . . there is no reason why the criminality of such intimate and connected circumstances should exclude them, more than other facts apparently innocent. Thus, if a man be indicted for murder, and there be proof that the instrument of death was a pistol, proof that that instrument belonged to another man, that it was taken from his house on the night preceding the murder, that the prisoner was there on that night, and that the pistol was seen in his possession on the day of the murder just before the fatal act was committed, is undoubtedly admissible, although it has the tendency to prove the prisoner guilty of a larceny. Such circumstances constitute a part of the transaction; and whether they are perfectly innocent in themselves, or involve guilt, makes no difference as to their bearing on the main question which they are adduced to prove. But if the circumstances have no intimate connection with the main fact, if they constitute no link in the chain of evidence; then, supposing them innocent, their admission, to be sure, may do no harm, yet they ought to be excluded, because they are irrelevant; but if they denote other guilt, they are not only irrelevant, but they do injury, because they have a tendency to prejudice the minds of the jury, and for this additional reason they ought to be excluded."

1858, JOHNSON, J., in *People* v. *Wood*, 3 Park. Cr. 681: "The proper inquiry, when the circumstance is offered, is, Does it fairly tend to raise an inference in favor of the existence of the fact proposed to be proved? If it does, it is admissible whether such fact or circumstance be innocent or criminal in its nature. It does not lie with the prisoner to object that the fact proposed as a circumstance is so heinous in its nature and so prejudicial to his character that it shall not be used against him, if it bears upon the fact in issue. The atrocity of the act cannot be used as a shield under such circumstances, or as a bar to its legitimate use by the prosecution. If it could, many criminals might escape just and merited punishment solely by means of their hardened and depraved natures.

1874, KINGMAN, C. J., in *State* v. *Folwell*, 14 Kan. 109: "It would be a singular rule of law that a person accused of a grave crime could compel the exclusion of important and relevant testimony merely by committing two felonies at the same time or so nearly connected that the one could not be proven without also proving the other."

Weed *v.* People, 56 N. Y. 628; 1874, Coleman *v.* People, 58 N. Y. 556, 560; 1880, Pierson *v.* People, 79 N. Y. 436; 1895, People *v.* Shea, 147 N. Y. 78, 41 N. E. 508; 1896, People *v.* McLaughlin, 150 N. Y. 336, 44 N. E. 1017; 1897, People *v.* Peckens, 153 N. Y. 576, 47 N. E. 883; *North Dakota:* 1896, State *v.* Kent, 5 N. D. 516, 67 N. W. 1052; *Oregon:* 1881, State *v.* Wintzingerode, 9 Or. 153, 158; 1905, State *v.* Rea, 46 Or. 620, 81 Pac. 822 (larceny of a horse; another larceny involving an admission by the defendant, received); *Pennsylvania:* 1863, Com. *v.* Ferrigan, 44 Pa. 386; 1878, Turner *v.* Com., 86 Pa. 70; *South Carolina:* 1839, State *v.* Ford, 3 Strobh. 517, 524; *Vermont:* 1876, State *v.* Bridgman, 49 Vt. 212; *Virginia:* 1829, Walker's Case, 1 Leigh 576; 1847, Burr *v.* Com., 4 Gratt. 534; 1867, Adams *v.* Lawson, 17 Gratt. 259, *semble*.

For the use of other crimes as stated in a *defendant's confession* of the crime charged, see also *post*, § 2100.

1876, CUSHING, C. J., in *State* v. *Lapage*, 57 N. H. 288: "I think we may assume, in the outset, that it is not the quality of an action, as good or bad, as unlawful or lawful, as criminal or otherwise, which is to determine its relevancy. I take it to be generally true, that any act of the prisoner may be put in evidence against him, provided it has any logical and legal tendency to prove any matter which is in issue between him and the State, notwithstanding it might have an indirect bearing, which in strictness it ought not to have, upon some other matter in issue."

1878, BREWER, J., in *State* v. *Adams*, 20 Kan. 319: "Whatever testimony tends directly to show the defendant guilty of the crime charged is competent, though it also tends to show him guilty of another and distinct offence. A party cannot by multiplying crimes diminish the volume of competent testimony against him."

1888, C. ALLEN, J., in *Com.* v. *Robinson*, 146 Mass. 571, 16 N. E. 452: "While it is well settled in this Commonwealth that on the trial of an indictment the government cannot be allowed to prove other independent crimes for the purpose of showing that the defendant is wicked enough to commit the crime on trial, this rule does not extend so far as to exclude evidence of acts or crimes which are shown to have been committed as part of the same common purpose or in pursuance of it. . . . In such a case it makes no difference whether the preliminary acts are criminal or not; otherwise, the greater the criminal, the greater his immunity. Such preliminary acts are competent because they are relevant to the issue on trial; and the fact that they are criminal does not render them irrelevant. Suppose, for further example, one is charged with breaking a bank, and there is evidence that he had made preliminary examinations from a neighboring room; that his occupation of such room was accomplished by a criminal breaking and entering would not render the evidence incompetent."

1893, BEATTY, C. J., in *People* v. *Walters*, 98 Cal. 138, 141, 32 Pac. 864, and *People* v. *Tucker*, 104 Cal. 440, 442, 38 Pac. 195: "It is true that in trying a person charged with one offence it is ordinarily inadmissible to offer proof of another and distinct offence; but this is only because the proof of a distinct offence has ordinarily no tendency to establish the offence charged. But whenever the case is such that proof of one crime tends to prove any fact material in the trial of another, such proof is admissible; and the fact that it may tend to prejudice the defendant in the minds of the jurors is no ground for its exclusion. . . . When such evidence is offered, the same considerations arise as upon the offer of other testimony: Is the evidence relevant and competent? Does it tend to prove any fact material to the issues?"

Occasionally this principle is spoken of as though it involved an exception to some otherwise general rule.[3] The truth is, however, that it is itself an illustration of the general principle, to which the Character-rule is the exception. That general principle (*ante*, § 10) is that all facts affording any reasonable inference as to the act charged are relevant and admissible, including facts showing design, motive, knowledge, or the like, where these matters are in issue or relevant. To this general principle there is the important exception (*ante*, § 194), that conduct tending and offered to show bad moral character as evidence is inadmissible. Thus, so long as we avoid the realm of this exception and do not seek to attack the defendant's character, we are within the scope and sanction of the great general principle. We are in no sense saved by a mere exception; and we are further reënforced by the fun-

[3] Thus, in People v. Cunningham, 66 Cal. 671, 4 Pac. 1144, 6 Pac. 700, 846, *supra*, it is said that "as a general rule no evidence can be introduced respecting any other crimes than that charged", except as far as it "tends to prove the crime alleged."

damental canon (*ante*, § 13) that admissibility for one purpose is not affected by inadmissibility for another:

1842, STORY, J., in *Wood* v. *U. S.*, 16 Pet. 360: "They constitute exceptions to the general rule excluding evidence not directly comprehended within the issue; or rather, perhaps, it may with more certainty be said, the exception is necessarily embodied in the very substance of the rule; for whatever does legally conduce to establish the points in issue is necessarily embraced in it, and therefore a proper subject of proof, whether it be direct or only presumptive."

1872, DOE, J., in *Darling* v. *Westmorelaud*, 52 N. H. 401, 412: "It is sometimes erroneously supposed that such evidence is excluded because it is 'collateral.' The true reason seems to be the exception (established by ancient English, and adopted without due consideration by modern American authorities) which excludes evidence of a prisoner's character and disposition for the commission of such a crime as that alleged in the indictment on which he is being tried, and the fact that although the Courts who introduced the exception might trust themselves to weigh evidence of other crimes, solely on the question of physical strength or other question on which it might be competent, they would not trust juries. It is evident that the exception, not being sufficiently emphasized as an exception and a very peculiar one, has produced much confusion, by seeming to countenance the idea that the law has an antipathy against experimental knowledge in general."

1921, PARKER, J., in *State* v. *Bassett*, 26 N. M. 476, 194 Pac. 867 (admitting evidence of a second abortion performed, to show intent): "These various statements of the so-called exceptions to the general rule are but statements that any evidence which tends to show the guilt of the person on trial is admissible, regardless of the fact that it may show the guilt of the defendant of another crime. If it is necessary or proper to show motive, intent, absence of mistake or accident, a common scheme or plan, the identity of the person charged, it is necessary or proper to show the same because it tends to show the guilt of the accused. In such cases other acts or crimes may be shown if they are relevant, regardless of their criminal character."

On the other hand, where the facts offered consist of past misconduct, whether criminal or not, and being offered to show design, motive, intent, knowledge, or the like, are determined *not* to be relevant for any such purpose, it follows, as of course, that they are also obnoxious to the character-rule and must be excluded. If they had been innocent (as Mr. Justice Brockenbrough points out above), " yet they ought to be excluded, being irrelevant "; but where they involve past misconduct, " they are not only irrelevant, but they do injury", because they prejudice the accused by invoking his character, "and for this additional reason they ought to be excluded."

They are admitted, then, whenever they are relevant otherwise than to character; and if they are not so relevant, they are excluded for the double reason of irrelevancy for the one purpose and impolicy for the other. Thus the only legitimate bearing of the Character-rule is to impel to a greater caution in determining their relevancy in a given instance; because if we are too liberal or loose, in not exacting an adequate degree of Relevancy or probative value for the allowable purposes, we admit evidence whose dominant bearing is a dangerous and forbidden one. But while greater care and caution is thus called for in applying to this class of evidence the tests of relevancy for design, motive, and the like, those tests themselves remain the same in

scope, and, when once satisfied, avail to admit the evidence. Whatever avenues of relevancy — Design, Motive, Knowledge, Identity, and so on — were open to this class of facts before, are open to them still. We are merely to scrutinize more carefully their right to enter these avenues, because of the harm that may be done by erroneous or over-loose interpretation:

1854, Scott, J., in *Austin* v. *State*, 14 Ark. 559: "It is certainly true as a general rule, both in civil and criminal cases, that the evidence must be confined to the point in issue; and in criminal cases there is perhaps a greater necessity, if possible, than in civil proceedings to enforce the rule. But in neither class of cases does this rule exclude all evidence that does not bear directly upon the issue; on the contrary, all evidence is admissible which tends to prove it, and no facts are forbidden to be shown except such as are incapable of affording any reasonable presumption or inference in elucidation of the matters involved in the issue."

1861, 1863, Bigelow, C. J., in *Com.* v. *Shepard*, 1 All. 581, and *Com.* v. *Jeffries*, 7 All. 567: "It is a dangerous species of evidence, not only because it requires a defendant to meet and explain other acts than those charged against him and for which he is on trial, but also because it may lead the jury to violate the great principle that a party is not to be convicted of one crime by proof that he is guilty of another. For this reason, it is essential to the rights of the accused that, when such evidence is admitted, it should be carefully limited and guarded by instructions to the jury, so that its operation and effect may be confined to the single legitimate purpose for which it is competent. . . . If it be asked what limit is to be placed on the range of such an inquiry, the answer is obvious: It cannot be extended to facts or circumstances which do not naturally or necessarily bear on the issue to be established, precisely as evidence of all collateral facts and circumstances must be confined to the proof of those which have a legitimate and direct connection with the principal transaction."

§ 217. **Summary of other Modes of Relevancy.** What are these other avenues of Relevancy by which such conduct may enter evidentially? They are limited only by the matters which, in the words of Mr. J. Bigelow, "naturally or necessarily bear on the issue to be established." These modes will be found throughout the whole scope of the system of relevancy, and the utility of such evidence may appear at any point. Nevertheless, the commonest instances of its use occur in the ensuing topics, because the matters there to be proved are those for which conduct most commonly serves as evidence. These matters may here be briefly enumerated, illustrating how under each head an act of misconduct may be, among other kinds of facts, relevant:

Capacity (physical strength or the like): on a charge of placing a large stone on a railroad track, the previous felonious placing of a rail on the track shows the defendant's strength-capacity for the act;

Habit or *Custom:* to show a habit of omitting a signal at a railroad-crossing, previous instances of its omission are relevant;

Design or *Plan:* to show a plan to rob a safe, the stealing of the key would be relevant; or to show a plan to murder a whole family and obtain their insurance-money, the killings of other insured members of the family would be admissible;

Knowledge or *Belief:* to show knowledge of the counterfeit quality of a bank-bill, a former unsuccessful attempt to pass a similar one is relevant;

Intent: to show intentional falsification of accounts, former incorrect entries of a similar sort tend to negative mistake;

Motive: to show a probable desire in a husband to get rid of his wife, an adulterous relation with another woman is relevant;

Identity: to assist in identifying a murderer, the commission of another murder by the defendant is relevant, if it appears that the same person committed both.

In all these instances, and in others less frequent, the misconduct of a defendant may become relevant otherwise than as showing Character. In the following chapters the bearing of the present principle is amply illustrated.

§ 218. **Res Gestæ and Acts a part of the Issue; Inseparable Crimes.** There is, however, an additional class of cases in which the misconduct of a defendant may be received, irrespective of any bearing on character, and yet not as evidential of one of the above matters (design, motive, or the like), or as relevant to any particular subsidiary proposition. That class includes *other criminal acts which are an inseparable part of the whole deed.* Suppose that A is charged with stealing the tools of X; the evidence shows that a box of carpenter's tools was taken, and that in it were the tools of Y and Z as well as of X; here we are incidentally proving the commission of two additional crimes, because they are necessarily interwoven with the stealing charged, and together form one deed. The other two crimes are not offered as affecting A's character, nor do they affect his character; because all were done, if at all, as parts of a whole, and if we believe, or disbelieve his doing of one part, we believe or disbelieve his doing of all. The two other crimes do not affect his character in the way forbidden by the reasons of the character-rule (*ante*, § 194) — *i.e.* by way of undue prejudice, in that we might condemn him now, though innocent of the act charged, because we are prejudiced by his former crimes; nor by way of unfair surprise, in that he cannot be prepared to defend himself against evidence of former misconduct of which he had no notice. While thus, on the one hand, these concomitant crimes are not obnoxious to the reasons of the character-rule, so also they are necessarily gone into in proving the entire deed of which the act charged forms a part. There is therefore not only a necessity for proving them, but no objection against proving them.[1]

§ 218. [1] ENGLAND: 1831, R. *v.* Salisbury, 5 C. & P. 155 (stealing bank-notes from a letter; the stealing of others from another letter, and replacing them by the ones in issue, admitted as a part of the transaction); 1862, R. *v.* Cobden, 2 F. & F. 833 (burglary; evidence of three other burglaries by the defendants on the same night was admitted, partly because "so intermixed that it is impossible to separate them", partly to explain the disposal of the property taken).

UNITED STATES: *Alabama:* 1906, Hammond *v.* State, 147 Ala. 79, 41 So. 761 (shooting the deceased's brother immediately after shooting the deceased; admitted); *California:* 1899, People *v.* Piggott, 126 Cal. 509, 59 Pac. 31 (general principle stated); 1906, People *v.* McClure, 148 Cal. 418, 83 Pac. 437 (killing another person in the same affray; admitted); 1908, People *v.* Manasse, 153 Cal. 10, 94 Pac. 92 (shooting of H. and C. as "a part of the same transaction"); 1910, People *v.* Crowley,

It is sometimes said that such acts are provable as a part of the 'res gestæ.' But this phrase is unsatisfactory, first, because it is obscure and indefinite, and needs further definition and translation before either its reason or its scope can be understood; and, secondly, because its very looseness and obscurity lend too many opportunities for its abuse. It is not too much to say that it is nowadays most frequently used merely as a cover for loose ideas and ignorance of principles. It is occasionally used to admit acts whose real function is to show Intent or Motive or Design. But the result is only to

13 Cal. App. 322, 109 Pac. 493 (another murder at the same time); *Florida:* 1898, Roberson *v.* State, 40 Fla. 509, 24 So. 474 (finding stolen goods under a warrant to search for other stolen goods; nature of the warrant, excluded, because of the intimation of other crimes; unsound); *Hawaii:* 1898, Republic *v.* Tsunikichi, 11 Haw. 341, 344 (killing of a child at the same time with that of a woman, admitted); 1899, Republic *v.* Yamane, 12 Haw. 189, 217 (assault on another person at the same time, admitted); *Illinois:* 1914, People *v.* Harrison, 261 Ill. 517, 104 N. E. 259 (kidnapping a girl; the physicians' description of the physical condition of the girl after her return, mentioning a swollen face, fingerprints on the neck, and a rape, excluded so far as describing the rape appearances; absurd; why not also exclude the swollen face and the finger-prints?); 1916, People *v.* Murphy, 276 Ill. 304, 114 N. E. 609 (killing of another person, admitted because inseparable from the killing charged); *Indiana:* 1885, Turner *v.* State, 102 Ind. 425, 1 N. E. 869 (the possession of another stolen book, admitted, as contradicting the defendant's account of how he came into possession of the lot of books among which was the one charged); *Kentucky:* 1909, Bennett *v.* Com., 133 Ky. 452, 118 S. W. 332 (defacing branded railroad ties); 1913, May *v.* Com., 153 Ky. 141, 154 S. W. 1074 (murder; killing of another person at the same moment, admitted); *Louisiana:* 1852, Terrell *v.* Allen, 7 La. An. 47, 48 (inveigling and stealing a slave; the capture of the slave in the defendant's quarters, admitted, though involving the crime of harboring; Preston, J.: "The same evidence that tends to prove one crime often tends to prove another; the firing a gun may tend to prove an attempt to kill, or manslaughter, by an actual killing; so the felonious taking of goods may be offered to prove a burglary as well as larceny"); 1857, State *v.* Munco, 12 La. An. 625 (charge of firing a gun with intent to kill; the fact of the other person being wounded, and a distinct crime shown, held admissible as a part of the proof of the offence charged); 1882, State *v.* Vines, 34 La. An. 1079, 1083 (another killing at the same time, by a member of the same party lying in wait, admitted); 1904, State *v.* Robinson, 112 La. 939, 36 So. 811 (shooting a second person, a moment later; admitted); *Massachusetts:* 1849, Com. *v.* M'Pike, 3 Cush. 181, 184 (manslaughter; to show the assault which ensued in the death, a conviction for it was received, with other evidence, but this was not to be used to show "his disposition to engage in such assaults"); 1888, Com. *v.* Schaffner, 146 Mass. 515, 16 N. E. 280 (on a charge of coloring milk, evidence of the milk being also of bad quality, held not inadmissible because it concerned a separate offence not necessarily involved); *Missouri:* 1896, State *v.* Perry, 136 Mo. 126, 37 S. W. 804 (that other persons were killed within a few moments of the same time, admitted); 1906, State *v.* Vaughan, 200 Mo. 1, 98 S. W. 2 (murder of a prison-guard in escaping; the killing of two other guards at the same time, admitted); *Montana:* 1904, State *v.* Howard, 30 Mont. 518, 77 Pac. 50 (robbery of a mail clerk; the robbery of the baggage-car, etc., at the same time, admitted); *New Mexico:* 1906, Terr. *v.* Livingston, 13 N. M. 318, 84 Pac. 1021 (horse and mule stolen at the same time); 1908, Terr. *v.* Caldwell, 14 N. M. 535, 98 Pac. 167 (other calves stolen at the same time); *New York:* 1908, People *v.* Rogers, 192 N. Y. 331, 85 N. E. 135 (assault upon three persons); 1910, People *v.* Hill, 198 N. Y. 64, 91 N. E. 272 (murder; two burglaries, admitted, to explain the finding of three revolvers); *Oklahoma:* 1912, Starr *v.* State, 7 Okl. Cr. 574, 124 Pac. 1109 (other cattle stolen at the same time); *Oregon:* 1897, State *v.* Porter, 32 Or. 135, 49 Pac. 964 (three persons killed within a few moments; the circumstances and conditions of all three deaths admissible); 1899, State *v.* Wong Gee, 35 Or. 276, 57 Pac. 914 (another assault by defendant at the same time, admitted); 1899, State *v.* Hanna, 35 Or. 195, 57 Pac. 629 (stealing of third person's horses at same time, admitted); *Pennsylvania:* 1898, Com. *v.* Roddy, 184 Pa. 274, 39 Atl. 211 (murder; traces of the escaping murderer, involving the stealing of another person's property, received); 1919, Com. *v.* Coles, 265 Pa. 362, 108 Atl. 826 (murder of policeman; another homicide just before, admitted as inseparably connected); *South Carolina:* 1907, State *v.* Kenny, 77 S. C. 236, 57 S. E. 859 (murder and larceny at the same time); *Utah:* 1896, State *v.* Hayes, 14 Utah 118, 46 Pac. 752 (three men killed under the same circumstances; the deaths of two admitted on a

make rulings on evidence arbitrary and chaotic, when we ignore the correct purposes of admission and substitute an indefinite and meaningless phrase of this sort. The term 'res gestæ' should be once for all abandoned as useless and vicious. Let it be said that such acts are receivable as "necessary parts of the proof of an entire deed", or "inseparable elements of the deed", or "concomitant parts of the criminal act", or anything else that carries its own reasoning and definition with it; but let legal discussion sedulously avoid this much-abused and wholly unmanageable Latin phrase.[2]

charge of killing the third); *Washington:* 1895, State *v.* Craemer, 12 Wash. 217, 40 Pac. 945 (where an infant child was killed at the same time as the mother, all the circumstances were received); 1911, State *v.* McDowell, 61 Wash. 398, 112 Pac. 521 (indecent assault); 1914, State *v.* Conroy, 82 Wash. 417, 144 Pac. 538 (robbery of two persons at the same time).

For other instances involving the *stealing of chattels* from the same lot, see *ante*, § 152 (possession of stolen chattels) and *post*, § 414 (identity of chattels).

For other instances involving contemporaneous *homicides*, see *post*, § 363 (other acts to show intent).

Throughout the various classes of crimes dealt with in §§ 309–367, *post*, will be found further instances.

For other instances of proof of an *inseparable crime*, see *post*, § 414 (evidence of identity).

For the use of an *accused's confession* of other crimes, see *post*, § 2100.

[2] Its abuse in other senses is dealt with *post*, §§ 1757, 1767.

SUB-TITLE II (*continued*): EVIDENCE TO PROVE A HUMAN QUALITY OR CONDITION

TOPICS II, III, IV, V: EVIDENCE TO PROVE PHYSICAL OR MENTAL CAPACITY, DESIGN, OR INTENT

CHAPTER X.

Topic II: EVIDENCE TO PROVE PHYSICAL CONDITION OR CAPACITY (STRENGTH, SKILL, HEALTH, ETC.)

§ 219. **General Principle.** It has been already noted (*ante*, § 190) that physical Capacity or Condition, like most other human attributes, may be evidenced in three ways: (1) by conduct or other manifestations indicating their inward source; (2) by external facts pointing forward to the existence of the quality or condition; (3) by the prior or subsequent existence of the quality or condition, pointing forward or backward to its existence at the time in question. The considerations which affect the validity of the various

inferences are simple, depending chiefly on ordinary experience and common sense, and cause little difficulty.[1] The doctrine just examined (*ante*, § 216), that the criminality of conduct which is in itself relevant is no objection to its reception, is frequently illustrated; and the necessity for applying it and for distinguishing the character-rule (*ante*, § 194) has given the occasion for most of the rulings. The policies of Unfair Surprise, Undue Prejudice, and Confusion of Issues (*ante*, §§ 194, 202) are here occasionally applicable. But they have ordinarily no real force. The trial Court's discretion is best trusted to determine their validity in the light of the circumstances of each case.

§ 220. **Power or Strength, from Instances of Conduct exhibiting it.** Where a person's physical power or strength is a proposition to be proved, instances of the person's conduct and acts, manifesting the existence in him of such power or strength, are the natural and proper evidence of it. In limiting the use of this evidence, the trial Court's discretion should control — a principle fully established in New Hampshire.[1]

§ 221. **Skill or Means, from Instances of its Exercise.** The possession of instruments adapted to do an act in question is evidence of capacity or ability to do it.[1] The skill to do the act may be evidenced by previous or subse-

§ **219**. [1] From the point of view of logic and psychology as applicable to argument before the jury (not the rules of Admissibility), see the materials collected in the present author's "Principles of Judicial Proof, as given by Logic, Psychology, and General Experience, and illustrated in Judicial Trials" (1913), §§ 73–81.

§ **220**. [1] *Iowa:* 1905, State *v.* Donovan, 128 Ia. 44, 102 N. W. 791 (seduction under hypnotism; defendant's power evidenced by other instances); *Massachusetts:* 1838, Ellis *v.* Short, 21 Pick. 142 (false arrest; to prove the plaintiff's strength and power of violent resistance when drunk, the fact of his having on a former occasion when drunk thrown stones and resisted arrest with violence was excluded; unsound); *New Hampshire:* 1858, State *v.* Wentworth, 37 N. H. 196, 211 (indictment for placing an obstruction, viz. two stones of considerable size, on a railroad track; the fact of the placing of iron rails on the track, near by, about the same time, by the defendant, was admitted as showing that the defendant "had the strength and ability to place them there"); 1863, State *v.* Knapp, 45 N. H. 148, 149, 154 (rape; to show the defendant's "capacity of overcoming such resistance as the prosecutrix might have offered", evidence was received that he had once "taken a barrel of flour up in his hands before him and carried it several rods", had "carried a barrel of sugar some ten rods on his shoulder", etc.); 1879, Hilliard *v.* Beattie, 59 N. H. 462, 465 (the rate of pulse of other healthy men subjected to the same conditions as the plaintiff was held properly excluded in the trial Court's discretion); *New York:* 1895, People *v.* Corey, 148 N. Y. 476, 42 N. E. 1066 (the condition of the defendant, charged with murder, the act of stabbing being conceded, and his affection by syphilis, was held unnecessarily and improperly admitted to show his capacity to commit the assault, on the principle that it merely prejudiced the jury, and that "illegal evidence which has a tendency to excite the passions, arouse the prejudice, awaken the sympathies, or warp or influence the judgment of the jurors, in any degree, cannot be considered as harmless"); *Washington:* 1897, State *v.* Cushing, 17 Wash. 544, 50 Pac. 512 (strength-tests, excluded, except on cross-examination to test accuracy).

For the relevancy of physical capacity, when properly evidenced, to show the doing or not-doing of an act, see *ante*, §§ 84, 85.

Compare also the instances cited *post*, § 460 (measures of skilfulness, etc.), some of which illustrate equally the present principle.

§ **221**. [1] 1921, Carter *v.* State, 26 Ga. App. 253, 105 S. E. 652 (selling whisky; that "stills were around the defendant's house", admitted); 1876, Com. *v.* Brown, 121 Mass. 71 (abortion; the possession of a "speculum chair" and other instruments, admitted, as showing that the defendant had "the means and opportunity to commit the offence charged").

For other ruling, see *ante*, §§ 87, 88, and *post*, § 238; some of the rulings are difficult to place, as the evidential fact has often more than one aspect.

quent conduct exhibiting it.[2] Skill or competence may also to some extent be inferred from ordinary appearance and conduct.[3]

That a *physician's competence* or skill may be evidenced by marked instances of the presence or absence of it seems clear from the present point of view; but a confusion of moral character with technical skill has occasionally led to the judicial treatment of such evidence under the character-rules (*ante*, §§ 208, 67, 87).[4]

[2] 1885, Belt *v.* Lawes, Eng., described in Montague Williams' Reminiscences, II, 222 (libel, for charging that the plaintiff, a sculptor, did not make the works of art put forth by him as his own, but merely employed others and took their productions; the plaintiff was ordered by the judge to execute a second bust of a person of whom there was already in existence a bust claimed by the plaintiff to be his work; this the plaintiff did in a room adjoining the Court, under conditions arranged to prevent fraud; and the resulting bust "went a long way to determine the result of the trial", which was a verdict for £5000); 1885, Costelo *v.* Crowell, 139 Mass. 588, 2 N. E. 698 (defence of forgery to a promissory note; evidence rejected of the plaintiff's having shown a person how to imitate notes by tracing; the character-rule was invoked as excluding evidence of "capacity and means" where directed to the act in issue and not the intent of the doer; the ruling is unsound).

Compare the analogous cases cited *ante*, § 87, *post*, §§ 238, 309, 460, 461.

[3] 1885, Keith *v.* N. H. & N. Co., 140 Mass. 175, 180, 3 N. E. 28 ("the appearance and conduct [upon the stand] of a railroad car-inspector", admissible "to aid the jury in determining whether he was a person of suitable qualifications and of sufficient intelligence to be entrusted with so responsible a duty"; the "principle applies where the inquiry . . . relates to intelligence and understanding as well as to physical capacity"; 1890, Peaslee *v.* R. Co., 152 Mass. 155, 158, 25 N. E. 71 (sanctioning the preceding, where there is other evidence of incompetency); 1897, Olsen *v.* Andrews, 168 Mass. 261, 47 N. E. 90 (see the citation *ante*, § 199; here nervous conduct, etc., was admitted to show unfit physical condition of an employee).

[4] The rulings are therefore by no means consistent: *England:* 1807, R. *v.* Williamson, 3 C. & P. 635 (a midwife indicted for childbed-death caused by negligence; fourteen women were called, and six examined, who had been delivered by the accused; Ellenborough, L. C. J.: "From the evidence of the witnesses on his behalf it appears that he had delivered many women at different times, and from this he must have had some degree of skill"); 1831, R. *v.* Long, Old Bailey, before Bayley, B., Pelham's Chronicles of Crime, ed. 1891, II, 217, 227 (trial of a quack physician, for manslaughter by improper treatment; the accused called one Mr. A., who testified that "he had several times been under the care of the prisoner; he had an asthma, and subsequently a determination of blood to the head. The Attorney-General here interfered, and submitted that the course of the present examination ought to be confined to the general character of the prisoner; in which the Court, after hearing arguments from Mr. Alley and Mr. Phillips, acquiesced. Mr. Phillips endeavored to shake this decision, contending that as the indictment raised the question whether Mr. Long was grossly ignorant, or had been grossly careless, it was impossible to establish his innocence otherwise than by showing, as he verily believed they could, that he was both learned and skilful, and most attentive and humane in his practice of the healing art. Mr. Baron Bayley: 'We cannot go into specific cases; we must confine ourselves to general evidence.' Mr. Phillips resumed his argument at length; but the Attorney-General in reply said that if his learned friends found themselves at liberty to go into all the successful cases of the prisoner, he should go into his several failures in practice. The Court having repeated its former decision, the examination of Mr. A. was resumed, and he stated that the prisoner had attended him for several disorders, and he had the fullest reason to be satisfied with his skill, care, and attention. Mrs. A., the wife of Gen. A., Miss R., her sister, Mrs. P., Mrs. M., Mrs. Mc., and a vast number of other ladies and gentlemen were then examined, and every one bore testimony in the strongest manner to the skill, assiduity, and humanity of the prisoner, and to the extraordinary success which had uniformly attended his practice"; notice that what was excluded was only the details of particular cases, the general success of the accused's treatments being received); 1848, R. *v.* Whitehead, 3 C. & K. 202, Maule, J. (particular instances inadmissible; though the doctrine seems to have been violated in this very case); *Canada:* 1869, Key *v.* Thomson, 1 Ham. N. Br. 295, 301 (malpractice; defendant's successful similar treatment of other cases, admitted to show the incorrectness of the plaintiff's witnesses' testimony as to the unskilfulness of his treatment); *United States:* 1898, Lacy *v.* Kossuth Co., 106 Ia. 16, 75 N. W. 689 (incompetency of physician, under statute; particular acts excluded); 1905, Shockley *v.* Tucker, 127 Ia. 456, 103 N. W. 360 (negligent use of X-ray instrument by a physician; other

§ 222. **Age, from Appearance; Voice, from Utterances; Sight, from things seen.** Experience teaches us that corporal appearances are approximately an index of the age of their bearer, particularly for the marked extremes of old age and youth. In every case such evidence should be accepted and weighed for what it may be in each case worth. In particular, the *outward physical* appearance of an alleged minor may be considered in judging of his *age;*[1] a contrary rule would be pedantically over-cautious.[2]

The quality of a *voice* may be evidenced by instances of utterance. But here the questions that have arisen concern rather the requirement of the oath (*post*, § 1824), the opinion rule (*post*, § 1977), the possibility of accurate knowledge founded on hearing only (*post*, § 660), and the relevancy of identifying circumstances (*post*, § 413).

The capacity of *sight* may be indicated by instances of its exercise; but this can best be considered in dealing with the modes of evidencing distance and other external facts (*post*, § 457).

instances of injury caused by the defendant with such instruments, excluded; no authority cited); 1882, Dresbrack *v.* State, 38 Oh. St. 365 (see citation *ante*, § 199).

Compare also the citations *ante*, §§ 67, 87, and *post*, § 457.

§ 222. [1] *Canada: Dom.* St. 1900, c. 46, R. S. 1906, c. 146, Crim. C. § 984 (in proving the age of a young person, on certain charges, the judge or jury "may infer the age from the appearance of the boy, girl, child, or young person"); *Sask.:* R. S. 1920., c. 192, § 128 (children's court; the judge may presume from appearance that the child is under a specified age);

United States: Black *v.* Pate, 130 Ala. 514, 30 So. 434 (age of a voter); 1899, Jones *v.* State, 106 Ga. 365, 34 S. E. 174 (rape of girl of fifteen years; appearance of the girl, allowed to be considered in determining capacity to consent); 1896, Republic *v.* Parsons, 10 Haw. 601, 606 (sexual intercourse under age); 1904, Wistrand *v.* People, 213 Ill. 72, 72 N. E. 748 (testimony to appearance may be evidence of age); 1909, People *v.* Davidson, 240 Ill. 191, 88 N. E. 565 (keeping a minor in a house of ill-fame; a person who has seen the woman may testify to her apparent age); Kan. G. S. 1915, § 6386 (offenses concerning dependent children, of specified age; "if the child appears to the Court to be under that age", this raises a presumption); 1898, Com. *v.* Hollis, 170 Mass. 433, 49 N. E. 632 (girl said to be under sixteen; jury allowed to consider appearance); 1902, People *v.* Elco, 113 Mich. 519, 91 N. W. 755; (criminal intercourse with a girl under sixteen); 1889 Elsner, *v.* Supreme Lodge, 98 Mo. 645, 11 S. W. 991; 1900, State *v.* Thomson, 155 Mo. 300, 55 S. W. 1013; 1915, State *v.* Koettgen, 88 N. J. L. 51, 95 Atl. 747 (keeping a disorderly house; age of persons there resorting, allowed to be testified to by persons inferring from appearance; approving the above text); N. Y. C. P. A. 1920, § 334, & Cons. L. 1909, Penal § 817 (appearance to be evidence to the Court on dispute as to child's age); 1913, People *v.* Kaminsky, 208 N. Y. 389, 102 N. E. 515 (juvenile offender under 16; age may be determined by inspection of the accused in court); 1851, State *v.* Arnold 13 Ired. N. C. 184, 192 (inspection of a defendant to judge whether he was under fourteen); 1893, Jones *v.* State, 32 Tex. Cr. 108, 22 S. W. 149 (seiling liquor to a minor; the buyer's appearance, admissible); 1903, Earl *v.* State, 44 Tex. Cr. 467, 72 S. W. 175; Utah Comp. L. 1917, § 1845 (offenses against children under specific age; child's appearance under that age, to raise a presumption); 1888, Hermann *v.* State, 73 Wis. 248, 250, 41 N. W. 171 (knowing enticement of minor female; her appearance before jury allowed to be considered, her age being otherwise shown, as indicating whether the defendant must have known her to be a minor).

Compare the doctrine as to *exhibiting the person to the jury*, *post*, § 1160.

[2] This is apparently the rule in Indiana; some of the rulings intimate an even more unjustifiable doctrine, namely, that the appearance of the person cannot be considered even in determining whether the liquor-seller acted in good faith in treating the person as an adult: 1876, Ihinger *v.* State, 53 Ind. 251, 253 (appearance before the jury, rejected; but testimony to appearance held competent, the issue being the defendant's good faith in selling liquor to an alleged minor); 1878, Robinius *v.* State, 63 Ind. 235, 237 (selling liquor to a minor; appearance rejected); 1878, Swigart *v.* State, 64 Ind. 598 (same); 1885, Bird *v.* State, 104 Ind. 385, 389, 3 N. E. 827 (same); 1887, Louisville, N. A. & C. R. Co. *v.* Wood, 113 Ind. 544, 550, 14 N. E. 572, 16 N. E. 197 (same, but treated as exceptional).

§ 223. **Health or Disease, from Appearance, Occupation, or Heredity.** Corporal *appearances* and *conduct* as indications of the inward health or lack of it are relevant.[1] The questions which arise in connection with such evidence are due to other considerations than relevancy; these may involve the propriety of inspection of an injured body by the jury (*post*, § 1158), or the competency of lay witnesses to testify to health or disease, by interpreting corporal appearances (*post*, § 568), or the application of the opinion rule to testimony about appearances of health or disease (*post*, §§ 1974, 1975), or the application of the hearsay rule, or its exceptions, to the person's statements of pain or injury (*post*, §§ 1718, 1790).

Physical capacity may also be evidenced by the *hereditary* existence of a certain quality;[2] and the same test of admissibility would here be applied as for insanity (*post*, § 232). Capacity may also sometimes be evidenced 'a priori' (on the principle noted *ante*, § 190) by circumstances likely to result in a physical injury or degeneration, — as when "expectation of life", in insurance cases, is affected by the *hazardous circumstances* of one's occupation.[3]

§ 224. **Pecuniary Capacity, from Borrowing or Non-Payment.** It has already been seen (*ante*, § 89) that a person's pecuniary capacity to pay a debt or to lend money is relevant to the probability of his paying or lending. To show his pecuniary condition as to this capacity, his *conduct in borrowing or not paying* thus becomes relevant. Nevertheless, a line is to be drawn; for the mere failure (for example) to pay a specific debt may be open to so many other explanations than total lack of the means (on the logical principle of § 32, *ante*) that it would have no appreciable probative value. There

In these rulings (except in the first) there is apparently no discrimination between the use of appearance before the jury and testimony to appearance; but possibly it is the former only (as in the first ruling) that is intended to be excluded.

For a consideration of this erratic doctrine that *inspection by the jury* is improper, see *post*, § 1160.

For the use of such evidence to show the *liquor-seller's belief*, see *post*, § 257.

§ **223**. [1] 1867, R. *v.* Zeigert, 10 Cox Cr. 547 (murder by starving a child; the child's asking for bread admitted as an "act"); 1881, Cowley *v.* People, 83 N. Y. 477 (cited *post*, § 225).

For *intemperance*, see *post*, § 235.

For instances of *subsequent disease*, see *post*, § 225, n. 1.

[2] 1902, Birmingham Southern R. Co. *v.* Cuzzart, 133 Ala. 262, 31 So. 979 (injury to eyes; to prove the plaintiff's injury due to other causes, the defendant was not allowed to show the existence of eye ailments in other members of the plaintiff's family, without evidence of the "descendible quality" of such ailments); 1906, Haynes *v.* Waterville & O. St. R. Co., 101 Me. 335, 64 Atl. 614 (personal injuries and expectancy of life; the ages of the plaintiff's father and grandfather at death, admitted; "a descent from robust, long-lived stock gives greater promise of long life than descent from frail, short-lived ancestry, other things being equal"); 1905, Sterling *v.* Union Carbide Co., 142 Mich. 284, 105 N. W. 755 (personal injury; ancestral long life, admitted as evidence of plaintiff's expectancy of life).

But it remains true, as to the specific trait of longevity, that ancestral longevity is not of much weight in estimating the probability of life of a particular person, because too many other circumstances combine to effect the total chance of survival of a particular person; see Hamilton *v.* Michigan C. R. Co., 135 Mich. 95, 97 N. W. 392 (1903), and § 232, *post*.

[3] 1893, Birmingham M. R. Co. *v.* Wilmer, 97 Ala. 165, 170, 11 So. 886 (that the plaintiff was in an extra hazardous occupation, admitted); 1893, Townsend *v.* Briggs, 99 Cal. 481, 485, 34 Pac. 116 (the injured plaintiff's expectation of life being in issue, any facts about him lessening that expectation are admissible; here, his drinking habits).

is room for much variety of circumstance in such evidence, and the discretion of the trial Court should control.[1]

§ 225. **Prior or Subsequent Condition.** In showing the existence at a given time of any physical condition (skill, strength, health, or the like), the existence of such a condition at a *prior or subsequent time* (being one of the classes of evidence noted *ante*, § 190) is evidential.[1] The limits of time over which such evidence may range must depend on the circumstances of each case as to the probability of intervening changes, and should be left entirely within the discretion of the trial judge. Other and analogous illustrations of the doctrine of prior and subsequent condition may be found elsewhere (*post*, §§ 233, 379, and 437).

TOPIC III. EVIDENCE TO PROVE MENTAL CAPACITY

§ 227. **Modes of evidencing Mental Capacity circumstantially.** Mental Capacity, like other human qualities or conditions (*ante*, § 190), may con-

§ **224**. [1] The conflict of rulings illustrates the desirability of making no hard-and-fast rule: *Massachusetts:* 1871, Woodward *v.* Leavitt, 107 Mass. 453, 458 (borrowing money to compromise with creditors, admitted); *New Hampshire:* 1855, Wiggin *v.* Plumer, 31 N. H. 251, 270 (same, admitted in rebuttal of alleged non-borrowing); *Michigan:* 1864, Angell *v.* Rosenbury, 12 Mich. 241, 252 ("among the particular facts admissible for the purpose, and thought to be of much weight, and most generally resorted to, is the return of an execution against the party unsatisfied"); *Minnesota:* 1875, Burr *v.* Wilson, 22 Minn. 206, 211 (same); *New York:* 1880, Pontius *v.* People, 82 N. Y. 339, 349 (the defendant claimed that he had lent $4000 and taken a note; to disprove the likelihood of this, evidence was offered of his straitened pecuniary condition; Danforth, J.: "His conduct in regard to necessary expenses, his pecuniary necessities, the borrowing of money by himself at or about the time when he claimed to have advanced the complainant money, would all bear upon the question. So would the fact that small debts were contracted by him and not paid when due or after frequent request, indicate something in regard to pecuniary ability. . . . A man may indeed be willing to lend to his neighbor in time of need, and yet be unwilling to pay his debts in due season, although fully able to do both; but whether in any given case either one or both of these facts existed, would have to be determined from a variety of circumstances, and their force could properly be estimated by the jury"); 1902, Bank of State of N. Y. *v.* Southern N. Bank, 170 N. Y. 1, 62 N. E. 677 (insolvent condition of a firm on Feb. 26, held admissible to show its condition on Jan. 21 prior); *Pennsylvania:* 1870, Woods *v.* Gummert, 67 Pa. 136 (action for money advanced as agent in 1860-62; an unsatisfied execution against the plaintiff in 1858 was excluded; though the use of such evidence for some situations was conceded; Sharswood, J.: "If the defendant is allowed to show that the plaintiff owes debts which he does not pay, the plaintiff may certainly rebut the evidence by showing that he has a good defence to them; thus innumerable collateral issues might be introduced. . . . Now had the plaintiff been suing upon a paper alleged to be forged or procured by fraud, such evidence might have been admissible as having some weight in a case of doubt, especially if it was contemporaneous with the transaction in controversy").

Compare the citations *post*, §§ 379, 392 (habit, motive).

§ **225**. [1] 1899, Sturdevant's Appeal, 71 Conn. 392, 42 Atl. 70 (condition of a person's leg a year before, admitted); 1892, Com. *v.* Campbell, 155 Mass. 537, 30 N. E. 72 (former facial appearance, admitted); 1893, Com. *v.* Morgan, 159 Mass. 378, 34 N. E. 458 (same); 1894, Gilbert *v.* R. Co., 160 Mass. 403, 36 N. E. 60 (former physical health; doubtful, or subject to the trial Court's discretion); 1903, State *v.* Scott, 172 Mo. 536, 72 S. W. 897 (condition of prosecutrix in rape, some months later, admitted); 1881, Cowley *v.* People, 83 N. Y. 477 (condition of a starved child after the time charged, the child having changed only for the better, admitted); 1906, Nophsker *v.* Supreme Council, 215 Pa. 631, 64 Atl. 788 (fraudulent insurance of life; the insured's illness after the issuance of insurance, admitted, its nature indicating a prior existence); 1895, Taylor, B. & H. R. Co. *v.* Warner, 88 Tex. 642, 32 S. W. 868 (personal appearance two years before, by photograph, admitted); 1904, Kavanaugh *v.* Wausau, 120 Wis. 611, 98 N. W. 550 (condition of a horse).

For other instances where the condition in question was shown by *photograph* and the ruling also involved the use of prior or subsequent condition, see *post*, § 792.

ceivably be evidenced circumstantially by three classes of facts, (1) the person's outward conduct, manifesting the inward and causing condition; (2) pre-existing external circumstances, tending to produce a special mental condition; and (3) the prior or subsequent existence of the condition, from which its existence at the time in question may be inferred. Each of these modes has its own special difficulties and problems.

§ 228. (1) **Insanity, in general, as evidenced by Conduct.** (1) Sanity and insanity are terms applicable to the mode of operation of the mind as judged by some accepted standard of normality. The mode of operation of the mind is ascertainable from the conduct of the person in question, *i.e.* from the effect produced by his surroundings on his mind when responding by action to those surroundings. Virtually, then, the mind is one, while the surroundings are multifold; and the mode of operation cannot be ascertained to be normal or abnormal except by watching the effects through a multifold series of causes. On the one hand, no single act can be of itself decisive; while, on the other hand, any act whatever may be significant to some extent.

The first and fundamental rule, then, will be that *any and all conduct* of the person is admissible in evidence. There is no restriction as to the kind of conduct. There can be none; for if a specific act does not indicate insanity it may indicate sanity. It will certainly throw light one way or the other upon the issue. "Upon this I believe that no difference of opinion will be found to exist," said Mr. Justice Patteson, in a celebrated case, "as to the principle on which such evidence is admissible: Every act of the party's life is relevant to the issue."[1] There can be no escape from this consequence. There is no distinction in kind (whatever there may be in degree) between one or another piece of conduct as evidence to be considered; *some* inference is always possible.[2]

1836, DENMAN, L. C. J., in *Doe* d. *Tatham* v. *Wright*, 6 Nev. & M. 132, 146: "Such an issue [insanity] opens a wide door for the admission of evidence, as every transaction of the testator's life, every expression he ever used, and his manner of conducting himself on the most ordinary concerns, may have a bearing on the question."

1870, HOWE, J., in *State* v. *Hays*, 22 La. An. 39, 40: "Insanity is a disease. It has its pathology and its symptoms, and it would seem that its existence can be determined only by a careful scrutiny of those symptoms. The tree is to be known by its fruits. The

§ 228. [1] 1838, Wright *v.* Tatham, 5 Cl. & F. 670, 715; so also Alderson, B., at p. 722.

[2] Compare the following opinions: 1851, Marianski *v.* Cairns, 1 Macq. Sc. App. 212, 218 (good opinion by Lord Truro); 1915, Bulger *v.* People, 60 Colo. 165, 151 Pac. 937 (murder; defence, insanity; conduct showing mere quarrelsomeness, admitted; citing the above text with approval); 1900, Blume *v.* State, 154 Ind. 343, 56 N. E. 771 (handwriting and composition of letters, admitted); 1909, McReynolds *v.* Smith, 172 Ind. 336, 86 N. E. 1009; 1921, Baker *v.* State, — Ind. —, 129 N. E. 468 (murder during robbery; plea, insanity; former robberies admitted to negative insanity); 1900, State *v.* Wright, 112 Ia. 436, 84 N. W. 541 ("in all cases involving the question of mental capacity, it is competent to go into the minutest details of the personal history" of the individual); 1906, Kempf *v.* Koopa, 74 Kan. 153, 85 Pac. 806; 1868, Shailer *v.* Bumstead, 99 Mass. 112 (see quotation *post*, § 233); 1904, Cashin *v.* N. Y. N. H. & H. R. Co., 185 Mass. 543, 70 N. E. 930; 1906, State *v.* Speyer, 194 Mo. 459, 91 S. W. 1075 (certain letters excluded); 1911, State *v.* Leakey, 44 Mont. 354, 120 Pac. 234 (accused's conversation, admitted on his behalf); 1854, Waterman *v.* Whitney, 11 N. Y. 157 (see quotation *post*, § 233).

condition of the hidden mechanism is to be ascertained by those communicated movements which are external and apparent. To this end the usual expressions of a mental state are original and competent evidence. If they are the natural language of mental alienation, they furnish satisfactory and sometimes the only proof of its existence. It is true that such expressions may be feigned, and often are; but whether they were real or feigned is for the jury to determine. Hence the rule prevails that, as indicia of the mental condition, not only the acts, but the conversations, exclamations, and declarations of the person may be shown."

No doubt a Court is occasionally found excluding this or that piece of conduct [3]; but such rulings, which cannot be defended on principle, are explainable usually as refusals to allow the incorrect impression to be given to the jury that the specific conduct raises a presumption of insanity [4] or has special weight in that direction. Moreover, a court on appeal may properly enough refuse a new trial merely for the rejection below of conduct which was not especially significant; but such decisions are in strictness not rulings upon the admissibility of evidence.

(2) Whether a certain piece of conduct ought to raise a *presumption of insanity* or of sanity, so as to shift the duty of producing evidence or otherwise to have special controlling force with the jury, is a different question, and is not a matter of the mere admissibility of the evidence. Such a question is often raised, for example, with regard to the fact of *suicide*. Rightly considered, "it stands as a fact, with all the other acts of the deceased's life",[5] so far as its admissibility is involved. Nevertheless, it is sometimes ruled upon in terms of admissibility, though the language is even then applied where the question of presumption is the one really raised; such rulings are therefore considered elsewhere (*post*, §§ 2500, 2501), in dealing with presumptions.

(3) Sometimes the condition of insanity is exhibited in a belief which is a *delusion*, and it may thus become necessary, not only to prove the belief, but also to prove the contrary *facts which make it a false and unnatural belief*. [6]

[3] 1895, Taylor *v.* U. S. 7 D.C. App. 27, 34 (accused's conversations in general, and apart from any specific one suggestive of insanity, excluded); 1868, People *v.* Garbutt, 17 Mich. 9, 16 ("unnatural and undue excitement" in a time of battle, excluded); 1918, Reed *v.* State, 14 Okl. Cr. 651, 174 Pac. 800 (murder; certain letters of the accused, held not improperly excluded, in the trial Court's discretion).

[4] See the next paragraph as to this.

[5] 1838, Duffield *v.* Morris, 3 Harringt. Del. 375, 382.

[6] 1889, Burkhart *v.* Gladish, 123 Ind. 337, 42 N. E. 118 (facts to prove a delusion as to the adultery of the testator's wife, admitted); 1898, Manatt *v.* Scott, 106 Ia. 203, 76 N. W. 717 (declarations by deceased that T. had attempted to poison J. and had said that he would poison the deceased, admitted as indicating a delusion); 1912, Lang *v.* Lang, 157 Ia. 300, 135 N. W. 604 (testator's delusion as to his children's misconduct; the actual facts admitted); 1908, O'Dell *v.* Goff, 153 Mich. 643, 117 N. W. 59 (will made under an alleged insane delusion that the contestant-son was illegitimate though born during marriage; the chaste repute of the wife, admitted, as evidence of the fact of legitimacy); 1915, Thayer *v.* Thayer, 188 Mich. 261, 154 N. W. 32 (will made under an insane delusion that testator's wife had been found by him in adultery; the wife's repute for chastity admitted); 1871, State *v.* Jones, 50 N. H. 369, 382 (wife-murder; belief in the wife's adultery, admitted as showing an insane delusion); 1868, Rouch *v.* Zehring, 59 Pa. 78 (denying the doing of a thing which had in reality been done, admitted); 1896, Titus *v.* Gage, 70 Vt. 13, 39 Atl. 246 (alleged insane belief that certain neighbors stole; the good reputation of these neighbors receivable, after proof of their innocence, to show the unreasonableness of the belief).

Distinguish the use of external facts *inducing* or *predisposing to* insanity, *post*, § 231;

When a man says, "I am the Messiah", or "I am the Emperor of the United States", the falsity of the external fact is ascertainable without expressly evidencing it. But when his belief is that a brother is plotting to poison him, or that he is a millionaire, these facts must be expressly evidenced in disproof. Accordingly, as a part of the whole fact constituting the delusion, the external elements may be evidenced. The objection to this is usually that confusion of issues ensues (*ante*, § 42) or that undue prejudice or sympathy will be excited for one or another party concerned (*ante*, § 42); but these possibilities (subject, no doubt, to the trial Court's discretion) cannot be allowed to stand in the way of demonstrating a significant manifestation of mental condition.

In such a case, of course, the opponent may show that the party's belief was *not* a delusion, *i.e.* that the facts believed by him *did exist*.[7]

(4) On the same principle, when conduct is looked to as an index of the rationality of mental operations, all the facts upon which the conduct was based being essential to forming a standard of judgment, the *acts and communications of third persons*, may become relevant, — not as in themselves having value, but as the raw material (as it were) for the mental manufacture of the person in question. When Pharaoh forbad to give the Hebrews "straw to make brick as heretofore," and required that they "go and gather straw for themselves", yet should not "minish aught from your bricks of your daily task", it was in fact not humanly possible to fulfil the new exactions; yet no man could judge whether the people of Israel were idle or were overworked, merely from the fact that their tale of brick was not delivered to their masters. All human action, mental or physical, when judged as to the normality of its accomplishment, depends upon the material and means furnished for action. When Horace Hawes, the insane millionaire of San Francisco, said that Jesus Christ was the greatest man that ever lived, and that he himself was the second in rank, it was easy to judge the irrationality of the latter statement; yet we do not regard Napoleon Bonaparte as irrational because he believed himself the greatest general in the world's history. Just as the greatness of a man's executive achievement must be measured by comparing what he had to do and his means of doing with what he has actually done, so the rationality of his acts is to be ascertained only *by comparing*

here it is not the truth or falsity of the facts that is involved, but merely the receipt of information to that effect.

Compare also the proof of the *falsity of the alleged fact*, as evidence discrediting the witness who testifies to the repute or rumor of it as the source of an insane person's belief (*post*, § 263).

[7] 1921, People v. Lowhone, 296 Ill. 391, 129 N. E. 781 (murder of N.; plea of insanity, that defendant was under a delusion that N. was trying to do bodily harm to defendant, that the townspeople in general were seeking to harm him, and incidentally that he had killed a negro and had served a penal term therefore; the facts of such killing and penal term, allowed to be proved by the State, to negative the existence of the delusions); 1854, Com. v. Wilson, 1 Gray Mass. 337, 339 (murder of A; defence, insane delusion that A was conspiring against defendant; A's expressions of hostility admitted to show his real feelings, as evidence that defendant was not deluded); 1871, State v. Jones, 50 N. H. 369, 382 (the issue being whether the defendant's belief in his wife's adultery was a mere insane delusion, or was founded on rational grounds, particularly rumor, the existence of such a general rumor was received).

the results of his reasoning with the data that lay before him to be reasoned upon.

Accordingly, when *any act* of his is found, *preceded by third person's acts or communications*, the latter are essential to a judgment upon the former. The only requirements to be insisted upon, as necessary assumptions, are that the other person's acts or communications have come to the knowledge of the person in question, and that some act or treatment of them by him has ensued. This application of the principle has been expounded, once for all, in the opinions delivered in the much-argued case of *Wright* v. *Tatham;* where, in spite of irreconcilable difference of detail between the various judges, there was a general recognition of the principle at large: [3]

1837, *Wright* v. *Tatham*, 7 A. & E. 313, 376; 5 Cl. & F. 670, 736, 740. BOSANQUET, J.: "The letters tendered in proof of the testator's capacity are stated to have been found after the testator's death, open and with the seals broken, in a cupboard under a bookcase in the testator's private apartment, among other letters, some of which had been answered, and others indorsed by him. . . . If the testator is shown to have dealt with the letters as a sensible man would deal with them, his doing so will afford evidence of his capacity. But, until it appears that he has acted personally in the matter, there is nothing from which any inference as to his state of mind can be drawn. Capacity or incapacity to make a will is the matter to be ascertained. In other words, the question is whether he has been in a condition to manage his own concerns, or whether his condition has been such that they must necessarily have been managed for him by others. Such being the real question to be tried, no presumption is to be made that any act bearing upon it was either done by the testator or by any other person for him, since the whole value of the act as evidence of the testator's mind depends upon the part which the testator himself has taken in it. The letters may have been opened, arranged, and deposited in the cupboard by the testator himself, or by his steward, attorney, or other agent. The facts are perfectly consistent with either view of the case." PARKE, B.: "There is no direct proof whatever of these acts being done by the testator; and, as to indirect proof, to infer that the testator did the acts, is to assume the very fact to be proved. . . . For the purpose of showing his capacity to make a will, the evidence is offered; and, to prove that, a letter found in the repository, in an open state, with the indorsement of Mr. Barrow upon it, is produced to show that the testator was competent to open the letter and to read it over, and to refer it to his attorney. If it be asked to use all this as indirect evidence, that is, as an inference that he did the acts, how can I so use it, except upon the ground, that, if he was capable of such acts of business, it is to be presumed that he, and not some one else, did this? But that is to assume the degree of competence which the facts are adduced in order to prove. The argument, then, proceeds in a circle,—because he had sufficient ability to do these acts of ordinary business, therefore it is to be inferred that he did them; and because he did them, it is to be also inferred that he was of sufficient ability to do these acts of ordinary business. No such inference can be made without an assumption of the very fact in question." VAUGHAN, J.: "In the first place, it may be asked, is there any evidence of acts done by the testator upon the letters in question, or any one of them? (for any acts of the testator are of course evidence). I am of opinion that there is fair ground for such inference. Certain letters are found in a man's private room, in the cupboard of his bookcase, with the seals broken in company with other letters, some of which have indorsements in his handwriting, and others of which have been answered in his handwriting. Do not all these facts conspire to prove, at least almost irresistibly to invite the conclusion, that the letters in question had their seals so broken and

[3] See this case in another aspect *post*, § 1786.

were perused by him? It has been argued at the bar, that, to raise this presumption, we assume the man's competency, which is the point to be proved. A little reflection will, I think, show this reasoning to be vicious. In the first place, the argument does not assume any competency at all; and, in the second place, the competency which is inferred is not the competency which is disputed, namely, the competency to make a will. . . And I infer that the testator was competent to open the seals and peruse the letters, because the answers and indorsements to the other letters in his handwriting prove him competent so to do, and we conclude that he actually did open and peruse these letters, because the fact of finding them opened in his private drawer, and in the company of letters which he must be taken to have opened and perused, furnishes cogent evidence that he opened and perused these. But we do not thereby even infer him competent to make a will. We conclude him competent to open and read a letter. The opening and perusing a letter are certainly acts, and therefore they stand upon the same footing with all the other acts of a man, and may be properly and primarily admitted. How far they are valuable elements in a body of proof, is another question, quite distinct from the present. . . . Thus we are carried on to the question, whether the contents of the rejected letters, or any of them, can throw any light upon and explain the acts so established; if they can, then of course they may be admitted; if not, they must be rejected. . . . I think I am warranted in saying that the contents of a letter cannot tend to clear up, or explain, or give any stamp of character to any act which does not from its nature import that the party apprehended or misapprehended its contents. . . . So, if it can be shown that a man has done any act in consequence of having read a letter, that letter will be a very valuable instrument to lead the mind to a proper estimate of the purpose or wisdom of such act. In all these cases, there is some act flowing from an apprehension or a misapprehension of the contents of the letter; and the contents are necessary to enable us to form a judgment of the soundness or absurdity of such apprehension. Or, if a person is proved by gestures or words to have shown certain signs of passion or apathy upon reading a letter or hearing some intelligence, then those gestures or words, or that apparent disregard, will prove how he apprehended such contents; and such contents may therefore be received to lead us to an opinion of his temper or his sanity. But, in such cases, it is not the perusal of the letter, but the acts and conduct at the perusal, which are illustrated by the subject-matter of the letter; and there must be evidence of some such acts or states of mind, in order to justify the admission of such declarations. In some cases, indeed, the mere omission to do anything upon the receipt of intelligence, might be proof of a state of mind. In the present case, then, there is no fact presented to us but that of mere perusal and casting the eye over the contents. There is nothing, as applied to two of the letters, on which we can fairly found the presumption, that Mr. Marsden acted as upon an apprehension of what they contained."

(5) In the foregoing sort of evidence, the *Hearsay rule* forms no objection to admitting the communications of third persons, because they are received without reference to the truth of their statements and without any credit being given to them testimonially; they are therefore not obnoxious to the Hearsay rule (as noted more fully *post*, § 1789).[9] The same objection may also be made to receiving the *utterances of the person himself* (accused, testator, or the like) whose sanity is in question; and the answer is the same. Such utterances are not received as testimonial assertions by him to prove the

[9] The following cases show the distinction: 1909, Snell *v.* Wilson, 239 Ill. 279, 87 N. E. 1022 (cited more fully *post*, § 260, n. 1); 1910, Clifford *v.* Taylor, 204 Mass. 358, 90 N. E. 862 (testimony that a third person, an attorney, refused to make a will for testatrix until a medical man approved, excluded); 1909, Fraley *v.* Fraley, 150 N. C. 501, 64 S. E. 381 (announcement of neighbors' views as to a property settlement of testator, made formally to the testator, admitted as evidence of his mental capacity).

facts asserted therein, but as indicating circumstantially the operations of his mind; accordingly, it is no violation of the Hearsay rule to receive them (*post*, § 1790)

(6) On the general principle of Relevancy (*ante*, § 34), any piece of conduct offered as indicating insanity may be explained away as equally or more consistent with some other hypothesis. That which appears to be an irrational act or utterance may, in the light of certain facts, be rational, or may be the result of some other abnormal mental condition than insanity (such as fever or intoxication). These *explanatory facts* are thus always admissible, providing only that they have in some degree an explanatory significance.[10] This much is indisputable, and is merely a simple application of a general principle.

But there is a larger application of it in the present relation; for since insanity or sanity is the relation of the mind as a whole to life as a whole, and since the grades and distinctions between eccentricity and insanity are sometimes difficult to interpret, the operation of the mind in a single instance may be explainable, not merely by other facts and conduct at that very time, but also by facts and conduct at a different time. The mental operation at the moment may seem irregular, and an inference of general irregularity might thence be drawn; but, when noticed at other times, it may be perceived to be regular enough on the whole. A larger scope of observation must often be taken in order to negative the erroneous inference from single acts that the whole, if known, would be similar to the single acts. This larger group of data, then, may properly be considered in order to explain away the apparent inference from isolated acts:

1858, CLIFFORD, J., in *U. S.* v. *Holmes*, 1 Cliff. 98, 109: "One of the suggestions . . . was that the government, in attempting to rebut the testimony offered by the prisoner on this point [of insanity] should have been limited to the explanation or denial of the particular transactions, acts, conduct, and declarations introduced by the prisoner to make out his defence. . . . [It] cannot be sustained. Most men in the course of their lives, in times of excitement produced by disease or otherwise, do many strange and peculiar acts, and oftentimes give utterance to eccentric or unusual language; and it is obvious that if a person accused of crime may select and offer in evidence all the dark spots of his life, or every peculiar and unusual act and declaration, and be allowed to exclude all the rest, that many guilty offenders must escape and justice be often defeated, because the means of ascertaining the truth are excluded from the jury. . . . [Whenever the accused has offered his acts, conduct, and declarations, before and after the homicide,] the government may offer evidence

[10] 1922, People *v.* Valcalda, — Cal. —, 205 Pac. 452 (homicide; former quarrelsome conduct admitted, to rebut insanity-evidence); 1863, Hopps *v.* People, 31 Ill. 385, 388 (wife-murder; the defendant's coolness and unconcern at the deed being offered as evidence of insanity, the prosecution was allowed to show that he "had spent years of his early life in a perilous calling", namely, smuggling, "demanding at all times great coolness and hardihood, and therein . . . learned the deportment exhibited by him on this occasion"); 1876, Ross *v.* McQuiston, 45 Ia. 147 (a testator had made two wills at different times, and the contestants, after showing insanity at the time of the first, offered it as indicating by its rational character that the rationality of the second will was not conclusive of sanity at the time); 1894, People *v.* Miles, 143 N. Y. 383, 38 N. E. 456 (to explain away strange conduct, the fact of intoxication at the time was received); 1867, Wood *v.* Sawyer, Phillips N. C. 275 (peculiar conduct being offered to show insanity at the time, it was evidenced that these peculiarities were normal traits present even at times of conceded sanity).

of other acts, conduct, and declarations of the accused within the same period to show that he was sane and to rebut the evidence introduced by the defence."

This principle finds constant application in evidencing *a testator's susceptibility to undue influence* (*post*, § 1738).

§ 229. **Same: Testamentary Capacity.** That any and all conduct may be indicative of Sanity or Insanity is equally true for *testamentary capacity* as for criminal capacity. There is, to be sure, a different legal standard of capacity for the two situations, and accordingly more emphasis and legal significance will attach to certain kinds of cases in the one instance than in the other. Moreover, certain forms of mental abnormality might conceivably be excluded altogether from consideration by the definition of the substantive law; but the evidence to prove them would then be excluded because the facts to be proved by it would be immaterial and not because of the law of evidence (*ante*, § 2). The chief questions that arise specially in the proof of insanity as affecting testamentary capacity are thus rather a consequence of its special definition in the substantive law rather than of any difference on the rules of Evidence. Only two of these seem worth noticing here, namely, the facts of former testamentary plans and of disinheritance of relatives in the will in issue. These two need special notice because such facts have other evidential uses which ought to be distinguished from the present one.

(1) The testator's capacity may be indicated, among other things, by his *method of dealing with his property and other affairs*. Whether they are treated by him intelligently or otherwise will be significant of capacity.[1] In particular, his *plans*, *conversations*, and *acts* (independently of the actual execution of the will) in reference to the *disposition of his property after death* will indicate whether his treatment of the subject is intelligent. Such facts are therefore admissible, like all other conduct, as bearing on his capacity at the time:[2]

1890, VANDERBURGH, J., in *Hammond* v. *Dike*, 42 Minn. 273, 44 N. W. 61 (admitting the fact that the testator, a week before his death, "had arranged to have his will changed in the way it was changed by the codicil [made on his death-bed] and his declarations on that subject"): "The question was substantially . . . whether he was able to and did comprehend the nature and effect of the transaction in its different bearings, including the subject-matter and the effect of the testamentary act upon his heirs and legatees named

§ 229. [1] Examples: 1893, Barker's Appeal, 63 Conn. 393, 412, 27 Atl. 973 (testator's diaries received); 1895, Bower *v.* Bower, 142 Ind. 194, 41 N. E. 523 (that the testator did not attend in person to his business, admitted); 1906, Swygart *v.* Willard, 166 Ind. 25, 76 N. E. 755 (statements as to property given to a child, admitted); 1907, Smith *v.* Ryan, 136 Ia. 335, 112 N. W. 8 (testatrix' declarations admitted to show senile dementia); 1886, Woodcock *v.* Johnson, 36 Minn. 217, 218, 30 N. W. 894 (testator's acts and declaration "tending to show his comprehension or non-comprehension of daily occurrences in his business", admitted); 1917, Wheeler *v.* McKeon, 137 Minn. 92, 162 N. W. 1070 ("business acts" and declarations showing comprehension of business transactions, admissible);

The following ruling is correct: 1917, Raymond *v.* Flint, 225 Mass. 521, 114 N. E. 811 (that handwriting is evidence of arteriosclerosis or senility, admissible, from one who is expert in insanity though not in handwriting).

[2] 1899, Nieman *v.* Schnitker, 181 Ill. 400, 55 N. E. 151 (previous wills at a sane period, admitted); 1922, Wright *v.* Upson, 303 Ill. 120, 135 N. E. 209 (testator's capacity; prior wills, admissible to evidence capacity, if "in substantial conformity with the provisions of the contested will" and if made at a time of mental soundness.

in the prior will. A testator may be of sound disposing mind and memory sufficient to sustain a will executed by him, though the state of his health and consequent mental condition may be unequal to business transactions of a more exacting nature; and his strength might hold out for the completion of a transaction involving but few details, and requiring his attention but a short time, while it would be insufficient for the disposition of a large estate under an elaborate will. Certainly, then, in determining the question of the capacity of the testator to understand the situation in which he stood in relation to the disposition of his estate, whether the subject was new or familiar to his thoughts, and what his previous intentions may have been, as shown by his acts or declarations, were important and material matters for the consideration of the jury. . . . If, then, the testator, in this instance, contemplated a change in the terms of his will, in view of an accession to his property, and had manifested his purpose so to do a short time before his sickness, these things would be material to be considered in determining whether he was able to understand, and did understand, the nature of the business in which he was engaged at the time he executed the codicil, and the scope and effect of the transaction. . . . Such declarations, especially if recent, inform the jury of the state of mind of the testator when confessedly sound, and so aid in determining whether the instrument is the product of the same will."

This use of prior testamentary plans and the like is to be distinguished from their use to show that he *did or did not execute* a certain disputed will or make a certain disputed alteration (*ante*, § 112, *post*, § 1735), or to show whether he intentionally destroyed a will be way of revocation (*post*, §§ 1737, 1782), or to show whether a will charged to have been made under undue influence conforms to his *normal wishes and plans* (*post*, § 1738). These are all legitimate evidential uses, but they rest in each instance on different principles and perform different services.

(2) That the testator has omitted, or disfavored, or expressly *disinherited certain near relatives* who might have been expected to be his chief beneficiaries is a circumstance having some bearing upon his mental condition. The provisions of the will in this respect, however, are not in themselves the evidential facts. Taken alone, they are colorless; it is only in comparison with the state of his relationships, that they become significant. If a will read, "I bequeath all my property to Joan of Arc, Maid of Orleans", our general knowledge supplies a fact which marks this bequest as a mental aberration. But if he bequeaths all "to my friend John Smith", and the facts are that John Smith is a well-to-do man, while an amiable wife and a large family of children are left totally unprovided for by the testator, it is only after comparison of these facts with the bequest that we infer a mental lack of balance. In short, the facts of the testator's family relationships are material to establish a standard of normal testamentary terms, — such terms as a rational man would presumably have sanctioned, and it is only after obtaining such a standard that it is possible to make inferences as to the rationality of the terms of the will. It is to this end that the facts of family relationship are considered: [3]

[3] 1859, Stubbs *v.* Houston, 33 Ala. 564 (unnatural distribution of property, admissible); 1861, Fountain *v.* Brown, 38 Ala. 74 (same); 1810, Swift, Evidence, Conn., 140 ("If the disposition of the estate be very unreasonable and improper, as giving it to strangers, or all to one

1820, GIBSON, J., in *Patterson* v. *Patterson*, 6 S. & R. 55: "Where a will is impeached for imbecility of mind in the testator, together with fraudulent practices by the devisees, the intrinsic evidence of the will itself, arising from the unreasonableness or injustice of its provisions, taking into view the state of the testator's property, family, and the claims of particular individuals, is competent and proper for the consideration of the jury. The issue 'devisavit vel non' involves the validity of the execution, and not the contents; yet, the contents, so far as they have a bearing on the question of execution, are pertinent, and with this view, the whole will is usually read. But the particular provisions of the will could have no practical influence on the question, without evidence of the circumstances and condition of the testator's family and property; for it is only by a comparison of these with each other, that an inference arises, as to the sanity of his mind, and its freedom of action. To justify a jury in invalidating a will, from its intrinsic evidence only, would require an extreme case, perhaps such as never can occur; but the disposition of the property may be so utterly absurd or unjust, as to induce a reasonable belief, that no man in his senses, and uncontrolled by an improper influence, would make it; and there may be cases, where this internal evidence, added to other proof, which would, of itself, leave the question doubtful, ought to turn the scale. In fact, the evidence of practice on the intellect of a weak man, is usually compounded of ingredients so various in their nature, and remote in their consequences and connexion, that the question of relevancy is often of very difficult solution. In such a case, the Court should lean in favor of admitting the evidence, to enable the jury to judge from a consideration of all the circumstances."

1833, BUCHANAN, C. J., in *Davis* v. *Calvert*, 5 G. & J. 269: "It is not of itself sufficient to avoid a will or testament, that its dispositions are imprudent, and not to be accounted for. But a will or testament may, by its provisions, furnish intrinsic evidence involving it in suspicion, and tending to show the incapacity of the testator to make a disposition of his estate with judgment and understanding, in reference to the amount and situation of his property, and the relative claims of the different persons who should have been the objects of his bounty — such as a disposition of his whole estate, to the exclusion of near and dear relations, having the strongest natural claims upon his affection, a wife and children, for instance, or other near relations —, without any apparent or known cause, which alone would be a suspicious circumstance, although not furnishing *per se* sufficient ground

child, this will be a strong circumstance from whence to infer undue influence and want of understanding"); 1893, Crandall's Appeal, 63 Conn. 365, 28 Atl. 531 (approving the above passage); 1867, Roe *v.* Taylor, 45 Ill. 485 (prior will rejected as being of no value under the circumstances); 1868, Crum *v.* Thornley, 47 Ill. 192, 198 (principle conceded); 1902, Webster *v.* Yorty, 194 Ill. 408, 62 N. E. 907; 1906, Waters *v.* Waters, 222 Ill. 26, 78 N. E. 1; 1906, Dillman *v.* McDanel, 222 Ill. 276, 78 N. E. 591; 1854, Addington *v.* Wilson, 5 Ind. 137 (see quotation *supra*); 1889, Conway *v.* Vizzard, 122 Ind. 266, 270, 23 N. E. 771 (a testator's giving more to nieces and nephews than to sisters, no evidence of insanity, apart from other facts); 1894, Sim *v.* Russell, 90 Ia. 656, 57 N. W. 602 (unnatural distribution of property, admissible); 1894, Denning *v.* Butcher, 91 Ia. 429, 59 N. W. 70 (same); 1895, Bever *v.* Spangler, 93 Ia. 576, 61 N. W. 1080, *semble* (same); 1898, Manatt *v.* Scott, 106 Ia. 203, 76 N. W. 717 (same); Townsend's Estate, 122 Ia. 246, 97 N. W. 1108 (but here the instruction is misconstrued); 1833, Davis *v.* Calvert, 5 G. & J. (Md.) 269 (see quotation *supra*); 1906, Meier *v.* Buchter, 197 Mo. 68, 94 S. W. 883; 1916, Williams' Estate, 52 Mont. 192, 156 Pac. 1087 (an "unnatural disposition of the property" is evidence); 1828, Clark *v.* Fisher, 1 Paige Ch. N. Y. 171 ("the will itself is unreasonable on its face, when taken in connection with the amount of his property and the situation of his relatives, and this is always proper evidence to be taken into consideration in judging of the state of the testator's mind"); 1897, Burns' Will, 121 N. C. 336, 28 S. E. 519 (that a testator had disinherited his seven children, admissible).

Occasionally a Court is found rejecting such facts merely because in the circumstances they do not enlighten, or declaring them in effect not to raise a presumption of incapacity: 1889, Spratt *v.* Spratt, 76 Mich. 384, 391, 43 N. W. 627 (facts of kinship may be shown "as bearing upon the question of mental capacity"; but the omission of certain relations "is not an indication of mental incapacity"); 1892, Couch *v.* Gentry, 113 Mo. 248, 256, 20 S. W. 890 (that omitted children had worked in the fields, excluded); 1892, Maddox *v.* Maddox, 114 Mo. 35, 41, 21 S. W. 499 (similar).

for setting aside the instrument. This is but a single example, and not given as the only one, calculated to excite suspicion of the competency and freedom to act of a testator. The contents, therefore, of the will or testament itself, and the manner in which it was written and executed, together with the nature and extent of the estate of the testator; his family and connections; their condition and relative situation to him; the terms upon which he stood with them, and the claims of particular individuals; the condition and relative situation of the legatees or devisees named; the situation of the testator himself, and the circumstances under which the will or testament was made, are all proper to be shown to the jury, and often afford important evidence in the decision of the question of incapacity. And sometimes, if taken altogether, may, according to the degree of the injustice, absurdity, or unreasonableness of the dispositions attempted to be made of the property, tending to induce a reasonable doubt of the necessary sanity of the maker, and of his free agency uncontrolled by some undue influence, and the nature of the attending circumstances, and condition, and conduct, and character of those around him, justify a jury in deciding against the validity of the instrument, when its provisions, standing alone, unattended by such circumstances, or not coupled with them, would not be sufficient."

1841, VERPLANCK, Sen., in *Stewart* v. *Lispenard*, 26 Wend. 255, 313: "If the testamentary disposition be in itself consistent with the situation of the testator and in congruity with his affections and previous declarations; if it be such as might naturally have been expected from one so situated, this is itself rational and legal evidence of no small weight to testamentary capacity; whilst the reverse will alone furnish occasion of doubt, demanding other evidence to refute it. The rationality of the act goes to show the reason of the person."

1854, PERKINS, J., in *Addington* v. *Wilson*, 5 Ind. 137: "By our law, a person competent to make a will may entirely disinherit his children if he pleases to do so; nor can his motives for such an act, where it is done, be called in question. The right is absolute to dispose of all one's property, over and above the portion required to pay debts and expenses. The hardship of the case, therefore, when the children are disinherited, is of no weight further than a circumstance for the consideration of the jury in connection with the other evidence submitted tending to show insanity or other mental defect."

This use of such facts to evidence incapacity is generally conceded as proper. It is desirable, however, to distinguish it from sundry other use of analogous facts to evidence Undue Influence; these are noted in the ensuing section.

§ 230. **Same: Undue Influence.** The making of a will under influence signifies that the testator's mind was capable of being and was in fact so subjected to the control of another person that the former did not follow his own normal wishes and plans but yielded to the latter's volition. For the purpose of evidencing this condition, various sorts of facts are relevant, but the chief questions about them arise in connection with the Hearsay rule, and they need be noted here only in order to distinguish them from the foregoing classes of evidence on the issue of mental incapacity.

(*a*) The *facts of family relationship*, in comparison with the will's actual provisions, may be considered not only (as above) on the issue of sanity, but also on the issue of undue influence.[1] The latter issue presupposes a due or

§ 230. [1] 1891, Eastis *v.* Montgomery, 95 Ala. 486, 492, 11 So. 204 (possession of property by omitted grandchildren, admissible as tending to show that "this exclusion was not unnatural"); 1903, Yorty *v.* Webster, 205 Ill. 630, 68 N. E. 1068 (unequal distribution is some evidence); 1892, Maddox *v.* Maddox, 114 Mo. 35, 46, 21 S. W. 499 ("unjust discrimination" held not to "raise an inference" of undue influence); and cases cited in the foregoing section.

normal standard of disposition which the testator might be expected to observe; and when a deviation is found, a possible inference is that the deviation was due to undue pressure.

(*b*) The *testator's conduct and utterances*, exhibiting *dislike*, *fear*, *anger*, or their opposites, towards particular persons, may serve to indicate his general condition of susceptibility to influence in certain quarters, and may thus be put in evidence for that purpose, in spite of the Hearsay rule (*post*, § 1738).

(*c*) The testator's prior and subsequent *testamentary plans and wishes*, as gathered from his conduct and utterances, may serve to indicate his normal testamentary attitude, which presumably would have been given effect in the will in issue, had no undue pressure been exerted. These may therefore be considered, in spite of the Hearsay rule, in order to reach a standard for judging of the undueness or abnormality of the will (*post*, § 1738).

(*d*) The testator's prior or subsequent *assertions as to the fact of undue influence* or of urgency or threats are usually excluded, because their natural but improper use would be to serve as mere testimonial assertions, inadmissible under the Hearsay rule (*post*, § 1738).

§ 231. (2) **Insanity, as evidenced by Predisposing Circumstances.** As human conditions of every sort are created or influenced by external environment, so too the diseased mental condition which we term insanity may be precipitated, intensified, or otherwise affected by external events coming to the apprehension of the person. Accordingly, *circumstances calculated to induce* this mental condition may always be admitted to evidence the probability of such affection; the only limitation is that the circumstance be in itself capable in some degree of producing such an effect, that it came to the person's knowledge, and that some further foundation for probability be laid by other evidence that there was a diseased mental condition: [1]

1891, PECKHAM, J., in *People* v. *Wood*, 126 N. Y. 249, 259, 27 N. E. 362 (admitting evidence that a defendant, charged with killing his father-in-law, and now defending on the ground of insanity, had been told by his wife, a week before the killing, of an incestuous rape upon her by the father, the purpose being to show "an adequate cause for the state of mind existing subsequent to the communication, and . . . that in truth such communi-

§ 231. [1] CANADA: 1915, R. *v.* Hawkes, 25 D. L. R. 631, Alta. (wife's killing of husband's alleged paramour; plea of insanity; husband's confession of infidelity, made to the accused his wife, held inadmissible, for lack of "other evidence that there was a diseased mental condition"; citing the above text with approval); UNITED STATES: 1871, Sawyer *v.* State, 35 Ind. 80, 83 (wife-murder; the wife's adultery not admitted to show insanity without concurrent evidence of insane conduct; see quotation *supra*); 1911, People *v.* Bowen, 165 Mich. 231, 130 N. W. 706 (wife-murder; rumors of her infidelity, brought to the accused, and conduct of hers, personally known to him, admitted, to evidence his mental disturbance; but not her actual misconduct not known to him); 1891, People *v.* Wood, 126 N. Y. 147, 27 N. E. 362 (see quotation *supra*); 1912, People *v.* Garfalo, 207 N. Y. 141, 100 N. E. 698 (reports of the murdered wife's infidelity, here excluded because the homicide was deliberate and "not in the heat of an overmastering passion"); 1910, State *v.* Greene, 152 N. C. 835, 68 S. E. 16 (insanity as a plea in homicide; the defendant's wife's communication to him of a rape by the deceased, admitted, but not the fact of the rape); 1920, Bereal *v.* State, 88 Tex. Cr. 138, 225 S. W. 252 (murder of wife's paramour; the fact of the paramour's insulting words and conduct as well as the communication of them, held admissible, to show passion as reducing the offense to manslaughter).

cation acting upon a diseased and weakened brain produced insanity at the time of the commission of the crime"): "It is not disputed that a fall on the head, a physical injury to the brain, or other physical and sufficient cause for insanity, can be proved. . . . Any material fact which might account for or naturally lead to insanity at that moment may be proved. Why should not the defendant have the right to prove a moral cause which might act upon a brain already diseased and might result in insanity as naturally as blows upon the head? This, in connection with evidence tending to show insanity at the time of the act done, is proper. . . . In fine, the evidence is admitted on the ground that it is corroborative, more or less strongly, of the mental condition which the other and separate evidence in the case tends to prove."

1871, WORDEN, J., in *Sawyer* v. *State*, 35 Ind. 80, 84: "[It is claimed] that inasmuch as the infidelity of the deceased [wife, killed by the defendant], was a great wrong inflicted upon the defendant, and inasmuch as his mind would protractedly dwell upon the subject, the evidence was competent as tending to show the existence of an exciting cause of insanity. This argument assumes that a jury may infer the existence of insanity from proof merely of a cause that may tend to produce it, without any proof whatever that the effect followed the cause. If it were a case where a given effect *must* follow a cause, there would be force in the argument, because proof of the cause would be proof of the effect. But we know that the various causes that *may* tend to produce insanity very frequently fail to produce any such effect; and it seems to us that it is not competent to prove the existence of such exciting cause unaccompanied with some [other] proof that the effect followed the cause."

It follows that the significance of such a fact can be *explained away* (on the principle of § 228, par. 6, *ante*) by conduct of the person showing that his *mind was not susceptible* to an influence from such circumstances.[2]

Distinguish the present sort of evidence from that noted in § 228, par. 3, *ante;* there the delusion being the material thing, the falsity of the facts believed by him is essential; here, however, it is the belief alone that is material, whether or not the facts were as believed or not; accordingly, a rumor or reputation may suffice to create the belief, whether or not there be a foundation of fact.

Distinguish also the principle of § 263, *post*, that the non-existence of the fact said to have been reputed or rumored, and thus to have caused a certain belief or deranged condition is evidence to *discredit the witness* who testifies to the repute or rumor.

§ 232. **Same: Hereditary Insanity.** That insanity of some varieties may be and even tends to be transmitted to descendants is an accepted pathological fact. Moreover, since it is equally true that it may pass over a genera-

[2] 1894, People *v.* Lane, 101 Cal. 513, 517, 36 Pac. 16 (murder; to disprove that the defendant's mind had been preyed upon, to the degree of derangement, by the belief that the deceased was trying to ruin his daughter, evidence, as admitted of the incest of defendant and his daughter); 1922, State *v.* Herring, — S. C. —, 110 S. E. 668 (murder of alleged paramour of wife; defense insanity on hearing wife's confession; prior hearing of other unchastity of his wife, admitted in rebuttal).

Contra, but clearly unsound: 1901, State *v.* Kirby, 62 Kan. 436, 63 Pac. 752 (murder of alleged seducer of defendant's daughter; to rebut the defendant's alleged mental excitement over the seduction, the prosecution was not allowed to prove the daughter's prior reputation for unchastity); 1896, People *v.* Strait, 148 N. Y. 566, 42 N. E. 1045 (wife-murder; after evidence of separation, offered to show a cause of insanity, evidence of adultery while separated from a prior wife, offered to show that the subsequent separation from the second wife could not have caused his mind to become unbalanced, was rejected).

tion or an individual before reappearing, it follows that insanity in collateral relatives may indicate an anterior ancestral tendency capable of appearing in other collateral branches. It seems to be generally conceded that ancestral and perhaps collateral insanity may therefore be put in evidence. Yet the irregularity of its operation, its frequent dependency on external provoking circumstances as a condition of bringing it into activity, and the possibilities of too much weight being given to its probative value, have led the Courts, almost unanimously, to impose some limitations on its admissibility.[1]

§ 232. [1] The various limitations suggested are illustrated in the following rulings, many of which are virtually based only on the facts of the case in hand and should not serve as precedents: ENGLAND: 1760, Earl Ferrers' Trial, 19 How. St. Tr. 932, 937 (ancestral insanity admitted); 1813, M'Adam *v.* Walker, 1 Dow 148, 161, 167, 177 (left undecided; termed by Lord Eldon, L. C., a "very delicate question"; but most questions were to his mind delicate ones); 1838, Doe *v.* Whitefoot, 7 C. & P. 270, Gurney, B. (sister's insanity, excluded); 1840, R. *v.* Oxford, 9 C. & P. 525, 538, 547, 4 State Tr. N. S. 497, 528 (before three judges; insanity of accused's grandfather, father, and brother, admitted); 1844, R. *v.* Tucket, 1 Cox Cr. C. 103 (see quotation *supra*).

UNITED STATES: *Federal:* 1858, U. S. *v.* Holmes, 1 Cliff. 98, 109, 110 (unspecified "hereditary insanity", admitted); 1915, James *v.* State, 193 Ala. 55, 69 So. 569 (murder; insanity of defendant's mother and her sister, excluded on the facts);
Arkansas: 1898, Green *v.* State, 64 Ark. 523, 43 S. W. 973 (admissible only after evidence of insane conduct);
California: 1866, People *v.* Smith, 31 Cal. 466 (insanity of mother and aunt, held admissible, other evidence of "personal insanity" being in the case);
Columbia (Dist.): 1881, Guiteau's Trial, I, 520, II, 1386, *et passim* (the insanity of Guiteau's father and near relatives was allowed to be evidenced); 1900, Snell *v.* U. S., 16 D. C. App. 501, 511 (insanity in a second cousin, held inadmissible);
Connecticut: 1880, State *v.* Hoyt, 47 Conn. 518, 540 (sister's insanity admitted, and cross-examination to show it not from hereditary causes);
Idaho: 1905, State *v.* Wetter, 11 Ida. 433, 83 Pac. 341 (principle approved);
Illinois: 1862, Snow *v.* Benton, 28 Ill. 306, *semble* (insanity of a mother, admitted); 1874, Meeker *v.* Meeker, 75 Ill. 260, 270 (paralysis of ancestors and near relations, excluded, because the testator's affection by paralysis was not disputed; "had it been a question of doubt, . . . we could see its pertinency"); 1883, Upstone *v.* People, 109 Ill. 169 (insanity of mother, sister, three brothers, and mother's sisters, admitted); 1906, Dillman *v.* McDaniel, 222 Ill. 36, 78 N. E. 591 (insanity of a paternal aunt of the testator, lasting only eighteen months, admitted, there being other evidence of the testator's insanity: the Court's opinion cites cases from other jurisdictions, but ignores the foregoing three from its own jurisdiction; this is censurable); 1912, Martin *v.* Beatty, 254 Ill. 615, 98 N. E. 996 (insanity of two brothers, two sisters, and a nephew, held improperly excluded);
Indiana: 1869, Bradley *v.* State, 31 Ind. 492, 495, 503, 510 (insanity of a half-sister, mother, her twin brother, and a cousin, admitted, but only in connection with other evidence of insane conduct of the defendant); 1871, Sawyer *v.* State, 35 Ind. 80, 84 (preceding case approved; see quotation *supra*);
Iowa: 1868, State *v.* Felter, 25 Ia. 75 (insanity of ancestors, admissible); 1876, Ross *v.* McQuiston, 45 Ia. 147 (parental insanity, admissible); 1894, Sim *v.* Russell, 90 Ia. 656, 57 N. W. 601 (same); 1894, Denning *v.* Butcher, 91 Ia. 425, 59 id. 70 (same); 1897, State *v.* Van Tassel, 103 Ia. 6, 72 N. W. 497 (admissible as cumulative only, accompanying other evidence); 1899, State *v.* Robbins, 109 Ia. 650, 80 N. W. 1061 (murder; epilepsy of defendant's mother and brother and insanity of another brother, admitted);
Maine: 1885, St. George *v.* Biddeford, 76 Me. 598, *semble* (admissible);
Maryland: 1902, Berry *v.* Safe D. & T. Co., 96 Md. 45, 53 Atl. 720 (insanity in other members of the family, held inadmissible except after evidence of insanity in the person in issue); 1920, Mitchell *v.* Slye, 137 Md. 89, 111 Atl. 814 (testator's capacity; Berry *v.* Safe D. & T. Co. followed);
Massachusetts: 1868, Com. *v.* Andrews, Davis' Rep. 133 (murder; insanity of various ancestral relatives, admitted); 1868, Shailer *v.* Bumstead, 99 Mass. 112, 131 (paralysis, etc., of "several of the family of the testatrix", not admitted because of lack of foundation; but a proof of hereditary insanity is competent in support of evidence of the existence of insanity in any given case);
Michigan: 1868, People *v.* Garbutt, 17 Mich. 9, 17 (insanity of a brother, admitted; see quotation *supra*);
Minnesota: 1895, State *v.* Hayward, 62 Minn. 474, 65 N. W. 63 (ancestral insanity, admissible only to corroborate other and more direct evidence);

These limitations, in general, may be gathered from the following passages; it will be seen that no clear settlement of them has been reached, except on the point that there must be some other accompanying evidence of insanity by conduct-manifestations (*ante*, § 234) on the part of the person himself:

1844, MAULE, J., in *R.* v. *Tucket*, 1 Cox Cr. 103 (receiving evidence of the insanity of a maternal grandfather): "It is a matter of fact and not a matter of law, that insanity is often hereditary in a family; but I think you should prove that in the first instance by the testimony of a medical man, and then your question will be legitimate."

1856, THOMAS, J., in *Baxter* v. *Abbott*, 7 Gray 71: "With the fact that the father and mother or either of them had been insane, that the insanity had appeared in them about the same age and in same form, its existence in the child is rendered more probable and is believed upon less perfect evidence. The transmission of this predisposition to insanity is matter of general observation, and is recognized by the best medical authorities."

1859, PEARSON, J., in *State* v. *Christmas*, 6 Jones L. 471, 474: "[Hereditary insanity] would only be one link in the chain, and would not 'per se' establish the fact. . . . [The authorities being conflicting, yet] thus far the way seems to be clear. In order to render it admissible, the species of insanity which is alleged and that which is offered to be proved in respect to members of the family must be of the same character; and the instances to be proven must have been notorious, so as to be capable of being established by general reputation, and not left to depend upon particular facts and proof about which witnesses may differ and the consequence of which would be to run off into numberless and endless collateral issues, so that in trying the question as to the insanity of one, the supposed insanity of half a dozen would be drawn in."

1868, COOLEY, C. J., in *People* v. *Garbutt*, 17 Mich. 9, 17: "That insane tendencies are transmitted from parent to child there is now no longer a doubt; and though it was once ruled that proof that other members of the same family have decidedly been insane is not admissible either in civil or in criminal cases, yet this ruling has been rejected as unphil-

Mississippi: 1913, Prewitt *v.* State, 106 Miss. 82, 63 So. 330 (insanity of blood relatives, admitted; that the tendency to insanity is hereditable need not be expressly evidenced);
Missouri: 1878, State *v.* Simms, 68 Mo. 305, 309 (insanity of aunt and sisters, held proper to be considered, even though no other evidence "directly" tended to prove insanity); 1887, State *v.* Pagels, 92 Mo. 307, 4 S. W. 931 (insanity of persons not shown to be connections, held not "material", as ground for a continuance); 1899, State *v.* Soper, 148 Mo. 217, 49 S. W. 1007 (insanity of collateral kindred, rejected on the facts); 1917, State *v.* Rose, 271 Mo. 17, 195 S. W. 1013 (forgery; insanity of the defendant's mother's uncle, excluded);
New Jersey: 1846, State *v.* Spencer, 21 N. J. L. 196, 203, *semble* (admissible); 1921, State *v.* James, — N. J. L. —, 114 Atl. 553 (murder; family history showing a "taint of insanity", not admitted merely to induce the jury's recommendation of lesser punishment);
New York: 1882, Walsh *v.* People, 88 N. Y. 467 (insanity of "parents or relatives", admissible "in aid or corroboration of other proof"); 1906, Myer's Will, 184 N. Y. 54, 76 N. E. 920 (general paresis of the testatrix' mother and brother, excluded for lack of evidence that the particular form was hereditary or transmissible); 1906, Pringle *v.* Burroughs, 185 N. Y. 375, 78 N. E. 150 (ancestral or collateral insanity, not admitted without conduct-evidence of the person himself);
North Carolina: 1859, State *v.* Christmas, 6 Jones L. 471, 474 (see quotation *supra*); 1875, State *v.* Cunningham, 72 N. C. 469, 474 (insanity of uncles and aunts excluded, where there was no insane conduct of the accused himself in evidence; see quotation *supra*);
Pennsylvania: 1877, Laros *v.* Com., 84 Pa. 204, 209 (quoted *supra*); 1909, Com. *v.* Snyder, 224 Pa. 526, 73 Atl. 910 (Laros *v.* Com. approved); 1919, Com. *v.* Dale, 264 Pa. 362, 107 Atl. 743 (insanity in an ancestor need not first be shown before offering insanity in collaterals; but in criminal cases insanity in the accused himself must first be evidenced, and also the hereditary nature of the specific form of insanity found in the collaterals; and the testimony to insanity in collaterals must be based on personal observation;
Tennessee: 1875, Hagan *v.* State, 5 Baxt. 615 (insanity of a brother admitted, there being evidence of the accused's insane conduct);
Vermont: 1896, Titus *v.* Gage, 70 Vt. 13, 39 Atl. 246 (intemperance of parent, without medical testimony to its significance, inadmissible).

Compare § 165, *ante*.

osophical and unsound, and it is now allowed to prove the insanity of either parent, — or even of a more remote ancestor, since it seems well established that insanity sometimes disappears in one generation and reappears again in the next. . . . [In this case, insanity of a brother was admitted.] It sometimes occurs that persons in vigorous health and correct habits, who have nevertheless entered into a marriage which violates some physiological law, may become parents of weak and diseased children only, so that insanity enters the family for the first time in the person of the children, but through qualities derived exclusively through the parentage. . . . If a family of several children should be found without known cause to be idiotic or subject to mental delusions, the inference of hereditary transmission would in many cases be entirely conclusive, notwithstanding the inability to point out anything of a similar character in any ancestor. Insanity in a part of the children only would be less conclusive; but the admissibility of the evidence in these cases cannot depend upon its quantity, and it could never be required that it should amount to a demonstration."

1875, BYNUM, J., in *State* v. *Cunningham*, 72 N. C. 469, 474: "It is held admissible in corroboration. . . . To allow such evidence to go to the jury as independent proof of the insanity of the prisoner would be of the most dangerous consequence to the due administration of criminal justice; since there are but few persons, it is ascertained, who have not had ancestors or blood relations, near or remote, affected by some degree of mental aberration. To admit such testimony, then, under the conditions set forth in this case, would break down the strongest barriers to crime established by the laws of evidence as heretofore understood."

1877, AGNEW, J., in *Laros* v. *Com.*, 84 Pa. 200, 209: "A Court is not bound to hear evidence of the insanity of a man's relatives . . . [or other collateral or secondary evidence] as grounds of a presumption of possible insanity, until some evidence has been given that the prisoner himself has shown signs of his own insanity."

§ 233. (3) **Prior and Subsequent Insanity**. A condition of mental disease is always a more or less continuous one, either in latent tendency or in manifest operation. It is therefore proper, in order to ascertain the fact of its existence at a certain time, to consider its existence at a prior or a subsequent time. The degree of continuity varies infinitely in various cases, and hence there can be little certainty in the inference from one period to another. Nevertheless, since it can never be known beforehand to what variety the case in question belongs in this respect, the facts of prior and subsequent existence cannot be absolutely known beforehand to be relevant. Much must depend on the type of insanity, as preliminarily indicated by the person's conduct at the time in question. There is also a further element of uncertainty in criminal cases, in that the accused has a strong motive to feign insanity after the act charged; and thus particular scrutiny is required in weighing the evidence of an accused person's subsequent insane conduct. In spite, however, of these uncertainties and difficulties, Courts are to-day universally agreed that both prior and subsequent mental condition, within some limits, are receivable for consideration; stress being always properly laid on the truth that these conditions are merely evidential towards ascertaining the mental condition at the precise time of the act in issue:[1]

§ 233. [1] ENGLAND: 1742, Sergeson *v.* Sealey, 2 Atk. 412 (inquisition of lunacy, found in 1726, and declaring insanity for eight years previous, admitted to show insanity in 1724); 1854, Beavan *v.* M'Donnell, 10 Exch. 184 (to show that the defendant's

1822, WASHINGTON, J., in *Stevens* v. *Van Cleve*, 4 Wash. C. C. 262: "The point of time to be looked at . . . is that when the will was executed. . . . The law permits evidence of such prior and subsequent incapacity to be given. But unless it bear upon that period and is of such a nature as to show incompetency when the will was executed, it amounts to nothing."

1854, SELDEN, J., in *Waterman* v. *Whitney*, 11 N. Y. 157: "The insanity or incapacity of the testator may be proved, not as important in itself, but as a means of arriving at his condition when the will was executed. . . . [It is useful] with a view to its reflex influence upon the question of his condition at the time of executing the will. . . . The object of the evidence is to show the mental state of the testator at the time when the will was executed. Of course, therefore, it is admissible only where it has a legitimate bearing on that question, and of this the Court must judge, as in every other case where the rele-

insanity on the day of the contract was such as to be necessarily apparent to the plaintiff, the defendant's insane conduct before and after that day was admitted; Platt, B.: "The question is one of degree only; the further off the evidence is carried, the weaker it may be; but it is still evidence, though, not proof, of the fact of knowledge").

UNITED STATES: *Federal:* 1822, Stevens v. Van Cleve, 4 Wash. C. C. 262 (see quotation *supra*); 1858, U. S. v. Holmes, 1 Cliff. 98, 108 (see quotation *supra*); 1896, St. Louis, I. M. & S. R. Co. v. Greenthal, 23 C. C. A. 100, 77 Fed. 150 (insanity three weeks before, admitted; following U. S. v. Holmes);
Alabama: McLean v. State, 16 Ala. 679; 1886, Kramer v. Weinert, 81 Ala. 414, 415, 1 So. 26; 1895, Murphree v. Senn, 107 Ala. 424, 18 So. 264 (temporary aberration twenty years before, not admissible without evidence of intervening aberration); 1911, Odom v. State, 174 Ala. 4, 56 So. 913;
Arkansas: 1859, Clinton v. Estes, 20 Ark. 219, 231; 1891, Bolling v. State, 54 Ark. 588, 599, 16 S. W. 658 (accused's conduct and language after a killing, admissible "whenever they are so connected with or correspond to evidence of disordered or weakened mental condition preceding the time of the offence as to strengthen the inference of continuance and carry it by the time to which the inquiry relates and thus establish its existence at that time; or whenever they are of such a character as of themselves to indicate unsoundness to such a degree or of so permanent a nature as to have required a longer period than the interval for its production or development"; following the language of Com. v. Pomeroy, Mass. *infra*); 1894, Green v. State, 59 Ark. 246, 248, 27 S. W. 5 (insanity twenty years before, excluded on the facts); 1898, Green v. State, 64 Ark. 523, 43 S. W. 973 (defendant's mental condition after arrest and during custody, admissible); 1916, Mason v. Bowen, 122 Ark. 407, 183 S. W. 973 (testator's utterances received);
California: 1867, People v. Farrell, 31 Cal. 581 (no time limit can be fixed in general); 1885, Dalrymple's Estate, 67 Cal. 444, 7 Pac. 906; 1897, People v. Griffin, 117 Cal. 583, 49 Pac. 711 (feeble-mindedness six months later, admitted); 1918, Allen's Estate, 177 Cal. 668, 171 Pac. 686 (testator);
Columbia: (Dist.): 1904, Shaffer v. U. S., 24 D. C. App. 417, 433 (accused);
Connecticut: 1822, Grant v. Thompson, 4 Conn. 208; 1831, Kinne v. Kinne, 9 id. 101, *semble;* 1921, Bishop v. Copp, 96 Conn. 571, 114 Atl. 682 (range of time of inquiries, considered);
Florida: 1905, Starke v. State, 49 Fla. 41, 37 So. 850;
Illinois: 1862, Snow v. Benton, 28 Ill. 306, 308 (insanity ten or twelve years before, admitted); 1878, Reynolds v. Adams, 90 Ill. 147; 1893, Craig v. Southard, 148 Ill. 37, 46, 35 N. E. 361 (prior and subsequent mental condition of testator, admissible); 1897, Harp v. Parr, 168 Ill. 459, 48 N. E. 113 (prior mental condition of a testator, receivable); 1899, Nieman v. Schnitker, 181 Ill. 400, 55 N. E. 151 (testator's utterances before and after execution, admitted); 1903, Baker v. Baker, 202 Ill. 595, 67 N. E. 410 ("no fixed rule can be laid down"); 1904, Chicago U. T. Co. v. Lawrence, 211 Ill. 373, 71 N. E. 1024 (mental condition of an injured person); 1914, People v. Gavrilovich, 265 Ill. 11, 106 N. E. 521 (mental condition of accused at time of examination, admissible; and the expert's opinion how long it had existed);
Indiana: 1882, Dyer v. Dyer, 87 Ind. 13, 19 (mental condition of a testator the day before the will's execution, admitted); 1889, Staser v. Hogan, 120 Ind. 207, 217, 21 N. E. 911 ("It was proper to show the condition of the testator's mind at any time"); 1895, Bower v. Bower, 142 Ind. 194, 41 N. E. 523 (no fixed limits of time can be made); 1900, Enlow v. State, 154 Ind. 664, 57 N. E. 539; 1910, Taylor v. Taylor, 174 Ind. 670, 93 N. E. 9 (adjudication of insanity in 1906, held not improperly excluded, on the facts, to show insanity at the time of making a will in 1900); 1918, Ramseyer v. Dennis, 187 Ind. 420, 119 N. E. 716;
Iowa: 1868, State v. Felter, 25 Ia. 72, 75, 76; 1876, Ashcraft v. De Armond, 44 Ia. 233 (admitting evidence of continued preceding insanity; "It would be otherwise if her insanity

vancy of testimony is denied. If the judge can see that the evidence offered cannot justly be supposed to reflect any light upon the mental condition of the testator at the time of making the will, he has an undoubted right to exclude it."

1858, CLIFFORD, J., in *U. S.* v. *Holmes*, 1 Cliff. 98, 108: "His acts, conduct, and declarations, not only throughout this voyage, but throughout his whole life, from early youth to the time of his arrest, had been introduced; . . . counsel had claimed and exercised the right to examine the witnesses so called upon all such occurrences, acts, and declarations in the life and conduct of the prisoner as tended to show that he was insane. . . . Beyond doubt the precise question to be tried in all such cases is whether the accused was insane at the time he committed the act, and to that point all the evidence must tend. Great difficulties surround the inquiry, and it is for that reason that the rules of law allow a wide range of testimony in the investigation."

were temporary in its nature, as where it was occasioned by the violence of disease or where she was subject to lucid intervals"); 1876, State *v.* Lewis, 45 Ia. 20 (defendant's condition subsequent to the time of the act, admitted); 1876, Ross *v.* McQuiston, 45 Ia. 147; 1884, State *v.* Jones, 64 Ia. 349, 355, 357, 360, 17 N. W. 911; 1895, Bever *v.* Spangler, 93 Ia. 576, 61 N. W. 1072; 1905, Glass' Estate, 127 Ia. 646, 103 N. W. 1013 (presumption as to senile dementia, discussed); 1906, Jones' Estate, 130 Ia. 177, 106 N. W. 610 (presumption defined); 1906, Wharton's Will, 132 Ia. 714, 109 N. W. 492; 1909, Speer *v.* Speer, 146 Ia. 6, 123 N. W. 176 (testator ill of bronchopneumonia and executing a will while ill; testimony of witnesses "on the day but not at the time, when this will was executed", as to his business capacity of mind, not admitted, because of "no probative force"; a singular example of a Court straining the law to avoid the supposed necessity of a new trial);
Kansas: 1897, State *v.* Newman, 57 Kan. 705, 47 Pac. 881 (condition "shortly before or after the homicide", admissible);
Kentucky: 1911, Banks *v.* Com., 145 Ky. 800, 141 S. W. 380;
Louisiana: 1870, State *v.* Hays, 22 La. An. 39 (accused's conduct and language before and after the time charged, admissible); 1904, State *v.* Lyons, 113 La. 959, 37 So. 890;
Maine: 1870, Robinson *v.* Adams, 62 Me. 412; 1885, St. George *v.* Biddeford, 76 Me. 598;
Maryland: 1833, Davis *v.* Calvert, 5 G. & J. 269 (testator's mental condition "both before and after that period", admissible); 1888, Spencer *v.* State, 69 Md. 28, 13 Atl. 809 (accused's condition three years before, excluded on the facts); 1902, Jones *v.* Collins, 94 Md. 403, 51 Atl. 398; 1905, Gesell *v.* Baugher, 100 Md. 677, 60 Atl. 481 (a sibylline utterance, purporting to follow the foregoing cases); 1920, Hutchins *v.* Hutchins, 135 Md. 401, 109 Atl. 121 (business transactions with the testator within a year before and after, admitted; with a distinction as to general opinion to incapacity; the distinction seems groundless);
Massachusetts: 1820, Somes *v.* Skinner, 16 Mass. 348, 358 (admitting previous extreme weakness of mind, to show present susceptibility to undue influence); 1841, Peaslee *v.* Robbins, 3 Mete. 164 (indorser's insanity, before and after indorsement, admitted); 1868, Shailer *v.* Bumstead, 99 Mass. 112 (see quotation *supra*); 1871, White *v.* Graves, 107 Mass. 327; 1875, Com. *v.* Pomeroy, 117 Mass. 148 (accused's subsequent condition admitted; see the phrasing followed in Bolling *v.* State, Ark. *supra*); 1878, Davis *v.* Davis, 123 Mass. 598; 1879, May *v.* Bradlee, 127 Mass. 420; 1882, Potter *v.* Baldwin, 133 Mass. 428; 1890, Lane *v.* Moore, 151 Mass. 87, 90, 23 N. E. 828; 1890, Woodward *v.* Sullivan, 152 Mass. 470, 25 N. E. 837; 1891, Dumangue *v.* Daniels, 154 Mass. 483, 485, 28 N. E. 900 (subsequent mental condition admissible; the trial Court's discretion to control as to time); 1896, Howes *v.* Colburn, 165 Mass. 385, 43 N. E. 125 (approving the trial Court's limitation to a period from about eight years before the execution of the will to about two and a half years after); 1896, Laplante *v.* Mills, 165 Mass. 487, 43 N. E. 294 (mental condition of a boy a year after his injury, received; "a boy who is dull at fifteen probably was dull at fourteen"); 1904, McCoy *v.* Jordan, 184 Mass. 575, 69 N. E. 358 (will; the range of time is in the trial Court's discretion); 1905, Hagar *v.* Norton, 188 Mass. 47, 73 N. E. 1073 (transfer of stock, etc., by deceased; Shailer *v.* Bumstead followed); 1909, Jenkins *v.* Weston, 200 Mass. 488, 86 N. E. 955 (the trial Court's discretion controls as to time); 1913, Aldrich *v.* Aldrich, 215 Mass. 164, 102 N. E. 487 (undue influence; circumstances 12 years prior, held not improperly excluded on the facts);
Michigan: 1893, Haines *v.* Hayden, 95 Mich. 332, 351, 54 N. W. 911 (subsequent mental condition, admitted on the facts);
Minnesota: 1880, Pinney's Will, 27 Minn. 282, 6 N. W. 791 (see quotation *supra*); 1895, State *v.* Hayward, 62 Minn. 474, 65 N. W. 63 (temporary delusions, of a different sort from that alleged against the witness, and existing some time before the trial, excluded); 1913, McAllister *v.* Rowland, 124 Minn. 27, 144 N. W. 412 (adjudication of insanity, made two months after the will, admitted);
Missouri: 1897, State *v.* Duestrow, 137 Mo.

1868, COLT, J., in *Shailer* v. *Bumstead*, 99 Mass. 112: "By common observation and experience the existence of many forms of mental development, especially that of weakness in those faculties which are an essential part of the mind itself, when once proved imply that the infirmity must have existed for some time. The inference is quite as conclusive that such condition must have had a gradual and progressive development, requiring antecedent lapse of time, as that it will continue when once proved for any considerable.

44, 38 S. W. 554 (liberal range of time allowed); 1897, Rhoades *v.* Fuller, 139 Mo. 179, 40 S. W. 760 (insanity twenty days later, excluded, partly because proved by a probate judgment of guardianship; see *post*, § 1671); 1901, Hamburger *v.* Rinkel, 164 Mo. 398, 64 S. W. 104; 1922, State *v.* Tarwater, — Mo. —, 239 S. W. 480 (murder; plea, insanity; "liberal latitude" approved);
Montana: 1909, State *v.* Crowe, 39 Mont. 174, 102 Pac. 579 (trial Court's discretion);
Nevada: 1889, State *v.* Lewis, 20 Nev. 342, 22 Pac. 241 (approving Com. *v.* Pomeroy, Mass.);
New Hampshire: 1871, State *v.* Jones, 50 N. H. 369, 382 (insanity "for a period of many years before the act", admitted); 1876, State *v.* Kelley, 57 N. H. 549 (insanity two months before, admitted); 1898, Pritchard *v.* Austin, 69 N. H. 367, 46 Atl. 188;
New Jersey: 1846, State *v.* Spencer, 21 N. J. L. 196, 203 ("Evidence of former attacks of insanity amounts to about this: It does not show that the prisoner *was* insane at the time of the homicide; but if there is *any* independent evidence that he was so, the former insanity increases the probability");
New York: 1854, Waterman *v.* Whitney, 11 N. Y. 157 (see quotation *supra*); 1888, People *v.* Hawkins, 100 N. Y. 408, 410, 11 N. E. 371, *semble* (accused's insanity two months later, admissible); 1891, People *v.* Wood, 126 N. Y. 249, 272, 27 N. E. 362 (diseased condition of the accused's brain, when examined by physicians, admitted to show insanity at the time of the killing charged); 1893, People *v.* Taylor, 138 N. Y. 398, 404, 34 N. E. 275 (condition during the four months between the homicide and the trial, admitted); 1896, People *v.* Nino, 149 N. Y. 317, 43 N. E. 853 (admitting language of the accused to the expert examining him in jail for insanity); 1896, People *v.* Hoch, 150 N. Y. 291, 44 N. E. 977 (examination of the accused, made just before and during trial, admitted);
North Carolina: 1820, State *v.* Scott, 1 Hawks 24, 25, 32 (homicide; conduct and utterances on the morning after, excluded; Henderson, J., diss., holding them admissible "not to prove the truth of the facts declared", but to allow inferences); 1839, Norwood *v.* Marrow, 4 Dev. & B. 451, 578 (subsequent insane conduct, admitted; practically repudiating State *v.* Scott); 1880, State *v.* Vann, 82 N. C. 631, 633 (insane language of the accused after the act, excluded);
No. Dakota: 1917, Westerland *v.* First Nat'l Bank, 38 N. D. 24, 164 N. W. 323 (voidable deed; judgment of insanity four years afterwards, held "entirely inadmissible, incompetent, irrelevant, and immaterial to prove insanity at a prior date"; entirely unsound, and erroneous, and unpractical);
Ohio: 1878, Wheeler *v.* State, 34 Oh. St. 394, 396 (inquisition of lunacy four years before, admitted);
Oklahoma: 1901, Queenan *v.* Terr., 11 Okl. 261, 71 Pac. 218;
Pennsylvania: 1821, Rambler *v.* Tryon, 7 S. & R. 93; 1822, Irish *v.* Smith, 8 S. & R. 576; 1845, Chess *v.* Chess, 1 Pa. St. 163; 1850, McTaggert *v.* Thompson, 14 Pa. 154; 1851, Louden *v.* Blythe, 16 Pa. 542; 1854, Wilkinson *v.* Pearson, 23 Pa. 120; 1861, Stauffer *v.* Young, 39 Pa. 455, 462, *semble;* 1871, Pidcock *v.* Potter, 68 Pa. 351; 1884, First Nat'l Bank *v.* Wireback's Ex'r, 106 Pa. 46; 1889, Herster *v.* Herster, 122 Pa. 239, 16 Atl. 342 (see quotation *post*); 1893, Hindman *v.* Van Dyke, 153 Pa. 243, 246, 25 Atl. 772 (condition four years before, admitted); 1895, Com. *v.* Bezek, 168 Pa. 603, 32 Atl. 109; 1921, Com. *v.* Loomis, 270 Pa. 254, 113 Atl. 428 (testimony at former trial in 1918 of L. now said to be insane; the adjudication of insanity in 1919, and his commitment, held not sufficient to show his present incompetency; an example of the law's pedantry, failing to distinguish between conclusive and sufficient evidence);
Rhode Island: 1904, State *v.* Quigley, 26 R. I. 263, 58 Atl. 905;
Vermont: 1853, Robinson *v.* Hutchinson, 26 Vt. 47 (see quotation *supra*); 1862, Fairchild *v.* Bascomb, 35 Vt. 398, 417 (condition four years before, admitted); 1918, Martin's Will, 92 Vt. 362, 104 Atl. 100 (will; an "extended period" covered);
West Virginia: 1878, Dinges *v.* Branson, 14 W. Va. 100, 105 (prior testamentary declarations, admitted to show capacity at a later time to recollect and carry out a plan);
Wisconsin: 1874, Burnham *v.* Mitchell, 34 Wis. 117, 134; 1889, Giles *v.* Hodge, 74 Wis. 360, 366, 34 N. W. 163; 1896, French *v.* State, 93 Wis. 325, 67 N. W. 706 (a time subsequent held not too remote on the facts); 1899, Small *v.* Champney, 102 Wis. 61, 78 N. W. 407 (mental condition when adjudicated insane, presumed to continue subsequently, but not to have existed antecedently, unless with other evidence of similarity of mental condition at prior time); 1901, Hempton *v.* State, 111 Wis. 127, 86 N. W. 596 (insanity fourteen years before, admitted).

Compare the cases cited *post*, §§ 1738, 1739.

period thereafter. . . . [Prior and subsequent declarations], if they are equally significant and no more remote in point of time, are equally competent, and may be quite as influential. . . . If therefore the statement or prior declaration offered has a tendency to prove a condition not in its nature temporary or transient, then, by the aid of the recognized rule that what is once proved to exist must be presumed to continue till the contrary be shown, the declaration, though prior in time to the act of validity of which is questioned, is admissible. Its weight will depend upon its significance and proximity."

1880, GILFILLAN, C. J., in *Pinney's Will*, 27 Minn. 283, 6 N. W. 791: "The gradual decay of his mental faculties from old age, . . . when it begins, is progressive and permanent; and if at one time it has reached such a stage that the man has become incapable of doing business, it would be contrary to all experience that he should recover. So, if in such a case it is shown that at any time subsequent to that in question the man's faculties are so far unimpaired that he is capable of transacting business, it is evidence that they were so unimpaired at the time in question."

There seems to be no agreed definition of the *limit of time* within which such prior or subsequent condition is to be considered; and in the nature of things no definition is possible. The circumstances of each case must furnish the varying criterion, and set determination of the trial judge ought to be allowed to control:[2]

1853, ISHAM, J., in *Robinson* v. *Hutchinson*, 26 Vt. 47: "Weakness of mind at the time of making the will may be inferred from weakness subsequent, . . . when the declarations were made so near the time of the execution of the will that a reasonable conclusion may be drawn as to the state of mind of the testatrix at the time the will was executed."

1889, CLARK, J., in *Herster* v. *Herster*, 122 Pa. 239, 16 Atl. 342: "The weakness of mind and consequent susceptibility to influence which is admissible in such a case must be shown to exist at the very time of the testamentary act. . . . The limitations which govern the admission of this quality of evidence must depend largely on the character of the unsoundness to be proved. There are types of mental unsoundness which appear suddenly and may be of short duration, and in such cases the proof, to be of any avail, must come near to the precise time when the act was performed; but the decadence of old age and many forms of mental derangement and imbecility are of slow advancement, and proof of their distinct development at any given period will afford pretty clear ground to infer their existence for a long period, either before or after, with a considerable degree of certainty. . . . The Court must judge, in each particular case, how far it will be profitable to extend the rule before and after the precise date in question. . . . Of course the objective point of inquiry, in every case, is the state of mind at the precise date of the testamentary act."

1890, C. ALLEN, J., in *Lane* v. *Moore*, 151 Mass. 87, 90 (holding that the mental condition before and after a given time, if near enough, is relevant to show the condition at that time when it is in issue): "The judge will determine whether the time is so remote, or whether the circumstances have so changed, that declarations then made would not be deemed satisfactory evidence tending to show the person's condition at the earlier period."

The question whether an *inquisition or adjudication of lunacy* is admissible at all raises a question of an exception to the Hearsay rule (*post*, § 1671). Supposing it admissible, then it evidences insanity at the time of inqui-

[2] This relegation to the trial judge's discretion is also approved in the following cases cited *supra*: Clinton *v.* Estes, Ark.; Enlow *v.* State, Ind.; Dumangue *v.* Daniels, Mass.; Wilkinson *v.* Pearson, Pa. The length of time which has in various cases been recognized as within the proper range of consideration is illustrated in the citations of the foregoing note.

sition, and the present question — of the relevancy of insanity at that time — is then the same as in cases where the insanity is otherwise evidenced by conduct or the like.

§ 234. **Other Principles affecting Proof of Insanity, discriminated.** The only inquiry in this place is with the evidencing of mental capacity by circumstantial evidence. Other principles specially affecting the proof of capacity are dealt with elsewhere, and are chiefly the following: the qualifications, as to *experience*, of a witness to sanity (*post*, § 568); the qualifications of a witness, as to his *observation* of the person in question (*post*, § 689); the exception to the Hearsay rule, admitting *utterances* of the person in question (*post*, § 1734); the exception to the Hearsay rule, admitting *reputation* to prove insanity (*post*, § 1621); the exception to the Hearsay rule, admitting official *inquisition* or *adjudication* upon insanity (*post*, § 1671); and the application of the *Opinion* rule to testimony to insanity (*post*, § 1933).

§ 235. **Intoxication.** Intoxication, as a mental condition of temporary stupefaction, may be evidenced circumstantially in the same general modes that are available (*ante*, § 227) for mental capacity or condition in general. (1) It may be evidenced by the person's *conduct*.[1] (2) It may be evidenced by *predisposing circumstances*, *i.e.* by the drinking of intoxicative liquor.[2] (3) It may be evidenced by his *prior or subsequent condition* of intoxication within such a time that the condition may be supposed to be continuous.[3]

§ 235. [1] 1905, Smith *v.* State, 142 Ala. 14, 39 So. 329 (conduct in a saloon, admitted to show the extent of intoxication); 1897, State *v.* Harris, 100 Ia. 188, 69 N. W. 413 (burglary; to disprove the fact of the defendant's intoxication at the time, evidence admitted of a robbery by him on the same evening); 1904, Ford *v.* Kansas City, 181 Mo. 137, 79 S. W. 923 (specific instances of intoxication, admitted to corroborate medical testimony to a general intemperance, as being the real cause of plaintiff's suffering); 1896, Bagley *v.* Mason, 69 Vt. 175, 37 Atl. 287 (battery; boisterous and belligerent conduct of the defendant just beforehand, admitted to show the extent of the intoxicated condition in which the plaintiff alleged the defendant was).

[2] 1805, Tuttle *v.* Russell, 2 Day Conn. 202 ("Can a Court say that evidence to show that a man has within an hour before drunk a quart of rum is not relevant to prove that the man is drunk? . . . It is barely possible that the consequence of a man's drinking a quart of rum may not be drunkenness, but generally it is not only a highly probable but a certain consequence. Courts and juries in weighing evidence are to calculate on probabilities, not possibilities"; this was the argument, as affirmed by the Court); 1858, McDowell *v.* Boston, 26 Ga. 535 (the mere taking of laudanum at unspecified times was held not enough to show general impairment or temporary affection by it); 1911, Stouse *v.* State, 6 Okl. Cr. 415, 119 Pac. 271 (murder; that the defendants were drinking intoxicating liquor shortly before, admitted); 1912, Rogers *v.* State, 8 Okl. Cr. 226, 127 Pac. 365 (witness); 1845, Fleming *v.* State, 5 Hump. (Tenn.) 564 (drinking a pint of brandy, admitted).

For the use of intoxication as *discrediting a witness*, see *post*, § 933.

[3] 1900, Allen *v.* Allen, 73 Conn. 54, 46 Atl. 242 (divorce for habitual intemperance; habits after date of complaint, admitted); 1883, Upstone *v.* People, 109 Ill. 169, 175 (murder when intoxicated; intoxication the day before, admitted); 1905, Miller *v.* People, 216 Ill. 309, 74 N. E. 743 (limits of time as to the taking of intoxicating liquor, considered); 1857, Com. *v.* Howe, 9 Gray Mass. 113 (prior and subsequent intoxication, to show intoxication at the time of a confession, admitted); 1901, Raynor *v.* R. Co., 129 N. C. 195, 39 S. E. 821 (intoxication at 3.45 P.M., held no evidence of intoxication at 11 A.M. the same day; "neither drunkenness nor soberness is necessarily a continuing state; both conditions are liable to rapid and frequent fluctuation"; this ruling throws an odd light on the manners of inebriety in that jurisdiction); 1855, McCandless *v.* McWha, 25 Pa. 95 (prior intemperate habits, admitted); 1921, Gibbard *v.* Evans, 87 W. Va. 650, 106 S. E. 37 (negligent driving; defendant's intoxication when driving shortly prior, admitted); 1908, Pollock *v.* State, 136 Wis. 136, 116 N. W. 851 (intoxication 1½ hours later, excluded).

This use of a prior continuing condition is to be distinguished from the use of an *intemperate*

Topic IV: Evidence to prove Design or Plan

§ 237. **General Principle.** The existence of a design or plan is usually employed evidentially to indicate the subsequent doing of the act designed or planned (*ante*, §§ 102–113). An utterance in which a design or plan is asserted is admissible under an exception to the Hearsay rule (*post*, § 1725). The question here is how such a design or plan may be otherwise evidenced, *i.e.*, circumstantially.[1] Of the three conceivable sorts of circumstantial evidence (*ante*, § 190), only two are practically available, viz.: (1) *Conduct*, as indicating the inward existence of a design; (2) *Prior or subsequent existence* of the design, as indicating its existence at the time in question.

Design or Plan is to be carefully distinguished from Intent. In many parts of the substantive law, particularly in the criminal law, the state of mind accompanying an act becomes legally important, and is for such purposes one of the propositions in issue. This may be termed Intent. It is not used evidentially to prove something else; it is one of the ultimate parts of the issue. Design or Plan, on the other hand, has almost invariably (except where a conspiracy is charged) a purely evidential use; the inference is to be from the design to the act, and thus the design must in its turn be evidenced. The two are practically as well as theoretically to be distinguished, because the conduct that evidences Intent (as may be seen *post*, §§ 302–304) is often of a different sort and needs fewer restrictions than conduct evidencing Design.

Design must also be distinguished from Emotion or Motive (anger, jealousy, and the like). Thus, threats of violence may evidence both a Design and an Emotion. Conduct as evidencing Emotion is dealt with elsewhere (*post*, §§ 394–46).[2]

§ 238. **Sundry Instances (Tools, Materials, Liquor Licenses, Preparations, Journeys, Experiments, Inquiries, Prophecies, and the like).** The kinds of conduct which may evidence a design are innumerable in their variety. Any act, which under the circumstances and according to experience as naturally interpreted and applied would indicate a probable design, is relevant and admissible. It is true that the design indicated may be too indefinite to be itself relevant as evidence of an act (*ante*, § 106); but this does not affect the relevancy of the conduct to evidence that design.

habit as evidence of an act of drinking done as a part of the habitual course of conduct (*ante*, § 96), and from the use of a condition of *intoxication* as evidencing *incapacity to do a specific act* (*ante*, § 85).

§ 237. [1] From the point of view of logic and psychology as applicable to argument before the jury (not the rules of Admissibility), see the materials collected in the present author's "Principles of Judicial Proof, as given by Logic, Psychology, and General Experience, and illustrated in Judicial Trials" (1913), §§ 39–43.

[2] The occasionally hazy condition of judicial reasoning and nomenclature in this field is illustrated in an opinion (State *v.* Goff, 117 N. C. 755, 23 S. E. 355) admitting evidence of threats to kill as indicating which party was the aggressor, but using this singular distinction: "while this was not competent as evidence of motive, it was admissible to show temper."

Most evidence of this sort needs no judicial ruling to determine its relevancy, and the precedents deal with only a limited number of the possible uses of such evidence. The discretion of the trial Court should control in all these cases; it is impossible to lay down any general rule that will be definite enough to serve as a solution for each instance; and it is poor policy to attempt in a Supreme Court to pass upon the probative value of each given piece of conduct.

Any attempt to reconcile all the rulings is hopeless; there is no reason why they should be treated as binding precedents. The question is always one of experience and common sense in each case. The general judicial attitude is shown in the following passage:

1878, BREWER, J., in *State* v. *Adams*, 20 Kan. 320 (burglary; the four defendants held a meeting to arrange for the crime; a bar of iron and a pair of pincers were alone necessary, and these the defendant brought; the facts were admitted of the defendant having taken a carpenter's brace from a store and hidden it; a third person removed it, and the defendant never used it); "Would not the act be one tending to show preparation, — a preparation made fruitless by the unexpected act of another? Could it not be shown that the one charged with homicide immediately prior thereto was providing himself with several weapons, though one only was used? . . . If one weapon he stole, another he borrowed, and one (his own) he put in order, would proof as to the first be incompetent while evidence as to the others was admissible? . . . If no act or conduct of the defendant could be shown unless the motive therefor or the connection between it and the crime were made indisputably clear, the range of inquiry would be limited and narrow. It is enough that the act has an apparent or probable connection with the crime, and then the motive of the defendant and the weight of it as testimony are to be considered by the jury. . . . Must it be affirmatively shown that each weapon was procured with reference to the homicide before evidence concerning its procurement is competent? Or are the facts concerning all to be put in evidence, leaving their weight to be determined by the jury?"; and the latter is approved.

The acquisition or possession of instruments, tools, or other means of doing the act, is admissible as a significant circumstance; the possession signifies a probable design to use; the instruments need not be such as are entirely appropriate, nor such as were actually put to use.[1] In particular, the adver-

§ 238. [1] ENGLAND: 1855, R. *v.* Jarvis, 7 Cox Cr. 53 (the possession of a number of false coins, wrapped in separate papers, etc., admitted to show a plan to utter them).

UNITED STATES: *Federal:* 1849, U. S. *v.* Burns, 5 McLean 23, 26 (possession of instruments for counterfeiting, admitted); *Alabama:* 1886, Finch *v.* State, 81 Ala. 41, 42, 49, 1 So. 565 (borrowing a knife just before the affray in which the knife was used, admitted as "an act of preparation"); *California:* 1898, People *v.* Cuff, 122 Cal. 589, 55 Pac. 407 (poisoning by strychnia; defendant's purchase of chloroform, admitted); *Florida:* 1899, Mobley *v.* State, 41 Fla. 621, 26 So. 732 (murder by stabbing; purchase of poison and taking it to deceased's house, admitted as indicating a general design to kill deceased); *Illinois:* 1887, Spies *v.* People, 122 Ill. 1, 141, 12 N. E. 865, 17 N. E. 898 (the fact that many men came promptly to a place and procured bombs simultaneously, held to point to an "expectation that bombs would be found at that place at that time", and thus to tend to establish a specific plan for their use); *Iowa:* 1858, State *v.* Hinkle, 6 Ia. 384 (wife-poisoning; previous possession of arsenic, admitted); 1884, State *v.* Franks, 64 Ia. 39, 42, 19 N. W. 832 (burglary; prior possession of burglar's tools, admitted); *Kansas:* 1901, State *v.* Wayne, 62 Kan. 636, 64 Pac. 68 (possession of tools appropriate to a burglary, though not exclusively so, admissible); *Massachusetts:* 1849, Com. *v.* Wilson, 2 Cush. 590 (burglary of the City Hall in Charlestown; evidence was rejected of the possession of a key fitted to open the door of the Lancaster Bank); 1849, Com. *v.* Williams, 2 Cush. 584 (burglary; the possession of

tisement or possession of the apparatus or a license for gaming,[2] or selling liquor,[3] evidences a design to game or to sell.

The *presence* of a person *at a place* or a *journey towards it*, together with behavior showing a desire for secrecy, may indicate a design to commit an unlawful act there.[4] But the indications of secrecy are not essential. In a civil case, for instance, a person's turning down the street to a railroad station would be some indication that he planned taking the train; so too, waiting openly under arms is some indication of a plan to use them, lawfully or unlawfully. The significant thing is the going to or being in a place under conditions which naturally suggest the supposed plan as a possible or probable explanation.[5] Where a person makes *inquiries*, either by word of mouth or by messenger, or by *experimentation* searches for knowledge, it is natural to infer that he designs to use the knowledge thus sought; and if the knowledge

burglar's tools, admitted); 1870, Com. *v.* Choate, 105 Mass. 451 (arson; after evidence tending to show that the fire was set by means of a box containing a lighted candle and combustible materials, and not adapted to any but incendiary purposes, the fact was admitted of the defendant's possession of a similar box before the fire in question, as showing, with other things, "a use of his shop for the purpose of preparing boxes and materials for setting incendiary fires, including the fire alleged, in the same place, and all instigated by one motive"; distinguishing Com. *v.* Wilson, *supra*); *Mississippi:* 1876, Long *v.* State, 52 Miss. 23, 34 (murder by shooting; procuring a pistol on the same morning, admitted); *Missouri:* 1888, State *v.* Rider, 95 Mo. 474, 485, 8 S. W. 723 (murder; the procurement of a pistol just beforehand, admitted); *New York:* 1897, People *v.* Scott, 153 N. Y. 40, 46 N. E. 1028 (getting a revolver out of pawn a few days before, admitted, to show deliberate intent); *Washington:* 1889, State *v.* Webster, 21 Wash. 63, 57 Pac. 361 (murder; defendant's purchase and possession of cantharides, just before the shooting, admitted on the facts); 1911, State *v.* Hatfield, 65 Wash. 550, 118 Pac. 735 (possession of a corporate seal).

Compare the cases cited *ante*, § 88.

For the *subsequent possession of stolen chattels*, as indicating the act of stealing, see *ante*, § 153.

[2] There are a number of statutes dealing in the same way with this and related offences, but they are usually intended to lay down a rule for the burden of proof (*post*, § 2500), and do not add anything new to the law of admissibility. The following are merely a few examples: Mass. Gen. L. 1920, c. 271, § 19 (advertising, etc., a ticket, etc., for lottery, evidence of the existence of the lottery, etc.); 1895, Com. *v.* Gorman, 164 Mass. 549, 42 N. E. 94 (possession of policy slips, evidence of intent to game).

[3] Conn. Gen. St. 1920, § 2822 (Federal liquor license or tax-payment, to be evidence, with the possession of liquor, of possession with illegal intent); 1899, Guy *v.* State, 90 Md. 29, 44 Atl. 997 (Federal liquor license is evidence of sale); Mass. Gen. L. 1920, c. 138, § 60 (exposure of signs, etc., is evidence that liquor is there for sale); N. H. Pub. St. 1891, c. 112, § 25 (exposure of signs, labelled bottles, etc., or a Federal liquor-tax receipt, is admissible to show the illegal keeping of liquor); 1918, Claunch *v.* State, 83 Tex. Cr. 378, 204 S. W. 436 (Federal liquor license admitted); 1887, State *v.* Spaulding, 60 Vt. 228, 233, 14 Atl. 769 (Federal license, admissible to show actual sales; "for if he had the intent to do an act, it would be more probable that he did it than it would be if he had no such intent"); Vt. Gen. L. 1917, § 6593; (payment of Federal liquor-tax, to be evidence of being a common seller and of keeping a liquor-nuisance); 1906, State *v.* Nethken, 60 W. Va. 673, 55 S. E. 742.

[4] 1829, R. *v.* Wilson, 1 Law. Cr. C. 112 (murder in a churchyard; the fact was offered that just before the affair the defendant and two others "were lurking there clandestinely with a bundle of cloth; the object being to raise a presumption that they were there with an evil intent, and *ergo* that they must have had malice against all persons coming in their way and likely to interrupt them"; Littledale, J., rejected it); 1896, Smalls *v.* State, 99 Ga. 25, 25 S. E. 614 (waiting out in a field, armed, for a pursuing officer, admitted).

[5] A man's presence in a brothel is some evidence that he intended to and did commit *adultery:* 1828, Astley *v.* Astley, 1 Hagg. Eccl. 714, 720; 1831, Kenrick *v.* Kenrick, 4 id. 114, 138 (citing other cases); 1878, Latham *v.* Latham, 30 Gratt. Va. 307, 312 ("Such an act, wholly unexplained, might be considered evidence of guilt, but it is clearly not one which precludes explanation").

So, too, the fact of a man and woman, not husband and wife, spending the night alone in the same sleeping-room: 1798, Williams *v.* Williams, 1 Hagg. Consist. 299; 1887, Com. *v.* Clifford, 145 Mass. 97, 13 N. E. 345.

is needed or is adapted to help in doing the act in question, the inquiries or experiments are thus evidential of a design to do the act.[6] *Obscure intimation and allusions* are often significant.[7] Words of a person, uttered beforehand, indicating a knowledge that an event is about to occur or an act to

[6] *Ark.* 1891, Bolling *v.* State, 54 Ark. 588, 596, 16 S. W. 658 (murder; buying a gun and practising shooting, a few weeks before, admissible); *Conn.* 1786, State *v.* Green, Kirby 89 (adultery; evidence admitted that the defendant hired a person to go to the woman's house and see whether her husband was at home); *Ill.* 1861, Com. *v.* Hersey, 2 Ill. 173, 177 (murder of a woman by poisoning; an inquiry two or three years before as to the methods of procuring abortions, excluded); *Ind.* 1909, Carter *v.* State, 172 Ind. 227, 87 N. E. 1081 (abortion with drugs; the woman's inquiries, a few days before, as to mechanical methods of producing miscarriage, excluded; unsound); *Ky.* 1896, Jackson *v.* Com., 100 Ky. 239, 38 S. W. 422 (evidence of inquiries about cocaine, and of its known effects and use, in procuring abortions, admitted to show a plan to procure one); *Mass.* 1885, Costelo *v.* Crowell, 139 Mass. 588, 2 N. E. 698 (defence of forgery to a promissory note; evidence rejected of the plaintiff's having shown a person how to imitate notes by tracing, the character-rule being invoked; unsound); 1910, Com. *v.* Howard, 205 Mass. 128, 91 N. E. 397 (wife-murder by strangling; a soldier's handbook, including instructions for the compression of the carotid artery, with the leaf turned down at that place, the book belonging to the defendant, admitted); *N. Y.* 1882, Walsh *v.* People, 88 N. Y. 462, 466 (murder by stabbing with a knife; a conversation of the defendant about the effect of throwing pepper into another's eyes and the punishment for it was admitted, as "tending to show that the prisoner was meditating the infliction of a personal injury upon some one and [with other evidence] a personal injury to the deceased"; evidence was also admitted of his having had the knife, used in the killing, sharpened on that morning, and of having the same morning asked the position of the heart in the body); *R. I.* 1899, State *v.* Mowry, 21 R. I. 376, 43 Atl. 871 (inquiries for a weapon like that used in a murder, and the presence of such a weapon at a third person's house, admitted); *Vt.* 1904, Wilmington S. Bank *v.* Waste, 76 Vt. 331, 57 Atl. 241 (forgery by H. of a note bearing W.'s signature; that in H.'s desk were found sheets of paper with defendant's name written several times, excluded, because no other evidence of H.'s authorship was given; erroneous).

Compare some of the citations *ante*, § 106.

[7] *California:* 1895, People *v.* Evans, — Cal. —, 41 Pac. 444 (the defendant spoke in the third person, saying that the man who had killed R. meant also to kill the deceased before he stopped); *Connecticut:* 1880, State *v.* Hoyt, 47 Conn. 518, 522, 538 (murder of a father; the defendant's declarations, in the previous May, that he should not be there to gather the corn they were planting, but should be in Kansas, admitted; also, "Folks talk about me; I will come home drunk some time and give them something else to talk about"); *Illinois:* 1920, People *v.* Newsome, 291 Ill. 11, 125 N. E. 735 (election frauds; defendant's prior statements explaining the case of such fraud by a certain method, admitted); *Michigan:* 1858, People *v.* Potter, 5 Mich. 1, 5 (just before coming to the place of the affray, the defendant remarked that "he had been reading 'Jack Rand', and he should not be surprised if he should turn highwayman sometime, for he had been struggling with poverty long enough" and, at the same time holding an open dirk-knife, said "if any man piled onto him, he would stick him"; this evidence was admitted, on the principle that "every occurrence, every remark, and the whole conduct of the prisoner, from the time he and the deceased came together until the consummation of the crime, are competent . . . for the purpose of illustrating the act itself by showing the influence which operated to produce the catastrophe, to establish malice, and to justify the act or mitigate the crime"); *North Carolina:* 1874, State *v.* Gailor, 71 N. C. 88, 90 (arson; the defendant's remark that "he would not be surprised if in three weeks there would not be a building on this hill, from the threats of B. M.", a third person, admitted); 1885, State *v.* Green, 92 N. C. 779, 782 (the crime being supposed to have been committed for money paid by another, evidence was admitted that the defendant said he would soon have some money); *Pennsylvania:* 1876, Continental Ins. Co. *v.* Delpeuch, 82 Pa. 235 (the deceased's pointing out his property just before death, held not relevant to show suicidal design); *Virginia:* 1829, Rowt *v.* Kile, 1 Leigh 217, 223 (instrument alleged to have been forged by J. R.; a remark of his that "his pen had not forgot to write", held not improperly excluded); 1895, Nicholas *v.* Com., 91 Va. 741, 21 S. E. 364 (the defendant's statements on several occasions that the deceased had heart disease and was liable to die at any time).

Compare the cases cited *ante*, § 106, "Generic Threats."

Some of the rulings cited under § 106, *ante*, could be as well considered from the present point of view.

The following case is odd: 1903, Hainsworth *v.* State, 136 Ala. 13, 34 So. 203 (murder; defendant's facial expression at a prayer-meeting two hours before, admitted).

happen, tend to show a design to do it or to coöperate in it, so far as it was not definitely expected or foreknown by others, because in that case the knowledge could be possessed only by the one planning it or privy to the plan; and the probative value of such evidence would vary with the particularity and exclusiveness of the foreknowledge thus indicated:

1752, *Blandy's Trial*, 18 How. St. Tr. 1122, 1132; the defendant had frequently told the servants that her father, the deceased, with whose murder she was charged, would not live long, basing the prophecy on the sight of his apparition and other things. *Bathurst*, arguing for the prosecution: "Mark how the destruction of this poor man is ushered into the world. Apparitions, noises, voices, music, reported to be heard from time to time in the deceased's house; even his days are numbered out, and his own child limits the space of his life but till the following month of October. What could be the meaning of this but to prepare the world for a death that was predetermined? Who could limit the days of a man's life but a person that knew what was intended to be done towards the shortening of it?"

1880, Loomis, J., in *State* v. *Hoyt*, 47 Conn. 518, 538: "Remote and obscure allusions to the act in contemplation are admissible as tending to show an existing disposition or design. . . . The fact that the language might possibly have an innocent meaning did not prevent its consideration by the jury, who would of course be called upon to decide whether such was the fact, or whether it was a dark hint thrown from a mind that already felt the shadow of the coming tragedy."

§ 239. **Explanations of Incriminating Facts.** According to the logical principle of Explanation (*ante*, § 34), it is always open to the person against whom such conduct is offered to explain away its force by showing some other hypothesis to be equally or more natural, as the reason for the conduct, than the design which it is claimed to evidence. Any explanation which is at all plausible should be received.[1]

§ 240. **Similar Offences or Other Acts to show Plan or System.** In the cases just considered, the conduct carried within itself the suggestion of design or plan. But acts which in themselves or alone carry no such suggestion may, when multiplied, or when compared with other acts or circumstances, suggest a common plan as the explanation or solution of the compared data. This kind of evidence has many difficulties; and the whole subject, for reasons of convenience, is dealt with elsewhere (*post*, §§ 300–371), where the distinction between the various uses of such evidence for proving Design, Intent, and Knowledge can best be examined.

§ 241. **Prior or Subsequent Design.** The time of a Design or Plan is seldom material. Wherever it is, the general principle (*ante*, § 190) is applied

§ 239. [1] 1881, People v. Malaspina, 57 Cal. 628 (reason for carrying a pistol, admitted); 1898, People v. Cuff, 122 Cal. 589, 55 Pac. 407 (poisoning by strychnia; custom of the place to have strychnia for vermin, admissible to explain the defendant's possession); 1822, Prindle v. Glover, 4 Conn. 266 (showing an innocent reason for a suspicious haunting of the premises on which the trespass took place); 1876, Com. v. Bowers, 121 Mass. 45 (adultery; the defendants were found in a bed-room at night; the fact that their plans in going to the town were innocent, excluded, apparently because the appearances against them were so strong); 1877, Com. v. Blair, 123 Mass. 242 (abortion; similar ruling); 1877, State v. English, 67 Mo. 136 (the defendant's journey to the place of a larceny, explained as called for by his business).

that the existence of a prior or subsequent condition is relevant to show its existence at the time in question; the length of the allowable interval depending on whether, under the circumstances of the case, there is any real probability that the continuance of the condition was interrupted. The application of the principle may be seen in the rulings dealing with Design or plan as evidence of an Act (*ante*, §§ 102–113).

Topic V: EVIDENCE TO PROVE INTENT

§ 242. **General Principle.** The state of mind which accompanies an act is often of legal consequence as forming an ingredient necessary for the attachment of certain consequences.

(1) *Criminal Intent.* The state of mind accompanying a forbidden act is frequently an element material to make the act a crime. This state of mind, often spoken of as "malice", differs in different crimes. In no case is it malice in the sense of mere hostile feeling or enmity; for a religious fanatic who kills to please his Deity and to save his victim from the taint of heresy, or a parent who kills his child to save it from starvation, may have legal "malice." This state of mind is also to be distinguished from design or plan, which, as already noted (*ante*, § 237), is a purpose or aim, considered with reference to its future fulfilment. The notion of Intent, in crimes, may be also, in a broad sense, that of ultimate purpose or object, but it is regarded simply as a state of mind co-existing with the act, and is of a conglomerate nature peculiar to itself. Thus, when A shoots a pistol whose ball strikes X, A's state of mind as he shot may have been that he was pulling the trigger of a pistol whose ball would (a) strike a tree, (b) strike Z, (c) strike a person, X, who was about to assault A himself. The criminal law tells us whether either of these states of mind is criminal; but it does not need to generalize in one phrase or term the exact nature of all possible criminal states of mind; it merely defines the criminal state of mind essential for each respective crime. The idea of criminal Intent, then, usually partakes of deliberateness, knowledge, object, and the like; its absence is often indicated by the ideas of mistake, good faith, reasonable belief, and the like. So far as evidence of it is concerned, the evidence of emotion, of knowledge, or of design has a bearing only so far as emotion, or knowledge, or design enter by the criminal law as constituents of criminal Intent. In other words, there is no special evidence of Intent (with the exception to be mentioned) apart from evidence of emotion, of knowledge, of design. If those elements affect criminal intent (as they usually do), then whatever evidence would serve to prove those elements would be receivable, but no new or peculiar principle of evidence would be involved. If, for example, the charge is of breaking and entering with intent to steal, obviously "intent" here signifies "design", or "plan", and whatever would otherwise be receivable to show design would also be here receivable, — in particular, the

conduct throwing light on the design of the person's entrance.[1] So if one is charged with wife-murder, his ill-feeling towards the wife would be an ingredient of criminal Intent, and whatever evidence would be otherwise suitable show motive (*i.e.* ill-feeling) would be receivable here also. So on a charge of uttering counterfeit notes, knowing them to be spurious, knowledge is an ingredient of the criminal intent, and whatever evidence would be otherwise suitable to show knowledge would here be appropriate. In short, *Intent as a separate proposition for proof does not commonly exist.* Knowledge, emotion, and design are distinct from each other, and have more or less distinct modes of proof. But as Intent is constituted of one or more of these as ingredients, it forms no separate title of proof; for each of the ingredients is to be proved in the way proper to itself.

There is, however, one element in Intent which is distinct from any of those above, and may thus have to be shown by different evidence. This is the element of deliberateness or wilfulness, — the *negative of inadvertence, accident.* Thus, one who incorrectly writes the addition of a column of figures may do so inadvertently or intentionally; one who knocks over a lamp and sets fire to a house may do so inadvertently or deliberately. This element is distinct from that of ignorance, or mistake through ignorance (*i.e.* the absence of knowledge). For instance, one who utters a counterfeit bill may have known it to be counterfeit, but may pay it out by inadvertence, having drawn from the wrong part of his pocket-book. So, on the other hand, one who sells tainted milk does not do it by accident, though he is ignorant of its bad quality. In other words, one may lack knowledge and yet act deliberately, or one may have knowledge and yet act inadvertently. Thus, this distinct element in criminal Intent consists not alone in the voluntary movement of the muscles (*i.e.* in action), nor yet in a knowledge of the nature of an act, but in the combination of the two, — *the specific will to act, i.e.* the volition exercised with conscious reference to *whatever knowledge the actor has* on the subject of the act.[2] We do not necessarily show this in showing knowledge; and, conversely, we may find this conceded and still have to show criminal knowledge. For instance, on the one hand, a person might know arsenic to be poisonous, and yet might administer it inadvertently to another; so that independently of showing his past knowledge of its nature, it might also be necessary to negative his inadvertence. On the other hand, a person might deliberately pull the trigger of a firearm though ignorant that it was loaded; and thus the deliberateness of the act — *i.e.* the combination of voluntary

§ **242**. [1] 1886, Reed, J., in State *v.* Teeter, 69 Ia. 718, 27 N. W. 485 ("It often occurs in human experience that the mere fact that a particular act has been done affords the best evidence of the motive or intention with which it was done. If one was to break and enter a building which was known to be on fire, the reasonable presumption from his act would be that his intention was either to attempt the extinguishment of the fire or the rescue of the property or persons within it. So if one was to be found in the night time in the act of breaking into a building in which money or property of great value was deposited, his act would give very strong evidence indeed of the motive or purpose which prompted it").

[2] Compare Austin's distinction between Will and Intention, quoted *post*, § 2413.

action with all the knowledge which the person had — would be unquestioned, and the further proof required would be that peculiar to showing knowledge of the particular firearm's contents. There may always thus be a residuum, apart from knowledge, which remains to be proved.

This residuum, the element of deliberateness, the negative of inadvertence or accident, may of course be evidenced by the surrounding circumstances and the conduct, as other mental states are. It may also be evidenced by Design; for, *e.g.*, one who has planned to kill another is very unlikely to have acted inadvertently in shooting at him. It may also be evidenced by Knowledge, for one who knows, *e.g.* that arsenic is poisonous, is less likely than otherwise to administer it inadvertently. It may also be evidenced by Emotion; for one who is angry with another is less likely than otherwise to strike him inadvertently. All these elements, independently useful and provable as bearing on the doing of the act, help also to throw light on the intent accompanying the act.

But there is one peculiar mode of evidencing this deliberateness — the negative of inadvertence or accident — which stands by itself, in the sense that it may have no bearing distinctively on a previous Design or on a previous Knowledge or on a previous Emotion, and yet may help to throw light on deliberateness, this distinctive residuum, — namely, *other similar acts.* The doctrine of chances and the experience of conduct tell us that accident and inadvertence are rare and casual; so that the recurrence of a similar act tends to persuade us that it is not to be explained as inadvertent or accidental. The rulings dealing with this kind of evidence are for the sake of convenience dealt with elsewhere (*post*, §§ 300–371), in connection with the other principles to be distinguished.

(2) *Testamentary Intent.* The state of mind accompanying an act dealing with a will is frequently of consequence as an ingredient of the total act. A tearing or a cancelling of a will may or may not be a revocation according as it is done deliberately and knowingly or the reverse. The peculiar element of Intent, here as in the preceding case, consists not merely of knowledge of the nature of the paper, but in action with the presence of such knowledge and with the foresight of the consequences. Circumstances, conduct, knowledge, former design, and the like, — all evidence this element of intent, and no distinct principle of evidence is involved. Other similar acts have rarely a bearing; so far as they have, they are admissible (*post*, § 370). Former design to revoke, as indicating probable intent at the time of destroying or cancelling, is admissible (*ante*, § 112, and *post*, § 1737). Subsequent belief in revocation, as pointing back to an intent to revoke, may also be admissible (*post*, §§ 271, 1737). The Hearsay rule is here the chief obstacle to be considered (*post*, § 1737).

(3) *Sundry Intents.* The intent accompanying an act may be material in an act of delivery, payment, or the like. The only question of evidence arising concerns the Hearsay rule for language accompanying the act (*post*, §§ 1770–1786).

SUB-TITLE II (*continued*): EVIDENCE TO PROVE A HUMAN QUALITY OR CONDITION

TOPIC VI: EVIDENCE TO PROVE KNOWLEDGE, BELIEF, OR CONSCIOUSNESS

CHAPTER XI.

§ 244. **General Analysis of the Subject.** The notions Knowledge, Belief, and Consciousness are not precisely identical; but they have a common feature, which is the typical one so far as concerns the modes of evidencing these mental states. That feature is most nearly expressed by the term *Consciousness*, *i.e.* presence in the mind of an impression as to a given fact. Thus, a person's Knowledge of a city's streets may be inferred from his conduct in finding his way through them unerringly; his Consciousness of guilt may be inferred from his conduct in fleeing from arrest; his Belief in a friend's innocence of embezzlement may be inferred from his conduct in trusting him with money. The respective terms are by usage more usually associated with different relations in which this impression of mind arises; the term Belief is used commonly when the impression is thought of as bearing on present or future action, Consciousness when thought of as bearing on past action, and Knowledge when thought of in connection with the reality of external objects.

These states of mind may or may not, considered in themselves, be in issue or be evidential of something else; *e.g.*, a person's state of mind as to the city's streets may not be evidential to show their actual condition, but may be legally material otherwise; his impression as to his own guilt may be evidential of that, but not of something else; his impression as to a friend's innocence may not be evidential of his innocence, but may be material in other respects. We are here not concerned, in theory at least, with the way in which one of these states of mind has come to be an object of proof, either as being an issue or as being itself evidential of something else. The substantive law tells us when any one of these states of mind is legally material to the issue; and the principles governing their relevancy evidentially to prove an act have already been considered (*ante*, §§ 172–177). It is assumed that somehow this kind of state of mind — impression, consciousness, knowledge, belief — is in the case, either as material to the issue or as relevant to prove something; and the question is how it is in its turn to be evidenced.

Of the three modes (Prospectant, Concomitant, Retrospectant) of evidencing a state of mind (*ante*, § 190), the first two are here the commonest, the third rarely calls for a ruling.

(1) *Conduct* or *behavior* (including language not used assertively) illustrates and points back to the state of mind producing it; and the state of mind which is variously termed knowledge, belief, or consciousness shows itself in the conduct of its bearer;

(2) *External circumstances*, calculated by their presence or occurrence to bring about the state of mind in question, are also available to show the probability that consciousness, knowledge, or belief subsequently ensued;

(3) A *prior or subsequent state* of mind indicates, within certain limits, its existence at the time in question.

These three typical modes of evidencing consciousness, knowledge, or belief have each their peculiar and common features, and must be examined separately. The inferences in the respective modes have so much in common that it is profitable to group them together.[1] The second of the above modes will for convenience' sake be considered first.

1. External Circumstances as evidencing Knowledge, Belief, or Consciousness

§ 245. **General Principle.** There are, in a broad analysis, four kinds of circumstances (events or things) which may point forward to the probability that a given person received a given mental impression (*i.e.* obtained knowledge, formed a belief, or was made conscious):

(1) The *direct exposure* of the fact to his sense of sight, hearing, or the like;

(2) The *express* making of a *communication* to him;

(3) The *reputation* in the community on the subject, as leading probably to an express communication;

(4) The intrinsic *quality of the occurrence*, as leading either to actual perception by his senses, or to express communication.

Throughout all these four modes there run two considerations, affecting some modes more strongly than others: (*a*) The probability that the person received an impression of *any fact at all;* and (*b*) The probability that from the particular occurrence he would gain an impression as to the *specific fact* in question. Doubt may arise upon either of these points, and the various modes above are stronger or weaker in one or the other of these considerations. The four modes may now be examined more in detail.

(1) *Direct exposure of the fact to the senses.* Here there is seldom any doubt as to the element (*b*) above; the question usually is whether the fact in question was brought within the range of the senses so as probably to be perceived at all. The typical case is the possession of a document. If a deed or a notice was laid on A's desk, the probability (greater or less according to circumstances) is that A read it. But actual possession by A is not necessary; the posting of a placard in a street through which A habitually passes is some evidence that A ultimately came to see and understand its contents. Occasionally the element (*b*) above is the emphatic one; for example, where A is charged with selling liquor to B, a minor, the appearance

§ 244. [1] From the point of view of logic and psychology as applicable to argument before the jury (not the rules of Admissibility), see the materials collected in the present author's "Principles of Judicial Proof, as given by Logic, Psychology, and General Experience, and illustrated in Judicial Trials" (1913), §§ 30–38.

of B, as indicating A's knowledge of B's minority or his belief in B's maturity, was the fact brought before A, and the question is whether it would probably have informed him as to the further specific fact, namely, B's age.

(2) *Express communication.* Little difficulty can arise here. There may be a question as to whether the communication came from a source which the person was fairly bound to consider authentic; but this would be a question of substantive law, involving the elements of good faith, constructive notice, or the like. There may also be a question as to the interpretation of the communication, — whether its sense could properly be taken as of one sort or another; but this also is a question of substantive law.

(3) *Repuiation.* Here the element (*a*) is the important one. The probative considerations are that, when a matter is so much talked of in a community that a reputation arises about it, a member of that community, in his ordinary intercourse with others, will come to hear it mentioned, *i.e.* by express communication; and the question is whether the probability is that there would be such a general discussion and whether the person is likely to have learned of that discussion. The first part of this inquiry — whether a reputation can arise — depends on the nature of the matter; the second part depends on the situation of the person in question.[1]

(4) *Quality of the occurrence,* in general. Sundry cases here combine the considerations of all the preceding modes, as well as of both the elements (*a*) and (*b*) above. Thus, a former accident to apparatus owned by A may indicate that A learned of the defect in the apparatus, either because he probably observed the former accident or because he probably was told of it by his subordinate having charge of the apparatus, or because complaint was probably made to him; and not only is the probability (*a*) of his having learned of the former accident thus involved, but also the probability (*b*) that the former accident would have revealed to him specifically the existence of the defect. So, also, a former act of violence by the deceased, in order to have any value to show the slayer's ground for apprehension of an attack, must (*a*) not only have been communicated to the slayer, (*b*) but also must be such as would create a belief in the deceased's probable aggression.

Such being the various modes in which the evidence may operate, nevertheless in a given situation (as where an employer is to be charged with knowledge of an employee's incompetency, or a defendant accused of murder is to show belief in the deceased's probable aggression) the knowledge, belief, or consciousness may be sought to be evidenced by more than one of the above modes. Practically, therefore, it is more convenient to group the cases, not according to the above modes of operation, but according to the various ultimate facts the knowledge or belief of which is to be shown.

§ 245. [1] Whether the reputation of a fact is admissible to prove the fact itself is a question of the Hearsay rule, treated *post*, §§ 1580–1626, and has nothing to do with the present subject.

§ 246. (1) **Defendant in Homicide; (*a*) Reputation of the Deceased.** Where a defendant charged with murder asserts that he killed in self-defence, his state of mind at the time of the killing becomes material; and an important element in determining his justification is his *belief in an impending attack* by the deceased. The reputation of the deceased for a violent, dangerous, or turbulent disposition is a circumstance which would contribute to such a belief:

1848, LUMPKIN, J., in *Monroe* v. *State*, 5 Ga. 137: "Reasonable fear, under our code, repels the conclusion of malice; and has not the character of the deceased for violence much to do in determining the reasonableness or unreasonableness of the fear under which the defendant claims to have acted? Does it make no difference whether my adversary be a reckless and overbearing bully, having a heart lost to all social ties and order and fatally bent on mischief, or is a man of Quaker-like mien and deportment, one who never strikes except in self-defence and then evincing the utmost reluctance to shed blood? Who, knowing the character of Kyd the pirate, or of the infamous John A. Murrell, would not instantly, upon their approach armed with deadly weapons, act upon the presumption that robbery or murder or both were contemplated? We apprehend that the imminence of the danger, as well as the chances of escape, will depend greatly upon the temper and disposition of our foe."

1856, WALKER, J., in *Franklin* v. *State*, 29 Ala. 17: "Conduct of a man of peaceable character and harmless deportment might pass by without exciting a reasonable apprehension of impending peril; while on the other hand the same conduct from a man of notoriously opposite character and habits might reasonably produce a consciousness of the most imminent peril and a conviction of the necessity of prompt defensive action. Whenever such bad character on the part of the deceased thus illustrates the circumstances attending a homicide, and the circumstances, so illustrated, tend to produce a reasonable belief of imminent danger in the mind of the slayer, the character, as mingled with the transaction, is a part of it, and is indispensable to its correct understanding."

1875, ROBERTS, C. J., in *Horbach* v. *State*, 43 Tex. 250: "A man's character for violence, dependent upon his irascible temper, overbearing disposition, and reckless disregard of human life, is as much a part of himself as his judgment and discretion, his sight or hearing, his strength, his size, his activity, or his age, — any one of which may become a material fact to give a correct understanding of his conduct and the intention with which an act is done by him, and are therefore part of the 'res gestæ' when pertinent to the act sought to be explained. Their office in evidence is adjective, or auxiliary to a substantive fact to which they are pertinent and without which they are irrelevant and immaterial. They are helps to the understanding in construing human conduct. The mind cannot reject or disregard them. They, and all like helps, ever have been and ever will be elements in the formation of belief as to what a man designs by an act to which they are pertinent. . . . If then the character of the assailant in any case has helped to form a reasonable belief in the mind of the assailed that his life was then in danger, when the acts alone would fail to do it, the jury should in some way be informed of the character of the assailant, as well as of his acts, to enable them to understand that the belief was a reasonable one. . . . It is scarcely necessary to go into an explanation of the condition of things in this country which imperatively requires the admission of the proof of the character of the deceased for violence. . . . It is well and generally known that there are some violent and dangerous men in this country, who are in the habit of carrying pistols, belted behind them and in their pockets, who never think of fighting in any other way than with deadly weapons, who are expert in using them, and who, especially when intoxicated, bring on and press to the extreme of outrage their deadly encounters for causes and provocations that would be regarded as utterly trivial by peaceable men; and that if one

of such persons, while engaged in an angry altercation, should suddenly step back and rapidly throw his hand behind him, it might readily be understood by those who saw it to mean that he was in the act of drawing a pistol to use it. The same act by one of the great mass of our peaceable citizens who are not in the habit of carrying weapons would suggest no such thought, and in such case the pistol would have to be drawn and exhibited before any such thing would be conceived, unless there had been some very extraordinary provocation. This state of things here is a substantial reality, well known and ostensible to the perception of every one at all familiar with the subject; and men act upon it, and are compelled to act upon it, in defending themselves from deadly assaults. . . . It may be deduced from these authorities that the general character of the deceased for violence may be proved when it would serve to explain the actions of the deceased at the time of the killing; that the actions which it would serve to explain must first be proved before it would be admissible as evidence; that if no such acts were proved as it would serve to explain, its rejection when offered in evidence could not be error; and that, if rejected when a proper predicate has been established for its admission, it is held to be error. . . . In arraying the facts to establish that he acted in self-defence, if an act of the deceased at the time of the killing is of doubtful import, or is otherwise of a character that it would be explained and construed more favorably for the accused by adding to it the proof of the character of the deceased for violence, then such proof is admissible."

The admissibility of such evidence is recognized, on principle, in all but a few jurisdictions.[1] The law varies, in the several jurisdictions, only

§ **246**. [1] *Federal:* 1896, Smith *v.* U. S., 161 U. S. 85, 16 Sup. 483 (Gray, J.: "that the deceased had the general reputation of being a quarrelsome and dangerous person was competent, especially if his character in this respect was known to the defendant"; the "especially" here is an uncertain phrase, indicating an unfamiliarity with the principle); *Alabama:* 1833, Quesenberry *v.* State, 3 Stew. & P. 308, 315 ("if the circumstances were such as to leave any doubt" as to the necessity of self-defence admissible); 1853, Pritchett *v.* State, 22 Ala. 39 (admitted in cases of self-defence, because it "might very reasonably justify a resort to more prompt measures of self-preservation"; but the deceased "forfeits no right to his life", until "by an actual attempt to execute his threats, or by some act or demonstration at the time of killing, taken in connection with such character or threats, he induces a reasonable belief", etc.; this is the foundation of the "overt-act" doctrine, advanced later); 1856, Franklin *v.* State, 29 Ala. 10, 14 (character for turbulence, violence, revengefulness, bloodshed, and the like, admissible where the deceased's conduct in the light of the character would excite apprehension; not limited to doubtful cases); 1875, Eiland *v.* State, 52 Ala. 333 (same; "it should never be received when at the time of the killing there is no act or word of the deceased which can be illustrated or explained by it, or when there is not evidence conducing to show the killing was in self-defence"); 1880, Roberts *v.* State, 68 Ala. 165 (same; adopting the same phrasing as in the case of threats; see *post*, § 247); 1882, De Arman *v.* State, 71 Ala. 360 (bad character for peacefulness, admitted; not necessary to use any special form of words, such as "bloodthirsty", "quarrelsome", etc.); 1882, Storey *v.* State, 71 Ala. 329, 341 (admissible "in all cases where an issue of self-defence properly arises"); 1883, Williams *v.* State, 74 Ala. 18, 20 (admitted, citing the last three cases); 1889, Smith *v.* State, 88 Ala. 77, 7 So. 52 (principle affirmed); 1891, Amos *v.* State, 96 Ala. 120, 124, 11 So. 424 (not admitted where there were no facts that could excite a belief of peril); 1893, Karr *v.* State, 100 Ala. 4, 14 So. 851 (no conditions specified); 1898, Naugher *v.* State, 116 Ala. 463, 23 So. 26; 1898, Rufus *v.* State, 117 Ala. 131, 23 So. 144 (excluded, the defendant being "clearly at fault"); 1903, Morrell *v.* State, 136 Ala. 44, 34 So. 208 (excluded, there being no evidence of an overt act); 1905, Green *v.* State, 143 Ala. 2, 39 So. 363 (rule stated); 1909, Pate *v.* State, 162 Ala. 32, 50 So. 357 (repute in a place 8 miles away, admitted); 1917, Glover *v.* State, 200 Ala. 384, 76 So. 300 (deceased's habit of carrying a pistol, unknown to defendant, excluded);
Arkansas: 1874, Palmore *v.* State, 29 Ark. 248, 261, 263 (admitted); 1904, Long *v.* State, 72 Ark. 427, 81 S. W. 387 (reputation of the deceased residing in another State, excluded);
California: 1858, People *v.* Murray, 10 Cal. 309 (admissible "when the circumstances of the contest are equivocal" as to self-defence); 1861, People *v.* Lombard, 17 Cal. 316, 320 (admissible "where the immediate circumstances of the killing render it doubtful whether the act was justifiable or not"); 1871, People *v.* Edwards, 41 Cal. 640, 643 (like People *v.* Mur-

as to the definition of the chief details that are made conditions of admissibility.

These details, and certain distractions must now be noticed:

(*a*) *Overt act.* The abstract validity of the principle cannot be doubted. That the deceased's reputation should in such situations be accepted as affecting the defendant's apprehensions is clear. But the unconditional and indis-

ray); 1896, People *v.* Howard, 112 Cal. 135, 44 Pac. 464 (admissible "in rare cases"); 1899, People *v.* Griner, 124 Cal. 19, 56 Pac. 625 (distinction between "character" and "general reputation", not decided); 1906, People *v.* Lamar, 148 Cal. 564, 83 Pac. 993;

Colorado: 1878, Davidson *v.* People, 4 Colo. 145, 150 (admitted, if an attack by the deceased is shown);

Delaware: 1845, State *v.* Thawley, 4 Harringt. 562 (excluded, on the theory that it is no excuse; Harrington, J., dubit.);

Florida: 1886, Bond *v.* State, 21 Fla. 738, 756 (excluded, because there was no evidence of hostile conduct at the time); 1891, Garner *v.* State, 28 Fla. 113, 136, 9 So. 835 (admissible when there was "some demonstration which", though otherwise innocent, "when received or considered in connection with or illustrated by such character, may arouse a reasonable belief of imminent peril" of death or great bodily harm; the Court to determine whether evidence of such exists, solving doubts in favor of the defendant); 1893, s. c. 31 Fla. 170, 174, 12 So. 638 (same); 1893, Roten *v.* State, 31 Fla. 514, 523, 12 So. 910 (admissible only after evidence of a hostile demonstration or overt act); 1894, Steele *v.* State, 33 Fla. 348, 350, 14 So. 841 (same as Garner *v.* State, *semble*); 1896, Hart *v.* State, 38 Fla. 39, 20 So. 805; Allen *v.* State, 38 Fla. 44, 20 So. 807;

Georgia: 1848, Monroe *v.* State, 5 Ga. 85, 137 (admitted); 1855, Keener *v.* State, 18 Ga. 194, 220 (same); 1855, Bowie *v.* State, 19 Ga. 7 (same); 1892, Croom *v.* State, 90 Ga. 430, 17 S. E. 1003 (character for violence towards negroes, excluded); 1903, Dannenberg *v.* Berkner, 118 Ga. 885, 45 S. E. 682 (rule applied);

Idaho: 1868, People *v.* Stock, 1 Ida. 218 (admissible, if the circumstances "raise a doubt" in regard to self-defence);

Illinois: 1885, Davis *v.* People, 114 Ill. 86, 95, 29 N. E. 192, *semble* (that he was "a good man in a fight", admissible); 1902, Carle *v.* People, 200 Ill. 494, 66 N. E. 32 (admissible, after other evidence tending to show the deceased's aggression);

Indiana: 1858, Dukes *v.* State, 11 Ind. 556, 565 (admitted where a question of self-defence arose); 1864, Fahnestock *v.* State, 23 Ind. 231, 237, *semble* (general character for violence when intoxicated, admissible); 1884, Boyle *v.* State, 97 Ind. 322, 324 (character admitted); 1891, Bowlus *v.* State, 130 Ind. 227, 28 N. E. 1115 (same);

Kansas: 1864, Wise *v.* State, 2 Kan. 419 (admissible, *semble*, where from other circumstances it appears that "the defendant was justified in believing himself in danger"); 1874, State *v.* Potter, 13 Kan. 414, 423 (admissible, *semble*, where there is a doubt as to self-defence and the testimony "may serve to explain the conduct of the deceased"); 1878, State *v.* Riddle, 20 Kan. 711, 714 (excluded on no clear rule; here there was an assault by the deceased, but not such as to excite fear of serious harm); 1879, State *v.* Scott, 24 Kan. 68, 70 (admitted; no rule stated); 1902, State *v.* Spangler, 64 Kan. 661, 68 Pac. 39 (admissible);

Kentucky: 1858, Payne *v.* Com., 1 Metc. 370, 379 (character, and the habit of carrying concealed deadly weapons, admitted; no general test laid down); 1871, Bohannon *v.* Com., 8 Bush 481, 488 (*semble*, admissible); 1893, Riley *v.* Com., 94 Ky. 266, 270, 22 S. W. 222 (admitted);

Louisiana: 1850, State *v.* Chandler, 5 La. An. 489 (excluded; no reason given); 1854, State *v.* D'Angelo, 9 La. An. 48 (same; Slidell, C. J., intimating possible exceptions); 1855, State *v.* Brien, 10 La. An. 453 (same as Chandler's case); 1856, State *v.* Jackson, 12 La. An. 679 (same); 1878, State *v.* Robertson, 30 La. An. 340 (admitted where aggression by the deceased is shown, and *semble* previous threats; the above cases ignored); State *v.* Burns, 30 La. An. 679 (the preceding case ignored, the early cases cited; the evidence rejected, as under a general rule, intimating that on a proper showing of self-defence, it might be admissible); 1880, State *v.* Vance, 32 La. An. 1177 (excluded, because no action evincing a hostile purpose at the time was offered, a prior conditional threat not sufficing); State *v.* Ricks, 32 La. An. 1098 (admissible, when "threats and hostile acts or demonstrations are proven"); 1881, State *v.* Jackson, 33 La. An. 1087 (admissible, if there was an "assault or hostile demonstration" at the time, prior threats not being a sufficient foundation); 1882, State *v.* McNeely, 34 La. An. 1022 (admissible in connection with previous threats alone); 1883, State *v.* Garic, 35 La. An. 970, 971 (a charge that it could be considered, "in connection with proof of an overt act", apparently approved); State *v.* Claude, 35 La. An. 71, 74 (admissible when "any assault or hostile demonstration" or other circumstances showing belief of danger is proved); 1884, State *v.* Watson, 36 La. An. 148 (admitted, if there were "threats made and communicated, followed by

criminate admission of such evidence is dangerous. The danger is, not only that the deceased's reputed character, once in evidence, will be appealed to as justifying the deliberate destruction by private hands of a detested malefactor, but also that, though no plausible situation of self-defence is otherwise evidenced, this evidence will be improperly used to confuse the issue as if

some act on the part of the deceased to induce the belief or apprehension that the threats were about" to be executed); State *v.* Birdwell, 36 La. An. 859, 861 (admissible only in case of an "overt act, assault, or hostile demonstration" at the time, and not merely of the use of previous threats); 1885, State *v.* Saunders, 37 La. An. 389 (admissible in case of a "hostile demonstration, overt act, or threats"; citing only State *v.* Garic); State *v.* Ford, 37 La. An. 443, 460 (same test; the trial Court is to determine whether the preliminary overt-act evidence suffices); State *v.* Janvier, 37 La. An. 644 (same); State *v.* Kervin, 37 La. An. 782 (same); State *v.* Jackson, 37 La. An. 896 (same); 1888, State *v.* Williams, 40 La. An. 168, 3 So. 629 *semble* (same); 1890, State *v.* Cosgrove, 42 La. An. 753, 7 So. 714 (same); 1891, State *v.* Paterno, 43 La. An. 514, 9 So. 442 (rejecting the character because of the "absence of danger and necessity for self-defence"; none of the above cases cited); 1892, State *v.* Christian, 44 La. An. 950, 954, 11 So. 589 (same as State *v.* Ford, including the rule of trial Court's discretion); 1893, State *v.* Stewart, 45 La. An. 1164, 1166, 14 So. 143 (same); State *v.* Nash, 45 La. An. 1137, 1141, 13 So. 732, 731 (rejecting the character because not communicated and because no overt act was shown); State *v.* Carter, 45 La. An. 1326, 14 So. 30 (dangerous character not received in mitigation, unless "hostile demonstration" is shown); 1894, State *v.* Barker, 46 La. An. 798, 802, 15 So. 98 (trial Court's findings control, unless affirmatively shown erroneous); State *v.* Williams, 46 La. An. 708, 15 So. 82 (same as State *v.* Ford; the "overt act" must be "some demonstration . . . of such character as to impress upon him that he was in imminent danger of his life or some great bodily harm"); State *v.* Beck, 46 La. An. 1419, 16 So. 368 (same as State *v.* Ford); State *v.* Green, 46 La. An. 1522, 16 So. 367 (same); 1895, State *v.* Vallery, 47 La. An. 182, 16 So. 745 (admissible, where there is "a hostile demonstration"; the trial Court's discretion controls); 1896, State *v.* Compagnet, 48 La. An. 1470, 21 So. 46 (same); 1901, State *v.* Napoleon, 104 La. 164, 28 So. 972 (admitted; no cases cited). From this maze of twisting precedents, which none but a Louisiana practitioner should be condemned to unravel, these conclusions could be ventured: (1) The law of to-day goes back only to Birdwell's and Ford's cases, in which the phrasing of the limitation and the doctrine of the trial Court's discretion are established; (2) Some later cases (erroneously, it would seem) still treat threats at the time of the affray as equivalent to an overt act of aggression; (3) In the Paterno case, the doctrine is laid down that the deceased's character and threats are also evidential as explaining away the inference of the defendant's malice from his prior preparations; this doctrine is apparently unsound as far as concerns the character-evidence; see *post*, § 247. Ensuing rulings centre chiefly on the question of the finality of the trial Court's ruling: 1904, State *v.* Golden, 113 La. 791, 37 So. 757 (the trial judge, not the jury, determines whether the overt act has been sufficiently evidenced, but his ruling may be reviewed); 1906, State *v.* Rodriguez, 115 La. 1004, 40 So. 438 (mode of preparing the judge's certificate of finding as to the overt act, under St. 1896, No. 113, requiring a bill of exceptions to be taken down at the time in writing; Provosty, J., diss., says that "the recognized purpose of that act was to take from the control of the trial judge, where the doctrine of State *v.* Ford [*supra*] had placed it, the statement of the facts upon which a bill has been retained"); 1906, State *v.* Craft, 118 La. 117, 42 So. 718 (rule of the trial Court's discretion, affirmed); 1907, State *v.* Mathews, 119 La. 665, 44 So. 336 (excluded, because no overt act was shown); 1919, State *v.* Benoit, 144 La. 254, 80 So. 329 ("the uniform jurisprudence in this State" requires proof of the overt act "to the satisfaction of the trial judge"); 1921, State *v.* Sandiford, 149 La. 933, 90 So. 261 (trial Court's finding of no overt act, reviewed and affirmed; cited more fully *post*, § 247);

Maine: 1837, State *v.* Field, 14 Me. 244 (the deceased's character as "quarrelsome, savage, and dangerous", excluded, as not amounting to an excuse; the present point of view was emphasized by the counsel, but was apparently not understood by the Court);

Massachusetts: 1845, Com. *v.* York, 7 Law Reporter, Mass. 497, 507 (character rejected, as without precedent and leading to multifariousness); 1854, Com. *v.* Hilliard, 2 Gray 294 ("general character and habits" as a "quarrelsome, fighting, vindictive, and brutal man of great strength", not admitted to show "reasonable cause to fear great bodily harm"; because "such evidence is too remote and uncertain"); 1858, Com. *v.* Mead, 12 Gray 167 (the defendant shot the deceased while the latter was choking him, as alleged; the fact was excluded, following the preceding case, of the deceased's remarkable strength and of his skill and practice as a garroter by seizing another by the throat in a peculiar and danger-

there were real doubt about the necessity for defence and the apprehension of danger. Hence Courts have usually laid down certain conditions intended to prevent abuse of this evidence.

A common limitation is the broad one that *other evidence shall be offered* which serves to bring *self-defence* fairly into issue, — some appreciable evidence of the deceased's prior aggression, or of ground to believe in impending

ous mode); 1905, Com. *v.* Tircinski, 189 Mass. 257, 75 N. E. 261 (the foregoing cases repudiated; the deceased's general character as a violent and quarrelsome man, known to the defendant, admitted);

Michigan: 1868, People *v.* Garbutt, 17 Mich. 9, 15 (excluded, because insanity, not self-defence, was the defence); 1878, Brownell *v.* People, 38 Mich. 732, 735 (that the deceased was "a powerful man of violent temper", admitted);

Minnesota: 1860, State *v.* Dumphey, 4 Minn. 438, 445 (admissible where there is doubt as to the premeditation of the defendant; opinion not clear);

Mississippi: 1849, Jolly *v.* State, 13 Sm. & M. 223, 225, *semble* (admissible, if the deceased appears as the aggressor); 1856, Cotton *v.* State, 31 Miss. 504 (character admissible); 1859, Wesley *v.* State, 37 Miss. 327, 346 (admissible, where the defendant had ground to apprehend an attack); 1872, Chase *v.* State, 46 Miss. 683, 703 (excluded, although the issue of self-defence was raised and strong evidence of it offered; the opinion is confused, and, though citing authorities profusely, does not show understanding of the principle); 1872, Harris *v.* State, 46 Miss. 319, 325 (approving the Chase case); 1881, Spivey *v.* State, 58 Miss. 858, 864 (admissible, where there is apparent danger from some overt act indicating a present purpose to do the accused some great bodily harm"); 1885, Moriarty *v.* State, 62 Miss. 654, 661 (expressing the rule substantially as in the preceding case); 1888, King *v.* State, 65 Miss. 576, 582, 5 So. 97 (character admissible, approving the preceding case); 1898, Smith *v.* State, 75 Miss. 542, 23 So. 260 (the defendant's testimony alone is enough to "lay the predicate" of "some testimony" of an overt act);

Missouri: 1853, State *v.* Jackson, 17 Mo. 544, 548 (excluded here, because no issue of self-defence was made); 1859, State *v.* Hicks, 27 Mo. 588, 590 (admitted, the issue being self-defence and the other evidence creating a doubt); 1872, State *v.* Keene, 50 Mo. 357, 360 (same); 1874, State *v.* Bryant, 55 Mo. 75, 78 (holding that character as a "desperate and dangerous" man, and not merely as to "peace and quiet", should have been admitted); 1875, State *v.* Harris, 59 Mo. 550, 552, 556 (admitted, but with the intimation that the deceased must appear to have made some demonstration at the time); 1876, State *v.* Elkins, 63 Mo. 165 (admissible in doubtful cases of self-defence); 1893, State *v.* Pettit, 119 Mo. 410, 414, 24 S. W. 1014 (admitted); 1893, State *v.* Kennade, 121 Mo. 405, 415, 26 S. W. 347 (excluded, because not communicated); 1907, State *v.* Zorn, 202 Mo. 12, 100 S. W. 591; 1910, State *v.* Colvin, 226 Mo. 446, 126 S. W. 448 (certain testimony held insufficient);

Montana: 1898, State *v.* Shafer, 22 Mont. 17, 55 Pac. 526 (admitted; there being evidence of deceased's aggression); 1899, State *v.* Shadwell, 22 Mont. 573, 57 Pac. 281 (similar);

Nevada: 1880, State *v.* Pearce, 15 Nev. 188, 191 (admissible, where "the circumstances are such as to raise a doubt" as to self-defence);

New York: 1866, People *v.* Lamb, 41 N. Y. 360, 366 (admissible only "where the defendant had reason to be in fear" of life or great bodily harm); 1881, Abbott *v.* People, 86 N. Y. 461, 469 (admissible only "where it is shown that an assault has been committed or threatened at the time when the homicide is committed or immediately preceding it, or is intimately connected with it so as to justify" action in self-defence); 1904, People *v.* Rodawald, 177 N. Y. 408, 70 N. E. 1 (admissible, if the reputation has come to the defendant's knowledge);

North Carolina: 1877, State *v.* Turpin, 77 N. C. 473, 477 (character as a violent and dangerous man; uncommunicated character also admissible, under § 63, *ante;* the limitation is made that there must be evidence tending to show self-defence, and that the evidence be wholly circumstantial; for the first time the necessity of communication is recognized in this State; the local precedents cited do not deal at all with the present question); 1879, State *v.* Chavis, 80 N. C. 357 (State *v.* Turpin recognized); 1893, State *v.* Rollins, 113 N. C. 722, 732, 18 S. E. 394 (excluded, where not known to defendant); 1897, State *v.* Byrd, 121 N. C. 684, 28 S. E. 353 (admissible, but only where there is "other evidence tending to show self-defence" or where "the evidence of the killing is entirely circumstantial"; but the latter seems to be said of uncommunicated character only);

Ohio: 1860, Gandolfo *v.* State, 11 Oh. St. 114, 118, *semble* (admissible); 1875, Marts *v.* State, 26 Oh. 162 (same); 1907, State *v.* Roderick, 77 Oh. 301, 82 N. E. 1082 (admissible; correcting the loose remarks in Marts *v.* State, *supra*, that besides reputation-evidence some other evidence of the actual character must be given);

aggression, — for it is not always clear which is judicially meant. By some Courts it is said (more strictly) that the issue of *self-defence* (*i.e.*, presumably, the impending of an attack) *must be in doubt.* Another and more specific form of limitation is the doctrine of "*overt act*", peculiarly developed in Louisiana and Florida. The notion here is that the deceased's reputation can have a 'bona fide' bearing on the defendant's apprehension only where there occurs, at the time of the affray, some conduct of the deceased which might be otherwise colorless, but when interpreted by his known character becomes apparently an act of aggression. Thus there must be some "overt act", *i.e.* of

Oregon: 1894, State *v.* Morey, 25 Or. 241, 255, 35 Pac. 655, 36 Pac. 573 (admissible, when there is evidence "tending to show that the defendant was assailed by the deceased and in apparent danger"); 1911, State *v.* Parker, 60 Or. 219, 118 Pac. 1011 (holding that the jury are not to consider the threats unless they have a doubt as to the aggressor; but all attempts of this sort to control the jury by instructions of law are misguided);

Pennsylvania: 1794, Pennsylvania *v.* Robertson, Add. 246 (murder of an Indian in self-defence; the reputation of the time that the Indians were in an angry mood, and the bad repute of the deceased, considered by the Court as affecting the defendant's state of mind); 1867, Com. *v.* Lenox, 3 Brewst. 249, 251 (reputed character admissible "if the case showed" that the defendant was "under reasonable fear of his life from the deceased at the time"); 1863, Com. *v.* Ferrigan, 44 Pa. 388 (general deportment as to violence, rejected, there being no evidence of aggression calling for self-defence); 1893, Com. *v.* Straesser, 153 Pa. 451, 456, 26 Atl. 17 (admissible, if the issue is self-defence and if knowledge is shown);

Porto Rico: 1911, People *v.* Sutton, 17 P. R. 327, 330, 359 (uncommunicated bad character excluded); 1916, People *v.* Barrioe, 23 P. R. 772 (People *v.* Sutton affirmed);

South Carolina: 1860, State *v.* Smith, 12 Rich. 430, 443 ("a character and habits of violence, treachery, etc., such as might beget reasonable apprehensions of grievous bodily harm"); 1888, State *v.* Turner, 29 S. C. 34, 41 (admissible; it must not be merely "bad character, as contradistinguished from character for violence, ferocity, vindictiveness, etc., etc."); *Tennessee:* 1836, Wright *v.* State, 9 Yerg. 342 (malicious stabbing; self-defence not alleged; the deceased's character as a "turbulent, insolent, saucy fellow" held inadmissible, as not extenuating the offence); 1842, Carroll *v.* State, 3 Humph. 315, 317 (no general rule); 1859, Harmon *v.* State, 3 Head 243 (the desperate and dangerous character of the deceased, "in connection with previous threats", held admissible, on self-defence pleaded, as "explanatory of the state of defence in which the defendant placed himself"; the requirement of communication implied only); 1872, Williams *v.* State, 3 Heisk. 376, 397 (the deceased's violent character, known to the defendant, treated as admissible, the issue being self-defence); 1873, Jackson *v.* State, 6 Baxt. 452, 458, 465 (*semble*, same);

Texas: 1854, Henderson *v.* State, 12 Tex. 525, 530 (not clear); St. 1858, Feb. 12, Pen. Code 1911, Art. 1143 ("where a defendant accused of murder seeks to justify himself on the ground of threats against his own life, he may be permitted to introduce evidence of the threats made; but the same shall not be regarded as affording a justification for the offence unless it be shown that at the time of the homicide the person killed by some act then done manifested an intention to execute the threat so made. In every instance where proof of threats has been made, it shall be competent to introduce evidence of the general character of the deceased. Such evidence shall extend only to an inquiry as to whether the deceased was a man of violent or dangerous character, or a man of kind and inoffensive disposition, or whether he was such a person as might reasonably be expected to execute a threat made"); 1871, Dorsey *v.* State, 34 Tex. 651, 658 (applying the preceding statute); 1875, Horbach *v.* State, 43 Tex. 242, 255 (pointing out that the Code section was chiefly intended to settle a controversy as to the admissibility of threats, and is therefore not exclusive of character-evidence relevant under other conditions not therein specified; admitting character-evidence additionally to explain acts of the deceased at the time "of doubtful import", are capable of being "construed more favorably for the accused" by such evidence); 1892, Evers *v.* State, 31 Tex. Cr. 318, 324, 20 S. W. 744 (excluded, where no "act indicating any purpose" to kill or harm defendant was shown); 1893, Skaggs *v.* State, 31 Tex. Cr. 563, 21 S. W. 257 (reputation of the deceased acquired after the killing excluded);

Vermont: 1876, State *v.* Lull, 48 Vt. 581 (admitted; here the character as "a violent and desperate man");

Virginia: 1872, Dock *v.* Com., 21 Gratt. 909, 911 (admissible; giving no general rule); 1900, Jackson *v.* Com., 98 Va. 845, 36 S. E.

possible aggression, before the reputation-evidence can be received. This is a wise and fair limitation, provided it be not further refined by details which degenerate into quibbles, — a proviso not always observed. — In few Courts has any one form of these limitations been clearly laid down or consistently followed.

Two peculiar questions may arise under the overt-act form of the doctrine. (1) Shall the question whether an overt act is sufficiently evidenced to lay the foundation for the reputation-evidence be *left entirely* in the hands of the *trial Court?* Unless our law is to become a mass of quibbles which no practitioner can master and every murderer will welcome, the answer must be in the affirmative.[2] (2) May the defendant's mere unsworn assertion of an overt act (where permitted instead of his sworn testimony) be considered as in itself some evidence of an overt act? It certainly should be;[3] but whether it is sufficient evidence for the trial Court should never be considered on appeal.

(*b*) *Kind of character.* The kind of reputed character of the deceased which should affect the defendant's apprehension may be *any emotional trait* that would naturally lead the former to make unprovoked aggression. Various phrasings are employed by the Courts to define this trait.[4]

(*c*) The reputation of a *third person* is relevant only so far as the third

487 (excluded, because the evidence did not tend to show self-defence); 1884, Harrison *v.* Com., 79 Va. 374 (admissible where "a case of self-defence is prima facie made out"; but the deceased's reputation, not the witness' personal opinion, is alone admissible);
Washington: 1896, State *v.* McGonigle, 14 Wash. 594, 45 Pac. 20 (excluded, because there was no contention of self-defence);
West Virginia: 1889, State *v.* Evans, 33 W. Va. 417, 424, 10 S. E. 792 (excluding hearsay — spoken of as reputation — to the influence of one of the two persons killed over the other, as affecting the defendant's reasonable fear; here it was perfectly immaterial whether the influence existed, and therefore whether reputation could be used to prove its existence); 1901, State *v.* Morrison, 49 W. Va. 210, 38 S. E. 481 (theory of admission pointed out); 1901, State *v.* Madison, 49 W. Va. 96, 38 S. E. 492 (admissible only *where there* is some evidence of self-defence);
Wisconsin: 1880, State *v.* Nett, 50 Wis. 524, 527 (admitting such evidence where the circumstances raise a question as to self-defence; and distinguishing on that ground the earlier ruling of Brucker *v.* State, 19 Wis. 539; 1865).

[2] 1885, Poché, J., in State *v.* Ford, 37 La. An. 443, 461: "Does the rule governing the admission of such testimony content itself with *testimony* of an overt act by the deceased, or does it require *proof* of such an act? . . . In passing on such a question, the trial Judge must of necessity be clothed with the authority to decide whether a proper foundation has been laid for the proffered evidence and that authority necessarily includes the discretion to ignore and not consider testimony which his reason refuses to believe."

[3] *Contra:* 1886, Bond *v.* State, 21 Fla. 738, 759; 1894, Steele *v.* State, 33 Fla. 348, 351, 14 So. 841. But since the accused has been enabled, in this jurisdiction, not merely to make a statement, but to become a witness (c. 4400, St. 1895, Rev. G. St. 1919, § 6080), it is properly held that his testimony alone may supply the overt act required: 1896, Hart *v.* State, 38 Fla. 39, 20 So. 805; Allen *v.* State, 38 Fla. 44, 20 So. 807.

[4] 1883, Williams *v.* State, 74 Ala. 18 (as a "turbulent, violent, and bloodthirsty man"); 1909, Pate *v.* State, 162 Ala. 32, 50 So. 357 (character as a man who would "take his adversary unawares", admitted); 1893, Garner *v.* State, 31 Fla. 170, 175, 12 So. 638 (must be a "violent and dangerous" character); 1891, Bowlus *v.* State, 130 Ind. 227, 28 N. E. 1115 ("strength, ferocity, vindictiveness, quarrelsomeness, etc."); 1881, Spivey *v.* State, 58 Miss. 858, 864 (admitting character as "violent, dangerous, or regardless of human life", but not as "overbearing, turbulent, or impetuous", because "the inquiry should be limited to such features of character as have a tendency to throw light on the apprehension of the accused because of that character").

Other phrasings will be found in n. 1, *supra*.

person at the time of the affray is associated with the deceased in the apparent aggression.[5]

(*d*) It is assumed throughout that the reputation offered was *known to the defendant*. Reputation in the neighborhood where both live is sufficient with nothing more. Reputation in any other place must be specifically shown to have been probably brought to the defendant's attention; his sojourn in the place where it prevailed would suffice.[6]

(*e*) In *civil cases* of assault or battery, or, for example, in a prosecution for *rape*, a similar situation — *i.e.* apprehension as affected by the opponent's reputation — may be presented, and similar evidence should be received.[7]

(*f*) The *strength* of the deceased may conceivably affect the defendant's apprehensions,[8] and also his potency for harm as indicated by his habitual *carrying of weapons* or his possession of them at the time of the affray;[9] these facts, if known to the defendant, should be considered as properly affecting his apprehensions.

(*g*) The prosecution may *rebut* the evidence of bad reputation, just as it may attempt to disprove any other allegation of the defence.[10] Most Courts refuse to allow the deceased's good reputation to be shown except in rebuttal of an alleged bad reputation.[11] Yet it is difficult to see, if a genuine issue of

[5] 1898, Anderson *v.* U. S., 170 U. S. 481, 18 Sup. 689 (murder of captain and mate; trial for the latter only; captain's ferocious character excluded; unsound, on the facts); 1895, Goldsmith *v.* State, 105 Ala. 8, 16 So. 933 (excluded; yet here the third person was taking part in the affray).

[6] The cases are cited in n. 1, *supra*.

The defendant's knowledge may be obtained otherwise than by reputation: 1901, State *v.* Burton, 63 Kan. 602, 66 Pac. 633 (defendant's personal knowledge or belief, however obtained, is admissible).

But a *witness' personal knowledge or opinion* of the deceased's character, even if it were admissible under the Opinion rule (*post*, § 1983), would not serve here, because it would not show the defendant's knowledge: 1899, State *v.* Shadwell, 22 Mont. 559, 57 Pac. 281.

[7] 1871, Strang *v.* People, 24 Mich. 1, 5 (where the prosecutrix gave as a reason for not complaining of an uncle's rape that he had been violent to his wife, etc.); 1897, Golder *v.* Lund, 50 Nebr. 789, 70 N. W. 397 (civil action, admitted).

For further illustrations of this class of evidence, see *post*, § 140.

[8] 1896, Smith *v.* U. S., 161 U. S. 85, 16 Sup. 483; 1871, State *v.* Collins, 32 Ia. 38; 1883, Com. *v.* Barnacle, 134 Mass. 215 (repudiating Com. *v.* Mead, *infra*, note 13); 1905, Com. *v.* Tircinski, 189 Mass. 257, 75 N. E. 261 (approving Com. *v.* Barnacle); 1909, Stevens *v.* State, 84 Nebr. 759, 122 N. W. 58 ("physical health and strength" of the prosecuting witness); 1880, State *v.* Nett, 50 Wis. 524, 527, 7 N. W. 344.

[9] 1902, Cawley *v.* State, 133 Ala. 128, 32 So. 227; 1904, Sims *v.* State, 139 Ala. 74, 36 So. 138 (excluded, because the defendant's knowledge was not shown); 1906, Rodgers *v.* State, 144 Ala. 32, 40 So. 572 (but the defendant's knowledge must be shown); 1906, Jackson *v.* State, 147 Ala. 699, 41 So. 178; 1897, People *v.* Schorn, 116 Cal. 503, 48 Pac. 495 (allowing the prosecution to deny this); 1902, People *v.* Adams, 137 Cal. 580, 70 Pac. 662; 1897, Daniel *v.* State, 103 Ga. 202, 29 S. E. 767; 1906, Warrick *v.* State, 125 Ga. 133, 53 S. E. 1027 (but the defendant's knowledge must be shown); 1897, McDouall *v.* People, 168 Ill. 93, 48 N. E. 86; 1858, Payne *v.* Com., 1 Metc. Ky. 370, 379; 1904, State *v.* Clayton, 113 La. 782, 37 So. 754, *semble;* 1909, Stockham *v.* Malcolm, 111 Md. 615, 74 Atl. 569 (plaintiff's carrying knuckles; here excluded for lack of evidence of overt act); 1888, King *v.* State, 65 Miss. 576, 582, 5 So. 97; 1900, State *v.* Yokum, 14 S. D. 84, 84 N. W. 389 (deceased's reputed habit of carrying firearms, admissible; reversing the ruling in s. c. 11 S. D. 544, 79 N. W. 835; Corson, J., diss.); 1902, State *v.* Ellis, 30 Wash. 369, 70 Pac. 963; 1903, State *v.* Crawford, 31 Wash. 260, 71 Pac. 1030.

Compare the cases cited *ante*, § 111.

[10] 1885, Davis *v.* People, 114 Ill. 86, 95, 29 N. E. 192; 1858, Dukes *v.* State, 11 Ind. 557, 565; 1892, Fields *v.* State, 134 Ind. 46, 56, 32 N. E. 780; 1876, Thomas *v.* People, 67 N. Y. 218, 224.

[11] 1904, Kennedy *v.* State, 140 Ala. 1, 37 So. 90; 1870, People *v.* Anderson, 39 Cal. 704; 1891, People *v.* Powell, 87 Cal. 348, 362, 25 Pac. 481; 1871, Pound *v.* State, 43 Ga. 88,

self-defence is raised, why the prosecution should not be allowed to show, independently of such rebuttal, the deceased's good reputation as throwing light on the defendant's just apprehensions.[12]

(*h*) The *actual character* of the deceased, though *unknown* to the defendant, is admissible in most jurisdictions, from another point of view and therefore under different conditions, as evidencing the deceased's probable aggression (*ante*, § 63). A comparison of the rulings in each jurisdiction and of the requirements made for the two kinds of evidence is profitable.

(*i*) The tests applied in admitting *communicated threats* (*post*, § 247) are often the same as for the present subject, for the principle is in effect identical.

(*j*) The principle of admitting *communicated single acts of violence* by the deceased (*post*, § 248) is also the same, though the same tests are not applicable in every respect.

§ 247. (1) **Defendant in Homicide**; (*b*) **Threats by the Deceased.** On the same principle as that of the preceding section, *threats of violence* against the defendant, uttered by the deceased, and brought to the knowledge of the defendant, are relevant to show his belief of impending danger from the deceased. The state of the law in the various jurisdictions varies only in the phrasing of the generally accepted conditions of admissibility.[1]

129; 1874, State *v.* Potter, 13 Kan. 414, 423; 1895, State *v.* Vaughan, 22 Nev. 285, 39 Pac. 733; 1909, State *v.* Magill, 19 N. D. 131, 122 N. W. 330; 1906, Puryear *v.* State, 50 Tex. Cr. 454, 98 S. W. 258; 1872, Dock *v.* Com., 21 Gratt. Va. 909, 912.

The rule in *Texas* rests on the statute, P. C. 1911, § 1143, quoted *supra*, n. 1; but the Court has here read into the statute a limitation which does plain violence to its express words: 1906, Arnwine *v.* State, 50 Tex. Cr. 254, 96 S. W. 4 ("after proof of the communicated threat, the State may introduce evidence of the good character of the deceased, even where the defendant has not sought to do so; but this has never been extended, so far as we are aware, to instances of uncommunicated threats").

[12] *Accord:* 1842, Carroll *v.* State, 3 Humph. Tenn. 315, 317. Compare the doctrine about *actual character* (*ante*, § 63).

§ 247. [1] ENGLAND: 1713, Noble's Trial, 15 How. St. Tr. 740 (the deceased broke into the defendant's room with a constable to arrest him, and the defendant stabbed him in alleged self-defence; evidence was admitted that the deceased had once before "drawn his sword upon him, and once brought a pistol to his chambers on purpose to shoot him").

UNITED STATES: *Federal:* 1895, Allison *v.* U. S., 160 U. S. 203, 16 Sup. 252 (threats admissible); 1896, Wallace *v.* U. S., 162 U. S. 466, 16 Sup. 859 (same);

Alabama: 1851, Powell *v.* State, 19 Ala. 577, 581 (admitted); 1853, Pritchett *v.* State, 22 Ala. 42 (where the circumstances indicate self-defence; for the beginning of the "overt act" doctrine, as here applied, see § 246, *ante*); 1853, Carroll *v.* State, 23 Ala. 28, 36; 1859, Dupree *v.* State, 33 Ala. 380, 386; 1872, Hughey *v.* State, 47 Ala. 97, 163 (as "threats unaccompanied by acts" of aggression could not possibly excuse, mere threats alone are not receivable); 1875, Powell *v.* State, 52 Ala. 1 (communicated threats received); 1877, Payne *v.* State, 60 Ala. 80, 86 (no evidence of aggression by the deceased; threats made two weeks before, excluded; Pritchett's Case misunderstood); 1878, Myers *v.* State, 62 Ala. 603 (the jury should not consider the deceased's threats, unless there was "a present, impending purpose on his part, real or apparent, to put such threats into immediate execution"; *i.e.* the threats are admitted, and the absence of an "overt act" merely weighs with the jury, — a true construction of Pritchett's Case); 1878, Polk *v.* State, 62 Ala. 239 (threats of J. admitted, as an excuse upon a charge of carrying concealed weapons); 1880, Roberts *v.* State, 68 Ala. 164 (admissible only when "the deceased had sought a conflict with the accused, or was making some demonstration, or overt act of attack"; "in other words, the circumstances must properly raise a case of self-defence"; hence, such threats "cannot be excluded if there is the slightest evidence tending to prove a hostile demonstration"); 1881, Green *v.* State, 69 Ala. 8, 10 (threats a week before, excluded; but, as there was evidence of aggression, the ruling seems erroneous); 1898, Jones *v.* State, 116 Ala. 468, 23 So. 135 (excluded where there was "no act or hostile demonstration", etc.); 1901, Harkness *v.*

(*a*) As in the preceding topic, considerations of policy call for some *restrictions* calculated to secure the 'bona fide' use of such evidence. These may be, and frequently are, the same as those applied (in the preceding topic) to

State, 129 Ala. 71, 30 So. 73 (excluding threatening conduct, as distinguished from threatening words, on an improper application of the principle of § 951, *post;* Sharpe and Dowdell, JJ., properly dissenting); 1901, Willingham *v.* State, 130 Ala. 35, 30 So. 429 (Harkness *v.* State followed, by a majority); 1902, Andrews *v.* State, 134 Ala. 47, 32 So. 665 (overt-act rule, applied); 1902, Ragsdale *v.* State, 134 Ala. 24, 32 So. 674 (same); 1903, Johnson *v.* State, 136 Ala. 76, 34 So. 209 (excluded, there being no evidence of aggression); 1904, Gregory *v.* State, 140 Ala. 16, 37 So. 259 (rule applied); 1905, Dunn *v.* State, 143 Ala. 67, 39 So. 147 (rule applied); 1904, Gilmore *v.* State, 141 Ala. 51, 37 So. 359 (rule applied); 1906, Martin *v.* State, 144 Ala. 8, 40 So. 275 (rule applied); 1906, Skipper *v.* State, 144 Ala. 100, 42 So. 43 (excluded, because no issue of self-defence arose);

Arkansas: 1855, Atkins *v.* State, 16 Ark. 568, 584 (admitted); 1859, Coker *v.* State, 20 Ark. 53, 55; 1860, Pitman *v.* State, 22 Ark. 354, 356; 1874, McPherson *v.* State, 29 Ark. 225, 228 (the limitation suggested that threats are not admissible if there is no evidence tending to show apprehension of injury; no authorities cited); Palmore *v.* State, 29 Ark. 248, 261, 263 (admitted not only to throw light on the defendant's state of mind at the time of the affray, but also to negative the apparent malice of having armed himself beforehand); 1879, Harris *v.* State, 34 Ark. 469, 472 (admissible); 1904, Lee *v.* State, 72 Ark. 436, 81 S. W. 385;

Arizona: 1914, Nelson *v.* State, 16 Ariz. 165, 141 Pac. 704;

California: 1860, People *v.* Arnold, 15 Cal. 476, 480 (admissible); 1861, People *v.* Lombard, 17 Cal. 316, 320 (admissible; but not legally sufficient as a defence unless followed by an overt act); 1869, People *v.* Scoggins, 37 Cal. 676, 683 (same); 1879, People *v.* Taing, 53 Cal. 602 (excluded here because no preliminary showing of any kind was made); 1880, People *v.* Travis, 56 Cal. 251, 253 (threats admissible; no authorities cited or rule laid down); 1906, People *v.* Lamar, 148 Cal. 564, 83 Pac. 993;

Florida: 1886, Bond *v.* State, 21 Fla. 738, 752 (admissible when there are "circumstances which might reasonably cause him to believe that the deceased at the time of the killing had a purpose to carry them out"; though "no exact definition of an overt act can probably be given"); 1889, Smith *v.* State, 25 Fla. 517, 521, 6 So. 482 (same); 1891, Garner *v.* State, 28 Fla. 113, 133, 9 So. 835 (admissible when there is, "at least apparently, a hostile demonstration, or overt act of attack, tending to show" danger with other phrasings; the Court to determine whether evidence of such exists and to solve doubts in favor of the defendant); 1894, Steele *v.* State, 33 Fla. 348, 350, 14 So. 841, *semble* (same); 1902, Lane *v.* State, 44 Fla. 105, 32 So. 896 ("there must be some evidence of the overt act");

Georgia: 1846, Reynolds *v.* State, 1 Kelly 222, 230, *semble* (overt act not necessary); 1847, Hudgins *v.* State, 2 Ga. 173, 181 (communicated threats admissible; here excluded only on the absurd ground that the informant, who told the defendant, "Yonder comes J. A., and he will kill you", expressed his "opinion" only; see the Opinion rule, *post*, § 1963); 1848, Howell *v.* State, 5 Ga. 48, 54; Monroe *v.* State, ib. 85, 135 ("naked threats unaccompanied with personal violence", excluded); 1855, Keener *v.* State, 18 Ga. 194, 218, 225 (the deceased's demeanor and threats just before the affray, admitted; the limitation of Monroe's case in effect repudiated; no overt act necessary); 1858, Hawkins *v.* State, 25 Ga. 209 (same as Hudgins' case); 1859, Lingo *v.* State, 29 Ga. 470, 483 (threats uncommunicated, rejected); 1881, Coxwell *v.* State, 66 Ga. 309 (previous communicated threats admitted); 1904, Taylor *v.* State, 121 Ga. 348, 49 S. E. 303 (communicated expressions of peaceful intent, admitted in rebuttal);

Illinois: 1914, People *v.* Terrell, 262 Ill. 138, 104 N. E. 264 (excluded, because no evidence of an overt act was offered);

Indiana: 1863, De Forest *v.* State, 21 Ind. 23, 26 (admitted); 1883, Wood *v.* State, 92 Ind. 269, 273 (same); 1900, Enlow *v.* State, 154 Ind. 664, 57 N. E. 539 (same); 1911, Malone *v.* State, 176 Ind. 338, 96 N. E. 1 (threats excluded for lack of overt act);

Iowa: 1871, State *v.* Collins, 32 Ia. 36; 1875, State *v.* Woodson, 41 Ia. 425, 428; 1876, State *v.* Maloy, 44 Ia. 104, 114; 1877, State *v.* Elliott, 45 Ia. 490 (admitted in all of these cases);

Kansas: 1879, State *v.* Brown, 22 Kan. 222, 230 (assumed as admissible); 1880, State *v.* Scott, 24 Kan. 68, 70 (admitted; no rule stated); 1901, State *v.* Burton, 63 Kan. 602, 66 Pac. 633 (admitted);

Kentucky: 1855, Cornelius *v.* Com., 15 B. Monr. 539, 546 (admissible); 1869, Young *v.* Com., 6 Bush 318, *semble* (same); 1865, Philips *v.* Com., 2 Duv. 328, 329 (same); 1870, Carico *v.* Com., 7 Bush 124, 129 (same); 1871, Bohannon *v.* Com., 8 Bush 481, 488, *semble* (same); 1882, Lightfoot *v.* Com., 80 Ky. 521, *semble* (same); 1896, Com. *v.* Hoskins, — Ky. —, 35 S. W. 284 (admissible; but here they were too indefinite); 1896, Grayson *v.* Com., — Ky. —, 35 S. W. 1035 (threats of a year before, held not improperly excluded, but not threats of a month before); 1903, Morrison *v.* Com.,

the use of the deceased's character. But they are less frequently laid down for the present class of evidence, apparently for two reasons, — first, because there is less danger of improperly using the deceased's threats in justification

— Ky. —, 74 S. W. 277 (overt-act rule apparently adopted);
Louisiana: 1859, State *v.* Mullen, 14 La. An. 577, 579, *semble* (admissible); 1878, State *v.* Robertson, 30 La. An. 340 (same): State *v.* Ryan, 30 La. An. 1177, *semble* (same); 1880 State *v.* Cooper, 32 La. An. 1084, *semble* (same); State *v.* Vance, 32 La. An. 1177, *semble* (same; but conditional threats excluded); 1881, State *v.* Jackson, 33 La. An. 1087, *semble* (admissible); State *v.* Fisher, 33 La. An. 1344, *semble* (same); 1884, State *v.* Birdwell, 36 La. An. 859, 861 (threats alone, without an "overt act, assault, or hostile demonstration" at the time, excluded); 1885, State *v.* Ford, 37 La. An. 443, 460 (same test; the trial Court to determine whether the preliminary overt-act evidence suffices); State *v.* Labuzan, 37 La. An. 489 (same); State *v.* Janvier, ib. 644 (same); 1886, State *v.* Spell, 38 La. An. 20 (same); 1887, State *v.* Brooks, 39 La. An. 817, 2 So. 498 (same as State *v.* Birdwell); 1889, State *v.* Demareste, 41 La. An. 617, 6 So. 136 (same as State *v.* Ford); 1890, State *v.* Cosgrove, 42 La. An. 753, 7 So. 714 (same); 1891, State *v.* Wilson, 43 La. An. 840, 9 So. 490 (same as State *v.* Birdwell, but phrasing the preliminary condition as "threat or hostile demonstration"); 1892, State *v.* Jackson, 44 La. An. 160, 161, 163, 10 So. 600 (same as State *v.* Ford; the deceased's ability to carry out the threats, not sufficient to admit them); 1893, State *v.* Harris, 45 La. An. 842, 845, 13 So. 199 (same as State *v.* Ford, emphasizing the trial Court's discretion); 1894, State *v.* Green, 46 La. An. 1522, 16 So. 367 (same); 1895, State *v.* King, 47 La. An. 28, 16 So. 566 (same); 1895, State *v.* Vickers, 47 La. An. 1574, 18 So. 639 (threats must be communicated); 1896, State *v.* Compagnet, 48 La. An. 1470, 21 So. 46 (same as King's case); 1897, State *v.* Pruett, 49 La. An. 283, 21 So. 842 (an overt act not required, where the only purpose was to explain away the defendant's expressed intention to kill the deceased, by showing his reasons for so threatening, *i.e.* to negative malice); 1898, State *v.* Wiggins, 50 La. An. 330, 23 So. 334 (admissible if an "overt act or hostile demonstration" is shown; the trial Court's discretion to determine this); 1899, State *v.* Frierson, 51 La. An. 706, 25 So. 396 (rule applied; trial judge's certificate not treated as sufficient on the subject of overt act; no authorities cited); 1903, State *v.* Tasby, 110 La. 121, 34 So. 300 (whether the trial judge's report as to the absence of evidence of an overt act is conclusive, not clear); 1903, State *v.* Forbes, 111 La. 473, 35 So. 710 (the Court remarks upon the importance of preserving "the stability of judicial decisions"; the trial judge's finding held conclusive); 1904, State *v.* Thomas, 111 La. 473, 35 So. 914 (threats, without an overt act, not admissible "as part of the 'res gestæ' and in mitigation"); 1906, State *v.* Rodriguez, 115 La. 1004, 40 So. 438 (mode of preparing an exception to the judge's ruling as to the overt act; cited more fully *ante*, § 246, n. 13); 1906, State *v.* Craft, 118 La. 117, 42 So. 718 (rule of the trial Court's discretion, affirmed; "that question is no longer open for discussion"; Breaux, C. J., diss.); 1907, State *v.* Mathews, 119 La. 665, 44 So. 336 (excluded, because no overt act was shown); 1912, State *v.* Harris, 131 La. 616, 59 So. 1009 (overt act must be shown, etc.); 1915, State *v.* Boudreaux, 137 La. 227, 68 So. 422 (State *v.* Ford followed; O'Niell, J., diss.); 1919, State *v.* Pairs, 145 La. 443, 82 So. 407 (trial judge's ruling as to hostile demonstration as a condition for admitting prior threats, held not conclusive; none of the foregoing cases cited; thus the see-saw of rulings continued to inject an interesting element of chance into criminal practice in this State); 1921, State *v.* Sandiford, 149 La. 933, 90 So. 260 (defendant had testified to a hostile demonstration by deceased at the time of the affray; he then offered testimony to the deceased's prior threats, to corroborate his own testimony to the hostile act and to his belief of danger; the trial judge excluded the evidence because "there was no doubt in the mind of the court as to who was the aggressor", and because threats were admissible only where "who was the aggressor is a very close or doubtful question"; held error, citing State *v.* Pairs, *supra;* on rehearing, held not error, because "we would not be justified in disturbing the ruling of the trial judge", and because the defendant had "failed to show by a preponderance of evidence that the deceased made a hostile demonstration", citing State *v.* Thomas, *supra*, and the cases of Golden, Craft, etc., *ante*, § 246; O'Niell, J., dissenting, deplores "that the judgment of this Court should begin again to oscillate, as it had been oscillating ever since the question was first presented" whether the defendant must first prove the hostile act by preponderance of evidence to the trial judge's satisfaction; pointing out the inconsistency of having a stricter rule for communicated threats than for uncommunicated threats (*ante*, § 111), in that the former also serve for the latter purpose, viz. to evidence who was the aggressor by doing the first hostile act; on second rehearing, the ruling is adhered to by the majority, who declare that State *v.* Pairs, *supra*, "was not intended to be a departure from the established jurisprudence" as to requiring proof of an overt act; citing with approval the above text in § 246, par. 1, *a*);

for the killing (less danger, that is, than where he can be shown to be an abandoned ruffian, a curse to the community), and, secondly, because specific threats of violence have a more decided bearing on the probability of

Maryland: 1880, Turpin *v.* State, 55 Md. 462, 473 (admitted only when there was an overt act at the time and the defendant was in apparent imminent danger);
Michigan: 1868, People *v.* Garbutt, 17 Mich. 9, 15 (excluded, because insanity, not self-defence, was the issue); 1878, Brownell *v.* People, 38 Mich. 732, 735, 736 (threats and conduct admitted on the issue of self-defence); People *v.* Lilly, 38 Mich. 276 (admitting "language, manner, and acts"); 1902, People *v.* Tillman, 132 Mich. 23, 92 N. W. 499 (battery; plaintiff's prior attack upon defendant admitted);
Minnesota: 1860, State *v.* Dumphey, 4 Minn. 438, 449 (threats made ten days beforehand, admissible);
Mississippi: 1859, Wesley *v.* State, 37 Miss. 327, 346 (admissible, where the defendant had ground to fear an attack); Newcomb *v.* State, 37 Miss. 383, 400, *semble* (if communicated, admissible); 1870, Evans *v.* State, 44 Miss. 762, 772 (excluded, because the other evidence showed no possible case for self-defence); 1872, Harris *v.* State, 46 Miss. 319, 323 (excluded, for the same reason); 1877, Johnson *v.* State, 54 Miss. 430, 435 (reviewing all the cases, and concluding that the issue must be self-defence, and there must be testimony tending to show a demonstration by the deceased); Holly *v.* State, 55 Miss. 424, 428 (excluded, because there was no evidence of any "overt act" or "demonstration" which in the light of the threats could reasonably have caused fear of their execution); Kendrick *v.* State, 55 Miss. 436, 449, 450 (apparently applying the same rule); 1885, Moriarty *v.* State, 62 Miss. 654, 661 (expressing the rule substantially as in Holly's Case); 1900, Johnson *v.* State, — Miss. —, 27 So. 880 (threats held improperly excluded); Oden *v.* State, — Miss. —, 27 So. 992 (threats held properly excluded on the facts); 1920, Clark *v.* State, 123 Miss. 147, 85 So. 188 (conditional threats, admitted);
Missouri: 1853, State *v.* Jackson, 17 Mo. 544, 548 (excluded, no issue of self-defence being made, and the threats not being recent); 1856, State *v.* Hays, 23 Mo. 287, 310 (same); 1871, State *v.* Sloan, 47 Mo. 604 (approving the Hays case, but admitting here threats made continuously to within a recent time, the issue being self-defence); 1872, State *v.* Keene, 50 Mo. 357 (similar facts); 1875, State *v.* Harris, 59 Mo. 550, 552, 556 (admitted; but with intimations that there must be an attempt to execute); 1876, State *v.* Elkins, 63 Mo. 159, 163 (no general rule attempted; intimations that the threats must be fairly recent and that there must be an attempt to execute them at the time); 1877, State *v.* Alexander, 66 Mo. 148, 162 (admissible, if there is "evidence tending to show" the deceased the aggressor); 1879, State *v.* Guy, 69 Mo. 435 (threat excluded; obscure); 1882, State *v.* Harris, 76 Mo. 364 (threat received); 1897, State *v.* Reed, 137 Mo. 125, 38 S. W. 574 (admissible only where the issue of defence is raised); 1898, State *v.* Albright, 144 Mo. 638, 46 S. W. 620 (admissible only in connection with an overt act); 1900, State *v.* Hollingsworth, 156 Mo. 178, 56 S. W. 1087 (conditional threats admitted; compare § 107, *ante*); 1901, State *v.* Smith, 164 Mo. 567, 65 S. W. 270 (admissible);
Nebraska: 1895, Basye *v.* State, 45 Nebr. 261, 63 N. W. 811 (admissible, "where it is claimed that the killing was in self-defence");
Nevada: 1873, State *v.* Hall, 9 Nev. 58 (admissible only when at the time "something was done which would induce a reasonable man" to fear death or serious bodily harm);
New Jersey: 1824, State *v.* Zellers, 7 N. J. L. 237 (admissible); 1905, State *v.* Tolla, 72 N. J. L. 515, 62 Atl. 675 (murder of a man by a woman; the man's prior attempts to violate her, excluded in the absence of any act at the time indicating "a present intention to harm the defendant"); 1915, State *v.* Hocker, 87 N. J. L. 13, 93 Atl. 78 (prior communicated threats, admissible; State *v.* Tolla distinguished);
New Mexico: 1900, Terr. *v.* Hall, 10 N. Mex. 545, 62 Pac. 1083 (admissible "where there is proof of a hostile demonstration by the deceased at the time of the killing"; confused opinion); Terr. *v.* Pratt, 10 N. Mex. 138, 61 Pac. 104 (an anonymous threatening letter, if rightfully believed by the defendant to come from the deceased, is admissible);
New York: 1835, People *v.* Rector, 19 Wend. 589, 614 (murder at the defendant's door, the deceased standing there, and the defendant having been summoned by knocks on the door just before; the fact was admitted of a riotous breaking of the defendant's house a few nights before, and of threats to return, though the defendant did not know whether the deceased was one of that party; Bronson, J., dissenting at 601); 1873, Stokes *v.* People, 53 N. Y. 174 (threats admissible, "as tending to create a belief in the mind of the accused that his life was in danger, or that he had reason to apprehend some great bodily harm from the acts and motions of the deceased, when in the absence of such threats such acts and motions would cause no such belief");
North Carolina: 1844, State *v.* Scott, 4 Ired. 415 (the threats apparently held admissible, but treated as in this instance not important, since the deceased was not doing anything which could be referred to this design to in-

aggression than mere dangerousness of character. It is therefore to be noted that the rulings on the two subjects in a given jurisdiction are not necessarily mutually applicable.

jure); 1877, State *v.* Turpin, 77 N. C. 473, 476 (threats admissible); 1897, State *v.* Byrd, 121 N. C. 684, 28 S. E. 353 (admissible only where there is "other evidence of tending to show self-defence" or where "the evidence of the killing is entirely circumstantial"; but the latter seems to be said of uncommunicated threats only);
Oklahoma: 1910, White *v.* State, 4 Okl. Cr. 143, 111 Pac. 1010 (not admissible where no issue of self-defence is made); 1918, Smith *v.* State, 14 Okl. Cr. 250, 174 Pac. 1107 (deceased's threats, not admitted, for lack of an overt act);
Oregon: 1870, State *v.* Dodson, 4 Or. 64 (uncommunicated threats, held properly excluded, when offered to show the defendant's apprehension; whether admissible for the purpose of showing deceased's actual intent, under § 110, *ante*, not decided; communicated threats, admitted); 1897, State *v.* Porter, 32 Or. 135, 49 Pac. 964 (communicated threats of a third person not acting with the deceased, excluded); 1898, State *v.* Bartmess, 33 Or. 110, 54 Pac. 167 (admissible; the conditions obscurely stated);
Pennsylvania: 1867, Com. *v.* Lenox, 3 Brewst. 249, 251 (admissible, "if the case showed" that the defendant was "under reasonable fear of his life from the deceased at the time"), 1881, Nevling *v.* Com., 98 Pa. 322, 336, *semble* (admissible, if there is evidence of a necessity for self-defence); 1918, Com. *v.* Principatti, 260 Pa. 587, 104 Atl. 53 (deceased's threats as a "black hand" agent, admitted);
Porto Rico: People *v.* Barrios, 23 P. R. 772 (uncommunicated threats, excluded; following People *v.* Sutton, cited *ante*, § 246);
South Carolina: 1860, State *v.* Smith, 12 Rich. 430, 443 (admissible); 1890, State *v.* Bodie, 33 S. C. 130, 11 S. E. 624 (same); State *v.* Wyse, 33 S. C. 591, 12 S. E. 556, *semble* (same);
Tennessee: 1858, Rippy *v.* State, 2 Head 218 ("previous threats, or even acts of hostility, . . . will not of themselves excuse the slayer; but there must be some words or overt acts at the time clearly indicative of a present purpose to do the injury; past threats and hostile actions or antecedent circumstances can only be looked to in connection with present demonstrations as grounds of apprehension"; this was said in repudiating the argument of the defendant that, after hearing of such recent threats, "he had a right to kill the deceased on sight"); 1872, Williams *v.* State, 3 Heisk. 376, 395 (the same doctrine laid down, and such threats assumed to be admissible); 1873, Jackson *v.* State, 6 Baxt. 452, 454 (the doctrine of the above cases approved, but the distinction pointed out that the evidence of former threats must be received and considered without any attempt on the judge's part to exclude it until some overt act at the time is shown; a decision reserved for such an extreme case as that of the deceased being asleep at the time);
Texas: 1854, Lander *v.* State, 12 Tex. 462, 484 (a full discussion of the proposition that prior threats are in themselves no legal excuse: but no decision as to admissibility); St. 1858, Feb. 12, Pen. Code 1911, § 1143 (quoted *ante*, § 246); 1870, Myers *v.* State, 33 Tex. 525, 542 (the Code is to be interpreted by common-law principles; threats are admissible only when they are distinctly directed against the defendant's life and when it is "unequivocally shown" that the deceased "was doing some act at the time of the killing which manifested an intention to carry the threat into execution"); 1871, Dorsey *v.* State, 34 Tex. 651, 657, *semble* (same); 1875, Horbach *v.* State, 43 Tex. 242, 255, 259 (declaring the object of the Code section to have been to settle a controversy as to the admission of threats, and holding that threats are admissible "as independent evidence without first having established a predicate for their admission by the proof of acts done at the time of the killing"; not citing Myers *v.* State); Irwin *v.* State, 43 Tex. 236, 241 (adopting apparently the same rule; but here holding not improper the rejection of cumulative evidence of threats which if admitted could not have served as a legal defence under the above section, because no act of violence at the time was shown); 1893, Mealer *v.* State, 32 Tex. Cr. 102, 107, 22 S. W. 142 (excluded, where the defendant "was in no possible danger" at the time);
Vermont: 1847, State *v.* Goodrich, 19 Vt. 117, 121 (previous affrays between the parties, and former attacks by the injured person on the defendant's house, and threats by the former, held not improperly rejected because not so offered as to indicate any influence in causing in the defendant a just fear of harm); 1916, Russ *v.* Good, 90 Vt. 236, 97 Atl. 987 (assault and battery; plea, self-defence; plaintiff's reputation as a fighting man, known to defendant, admitted; the trial Court determines as to remoteness);
Washington: 1888, White *v.* Terr., 3 Wash. D. 397, 403, 19 Pac. 37 ("admissible in all cases"); 1896, State *v.* McGonigle, 14 Wash. 594, 45 Pac. 20 (excluded because there was no contention of self-defence); 1896, State *v.* Cushing, 14 Wash. 527, 45 Pac. 145; 1897, s. c., 17 Wash. 544, 50 Pac. 512 ("overt act of attack" and "apparent imminent danger" of life therefrom are necessary; purporting to follow the Louisiana rule);
West Virginia: 1875, State *v.* Abbott, 8 W. Va. 743, 759 (admissible; rule obscure); 1889,

(*b*) Wherever the *overt-act* limitation is adopted, the rule should prevail (as in the preceding topic) that the trial Court's discretion determines the sufficiency of the evidence of an overt act.[2]

(*c*) The threats are required to have been *communicated* to the defendant, *i.e.* brought to his notice in some way; otherwise they have no bearing for the present purpose.

(*d*) The use of *uncommunicated threats*, as showing the probability of the deceased having been the aggressor, involves a different principle (dealt with *ante*, § 110); but the respective precedents are not always duly discriminated.

(*e*) The *actual making* of the threats is immaterial, if there was a communication made to the defendant of supposed threats.[3] This illustrates the contrast of principle with the doctrine of uncommunicated threats (*ante*, § 110).

(*f*) The threats of a *third person*, not joining in the deceased's overt act, would ordinarily be inadmissible.[4]

§ 248. (1) **Defendant in Homicide**: (*c*) **Violent Acts of the Deceased.** If it could be shown that the deceased had just before been running amuck in the streets, and that the defendant was informed that the deceased was on his way towards the defendant's locality, it is difficult to believe that any Court would decline to consider this conduct as bearing on the defendant's apprehensions. The fact that the circumstance creating apprehension is a single act or series of acts, instead of a general character, does not necessarily destroy its capacity to create apprehension. Nor does its distance in time from the moment of the affray necessarily have that effect. Such particular acts may or may not in a given case be calculated to create apprehension; but there is no reason for a fixed rule of exclusion, invariably forbidding their consideration:

1884, NIBLACK, J., in *Boyle* v. *State*, 97 Ind. 322, 326; "As in personal conflicts every man is permitted within reasonable limits to act upon appearances and to determine for himself when he is in real danger, it would seem to follow, as an inevitable consequence, that whoever relies upon appearances and a reasonable determination upon such appearances, as a defence in a case of homicide, ought to be allowed to prove every fact and circumstance known to him and connected with the deceased which was fairly calculated to create an apprehension for his own safety."

1906, MILES, J., in *McQuiggan* v. *Ladd*, 79 Vt. 90, 64 Atl. 503: "This was an action for assault and battery against John Ladd, Daniel Ladd, and Eugene Spicer. . . . As bearing

State *v.* Evans, 33 W. Va. 417, 425, 10 S. E. 792 (same).

The following ruling shows a different application of the same principle: 1857, People *v.* Shea, 8 Cal. 538 (assault with intent to kill; the prosecuting witness' reason for going armed, viz. that he had been told of something the defendant had said, admitted).

[2] 1897, State *v.* Pruett, 49 La. An. 283, 21 So. 842 (discretion of the trial Court as to overt acts conceded; but irrespective of this the defendant is entitled, under Act 99 of 1896, to have the testimony as to the alleged overt act taken down in writing for review); 1897, State *v.* Cushing, 17 Wash. 544, 50 Pac. 512 (discretion conceded).

[3] 1909, Morris *v.* Terr., 1 Okl. Cr. 617, 99 Pac. 760; 1912, Rogers *v.* State, 8 Okl. Cr. 226, 127 Pac. 365; 1909, Buckner *v.* State, 55 Tex. Cr. 511, 117 S. W. 802.

[4] 1906, State *v.* Mitchell, 130 Ia. 697, 107 N. W. 804 (threats of the defendant's landlord, a third person, excluded); 1903, State *v.* Forbes, 111 La. 473, 35 So. 710 (leaving it to the trial Court's discretion; Monroe, J., diss.; here the defendant claimed to have been aiming at the third person).

upon the reasonableness of the force used by Daniel in repelling the claimed assault of the plaintiff, the defendants claimed and gave evidence tending to prove that Daniel knew by observation and reputation at the time of the assault that the plaintiff when under the influence of intoxicating liquor, was a quarrelsome and dangerous man, and that on the occasion in question the plaintiff was under the influence of intoxicating liquor which was then detected by Daniel, and that, in consequence thereof, and having in mind what he knew and had heard of the plaintiff's character under such circumstances, he was afraid of him. . . .

"The plaintiff's first exception is to the admission of the testimony of Mrs. Ladd, Brown, and McCormick, wherein they testify that they had seen the plaintiff on different occasions under the influence of intoxicating liquor at times previous to the assault in question, and that on those occasions he was cross and ugly, as stated above. The plaintiff urges that this was error, because it was an attempt to prove character by specific instances. . . . The word 'character' has an objective as well as a subjective meaning, which is quite distinct. As applied to man, objective character is his actual character. Subjective character is such character as he possesses in the minds of others, and is the aggregate or abstract of other persons' opinions of him. . . . In a case like the one at bar, where the actions of a third person are to be effected by a knowledge of another's character, not only may the subjective character be involved, but the objective may as well, for the action of one, influenced by the character of another, is affected to the same extent by a belief in the truth of general report as it is by a knowledge of the fact; because in either case he believes he knows the fact, and it is that *belief* which is important. . . .

"It follows that it was admissible for the defendants to show what was observed as to the character of the plaintiff, as to being cross and ugly when under the influence of intoxicating liquor at a time previous to the alleged assault. And, in order to show that, it was necessary to show that he was under the influence of intoxicating liquor on those occasions. And, as the case tends to show that the defendant Daniel knew of those traits of character at the time of the alleged assault and battery, it was not necessary that every occasion observed, which went to make up and establish the existence of those traits of character, should be brought to the *knowledge* of the defendant in all their details. It was enough that he knew that such traits of character existed, communicated to him by the witnesses who testified respecting them or coming to him from other sources."

The state of the law has come on the whole to favor the admissibility of such facts.[1] Nevertheless, in the majority of jurisdictions, such evidence was,

§ 248. [1] ENGLAND: 1866, R. *v.* Hopkins, 10 Cox Cr. 229 (to show the defendant's state of mind when he killed his wife with a knife, evidence was received that the wife had often before attacked him and nearly strangled him, that his neck was sensitive with old abscesses, and that the wife on this occasion rushed at his neck);

UNITED STATES: *Federal:* 1898, Andersen *v.* U. S., 170 U. S. 481, 18 Sup. 689 (murder of captain and mate; trial for the latter only; maltreatment of the defendant by the captain and by the mate on preceding occasions, excluded on the facts, because no overt act at the time of killing was shown; no authorities cited);

Alabama: 1884, Jones *v.* State, 76 Ala. 15 (excluded); 1888, Davenport *v.* State, 85 Ala. 336, 5 So. 152 (same);

Arkansas: 1882, Campbell *v.* State, 38 Ark. 498, 508 (excluded); 1911, Coulter *v.* State, 100 Ark. 561, 140 S. W. 719 (excluded); 1922, Jett *v.* State, — Ark. —, 236 S. W. 621 (killing by an officer; deceased's conviction of robbery in Missouri, excluded);

California: 1865, People *v.* Henderson, 28 Cal. 465, 469, *semble* (recent acts of violence excluded, only because not communicated); 1891, People *v.* Powell, 87 Cal. 348, 362, 25 Pac. 481 (quarrels with other persons, inadmissible);

Columbia (District): 1916, Marshall *v.* U. S., 45 D. C. App. 373 (murder; "I knew how he [deceased] did policemen", admitted);

Delaware: 1874, State *v.* Woodward, 1 Houst. Cr. C. 455, 458 (shooting a trespasser; previous maraudings and personal violence by others in the neighborhood, excluded, there being no act of aggression at the time by the deceased);

Florida: 1891, Garner *v.* State, 28 Fla. 113, 138, 9 So. 835 (excluded); 1893, s. c., 31 Fla. 170, 175, 12 So. 638 (same);

Georgia: 1855, Bowie *v.* State, 19 Ga. 7 (excluding the fact that the deceased had fled from

for a long time, absolutely excluded. In some instances this was probably due to a notion that the deceased's character is sought objectively to be shown by particular acts (on the principle of § 198, *ante*); but the real pur-

the law in Tennessee, but intimating that if the crime would in its nature "excite the fears of a reasonable man", the fact might be received); 1871, Pound *v.* State, 43 Ga. 88, 128 (excluded, unless so connected with the killing as to "form a link", etc.); 1883, Doyal *v.* State, 70 Ga. 134, 147 (specific acts of violence, excluded); 1892, Croom *v.* State, 90 Ga. 430, 17 S. E. 1003 (excluded); 1897, Powell *v.* State, 101 Ga. 9, 29 S. E. 309 (excluded); 1906, Warrick *v.* State, 125 Ga. 133, 53 S. E. 1027 (excluded);
Idaho: 1911, State *v.* Louie Moon, 20 Ida. 202, 117 Pac. 757 (threats of associates of the deceased, excluded);
Indiana: 1884, Boyle *v.* State, 97 Ind. 322, 326 (former shooting and stabbing, etc., admitted); 1891, Bowlus *v.* State, 130 Ind. 227, 230, 28 N. E. 1115 (admitted); 1900, Enlow *v.* State, 154 Ind. 664, 57 N. E. 539 (admitted);
Iowa: 1902, State *v.* Sale, 119 Ia. 1, 92 N. W. 680; 95 N. W. 193 (deceased's violence at a remote prior time, excluded); State *v.* Beird, 118 Ia. 474, 92 N. W. 694 (instances of specific acts of violence on the same evening, held admissible);
Kansas: 1901, State *v.* Burton, 63 Kan. 602, 66 Pac. 633 (admissible);
Louisiana: 1898, State *v.* Fontenot, 50 La. An. 537, 23 So. 634 (excluded);
Michigan: 1893, People *v.* Harris, 95 Mich. 87, 91, 54 N. W. 648 (admissible); 1904, People *v.* Farrell, 137 Mich. 127, 100 N. W. 264 (admissible);
Mississippi: 1885, Moriarty *v.* State, 62 Miss. 654, 661 (various desperate acts, excluded; general reputation alone admissible); 1888, King *v.* State, 65 Miss. 576, 582, 5 So. 97 (that the deceased had made deadly assaults on others, to the defendant's knowledge, excluded);
Missouri: 1910, State *v.* Green, 229 Mo. 642, 129 S. W. 700 (excluded);
Montana: 1899, State *v.* Shadwell, 22 Mont. 573, 57 Pac. 281 (deceased's riotous conduct towards others on the same evening in defendant's presence, admitted; but "specific acts of violence" at other times, excluded; opinion not well considered); 1901, State *v.* Shadwell, 26 Mont. 52, 66 Pac. 508 (prior ruling approved); 1903, State *v.* Felker, 27 Mont. 451, 71 Pac. 668 (prior assaults by the deceased upon the same person, admitted); 1909, State *v.* Hanlon, 38 Mont. 557, 100 Pac. 1035 (prior specific acts of violence, here admitted; State *v.* Felker and State *v.* Shadwell approved but enlarged in scope);
Nevada: 1917, State *v.* Sella, 41 Nev. 113, 168 Pac. 278 ("particular acts or instances which were not a part of the 'res gestæ' nor connected therewith", not admissible);
New York: 1874, Eggler *v.* People, 56 N. Y. 643 (particular instances of exhibitions of temper, excluded); 1876, Thomas *v.* People, 67 N. Y. 222 (the making of assaults with a knife upon various other persons, some time before, excluded);
Ohio: 1907, State *v.* Roderick, 77 Oh. 301, 82 N. E. 1082 (acts of violence known to defendant by repute only, excluded; but *semble* such acts personally known to him may be admissible);
Oklahoma: 1906, Sneed *v.* Terr., 16 Okl. 641, 86 Pac. 70 (prior violence by deceased, the same night, admitted); 1906, McHugh *v.* Terr., 17 Okl. 1, 86 Pac. 433 (assault with intent; State *v.* Burton, — Kan. —, approved); 1912, Rogers *v.* State, 8 Okl. Cr. 226, 127 Pac. 365 (admitted); 1919, Thompson *v.* State, 16 Okl. Cr. 716, 184 Pac. 467 (manslaughter; deceased's specific acts of violence towards others", admitted); 1921, Elliott *v.* State, — Okl. Cr. —, 194 Pac. 267 (murder; deceased's prior specific acts of violence, not known to defendant, excluded);
Oregon: 1900, State *v.* Mims, 36 Or. 315, 61 Pac. 888 (excluded); 1908, State *v.* Doris, 51 Or. 136, 94 Pac. 44 (prior assault by a third person similar in size, etc., to the deceased, admitted);
Pennsylvania: 1893, Com. *v.* Straesser, 153 Pa. 451, 456, 26 Atl. 17 (single act of violence, unexplained, inadmissible);
Porto Rico: 1915, People *v.* Paris, 22 P. R. 370, 374 (but here excluded because there was no evidence of aggression);
South Carolina: 1897, State *v.* Dill, 48 S. C. 249, 26 S. E. 567, *semble* (excluded; but here merely cumulative); 1905, State *v.* Thrailkill, 71 S. C. 136, 50 S. E. 551 (excluded); 1905, State *v.* Dean, 72 S. C. 74, 51 S. E. 524 (State *v.* Dill approved); 1906, State *v.* Andrews, 73 S. C. 257, 53 S. E. 423 (admissible if "so connected in point of time or occasion with the fatal rencontre as to produce reasonable apprehension", etc.);
South Dakota: 1909, State *v.* Raice, 24 S. D. 111, 123 N. W. 708 (deceased's prior acts of violence to third persons, notified to defendant, excluded);
Texas: 1893, Skaggs *v.* State, 31 Tex. Cr. 563, 21 S. W. 257 (said to be sometimes admissible); 1903, Connel *v.* State, 45 Tex. Cr. 142, 75 S. W. 512 (patricide; specific acts of violence to other members of the family, excluded);
Vermont: 1906, McQuiggan *v.* Ladd, 79 Vt. 90, 64 Atl. 503 (quoted *supra*, 1);
Wyoming: 1916, Mortimer *v.* State, 24 Wyo. 452, 161 Pac. 766 (homicide by son of father in alleged protection of brother; the deceased's prior specific acts of violence known to the accused, held admissible; the facts of this case illustrate the injustice of a contrary rule).

pose is merely to show such conduct as would naturally excite apprehension, whether it objectively indicates a fixed trait of character or not. Certainly all analogies of the law (apart from the common sense of the situation) favor such evidence; for if particular vicious acts of an animal are relevant to show that its owner was warned of its viciousness (*post*, § 251), and if particular misconduct of an employee is relevant to show that his employer was warned of his incompetency (*post*, § 250), then particular deeds of unscrupulous violence may well be deemed relevant to show an apprehension of violence from such a person. The true solution is to exercise a discretion, and to admit such facts when common sense tells us that they could legitimately affect a defendant's apprehensions.

Distinguished, here use of *prior quarrels* or difficulties between the deceased and the accused as evidence of *motive* (*post*, § 396), as also the propriety of *contradicting* the fact of such prior acts of violence (*post*, § 263).

§ 249. (2) **Employer of an Incompetent Employee**: (*a*) **Reputation of the Employee.** Where by the substantive law an employer's liability for injuries done by his employee depends upon his selection of a competent employee, it is well settled in all jurisdictions that the *reputation of the employee* is receivable to show that the employee's character in respect to competency was *known to the employer*.[1] It is sometimes pointed out that the reputa-

§ **249.** [1] *Federal:* 1896, Baltimore & O. R. Co. *v.* Henthorne, 19 C. C. A. 623, 73 Fed. 634 (engineer's reputation for intemperance); 1896, Central Vt. R. Co. *v.* Ruggles, 21 C. C. A. 575, 75 Fed. 953; 1905, Southern Pac. Co. *v.* Hetzer, 135 Fed. 272, 276, 285, C. C. A. ("a general reputation for incompetence" is admissible); 1905, Huntt *v.* McNamee, 141 Fed. 293, 299, C. C. A., *semble* (admissible only after other evidence of specific acts); *Alabama:* 1853, Cook *v.* Parham, 24 Ala. 21, 34; 1894, Western Stone Co. *v.* Whalen, 151 Ala. 482, 38 N. E. 243 (captain of a towing vessel); 1903, Metropolitan W. S. E. R. Co. *v.* Fortin, 203 Ala. 454, 67 N. E. 977 (motorman of an elevated railroad); *Illinois:* 1872, Chicago & A. R. Co. *v.* Sullivan, 63 Ill. 293, 297 (intemperate habits); *Indiana:* 1871, Pittsburg F. W. & C. R. Co. *v.* Ruby, 38 Ind. 294, 311 (train-conductor); *Kansas:* 1895, Cherokee Co. *v.* Dickson, 55 Kan. 62, 39 Pac. 691; *Maine:* 1880, Dunham *v.* Rackliff, 71 Me. 345, 349, *semble; Maryland:* 1894, Norfolk W. R. Co. *v.* Hoover, 79 Md. 253, 263, 29 Atl. 994 (intemperate habits); *Massachusetts:* 1861, Gahagan *v.* R. Co., 1 All. 187, 190 (that a flagman was "careful, attentive, and temperate" in his "general habits and behavior"); 1865, Gilman *v.* R. Co., 10 All. 233, 235, 239 (intemperate habits); s. c., 1866, 13 All. 433, 444 (same); 1890, Monahan *v.* Worcester, 150 Mass. 439, 23 N. E. 228 (that he was "physically weak and partially blind and deaf"); 1895, Driscoll *v.* Fall River, 163 Mass. 105, 39 N. E. 1003 (reputation "of a foreman amongst a few workmen employed under him", excluded, as not likely to give notice to or require attention from the employer); 1902, Carson *v.* Canning, 180 Mass. 461, 62 N. E. 964 (reputation of an employee "around the building", held not improperly admitted); *Michigan:* 1870, Davis *v.* R. Co., 20 Mich. 105, 123 (engineer; a reputation, but not mere casual remarks, admissible); 1885, Hilts *v.* R. Co., 55 Mich. 437, 442, 21 N. W. 878 (intemperate habits); *New Hampshire:* 1873, State *v.* M. & L. Railroad, 52 N. H. 539, 549, *semble; New York:* 1897, Youngs *v.* R. Co., 154 N. Y. 764, 49 N. E. 1106 (like next case); 1898, Park *v.* R. Co., 155 N. Y. 215, 49 N. E. 674 (reputation receivable to show knowledge of incompetency, after specific acts showing the fact of it; here a reputation ten years before was excluded); *Pennsylvania:* 1911, Rosenstiel *v.* Pittsburg R. Co., 230 Pa. 273, 79 Atl. 556 (the learned judge here seems to be in error in supposing that any courts have a contrary rule); *Texas:* 1896, Texas and P. R. Co. *v.* Johnson, 89 Tex. 519, 35 S. W. 1042 (reputation of the wrong-doing servant among his fellow-employees, held sufficient to fix upon the employer a knowledge of his inefficiency, but not to fix such knowledge upon the plaintiff-employee, though he and the other servants were upon the same division and were personally acquainted; the opinion is a labored attempt to explain this absurdity); *Utah:* 1899, Stoll *v.* Daly Min. Co., 19 Utah 271, 57 Pac. 295; *Wisconsin:* 1913, Serdan *v.* Falk Co., 153 Wis. 169, 140 N. W. 1035 (reputation admissible, to evidence knowledge, after the

tion in a given instance may obtain in such a narrow or remote circle of persons that it is not likely to have brought notice of the character to the employer (on the logical principle of § 245, par. 3, *ante*); but this is simply a corollary of the general principle.

It is to be noted that the substantive law may be such that the evidential question, whether such reputation was likely to reach the employer, does not arise; *i.e.*, it may be held that if a reputation of incompetency had arisen, then, even if the employer did not in fact hear of the reputation, yet his failure to learn of such an easily knowable thing is *in itself negligence*, as a matter of law, in that it involves failure to make inquiry concerning competence:

1870, COOLEY, J., in *Davis* v. *R. Co.*, 20 Mich. 105, 123: "If the defendants continue a man in their employ who is so notoriously unfit as to have established a general reputation to that effect, it is unreasonable (the plaintiff argues) to suppose the officers of the defendants ignorant of that fact; unless we excuse their want of information on the ground of neglect of duty on their part to their employees and the public, so gross as to make it proper and just to hold them responsible to the same extent as if they were fully informed of all the facts."

1890, FIELD, J., in *Monahan* v. *Worcester*, 150 Mass. 440, 23 N. E. 228: "If a person is incompetent for the work he is employed to do, the fact that he is generally reputed in the community to want those qualities which are necessary for the proper performance of the work certainly has some tendency to show that the master would have found out that the servant was incompetent, if proper means had been taken to ascertain the qualifications of the servant." [2]

§ 250. (2) **Employer**: (*b*) **Acts of an Employee.** Since reputation is after all created originally by conduct, the use of reputation, for the purpose just noticed, gives also, by implication, a sanction to the probative value of particular acts of misconduct as giving warning of incompetency. Experience, too, in general as well as in the business of employers, tells that particular acts of incompetency are the usual and sufficient source of judgment upon an employee's incompetency. The only objection, then, can arise from the doctrines of Confusion of Issues and of Unfair Surprise (*ante*, § 202); yet, since the evidence is so closely connected with the issue of the pleadings, since it has a comparatively small range of time and place, and since the facilities of procuring testimony to expose a fabricated charge are ample, an objection on this score does not seem serious. The natural view, that such particular acts, if not isolated or lacking in marked significance, may in a given case be admissible as calculated to give warning to the employer, is well set forth in the following passage: [1]

fact of incompetence has been evidenced, even though the knowledge is not disputed).

Distinguish the question what sort of reputation is admissible, under the Hearsay exception, to prove the *fact of the employee's incompetence* (*post*, §§ 1615, 1616, 1621), and the question of substantive law whether the employee's character is *in issue* (*ante*, § 80). The rulings upon these distinct principles are occasionally confused.

[2] *Accord:* Gilman *v.* R. Co. and Norfolk & W. R. Co. *v.* Hoover, *supra*.

§ 250. [1] *Accord: Federal:* 1895, Baltimore & O. R. Co. *v.* Camp, 13 C. C. A. 233, 65 Fed. 952, 958 (going to sleep on duty, etc.; "the entire record" of K. as an employee in the capacity concerned, admitted); 1903, Wabash S. D. Co. *v.* Black, 126 Fed. 721, 726, C. C. A. (previous bursting of two similar pulleys made by the same employees, admitted);

1874, ALLEN, J., in *Baulec* v. *R. Co.*, 59 N. Y. 356, 358: "When character, as distinguished from reputation, is the subject of investigation, specific acts tend to exhibit and bring to light the peculiar qualities of the man, and indicate his adaptation or want of adaptation to any position, or fitness or unfitness for a particular duty or trust. It is by many or by a series of acts . . . that the actual qualities, the true characteristics of individuals, those qualities and characteristics which would or should influence and control in the selection of agents for positions of trust and responsibility, are known. . . . [But only a single instance of carelessness in eight years' service was here shown.] A single act of casual neglect does not 'per se' tend to prove the party to be careless and imprudent and unfitted for a position requiring care and prudence. Character is formed and qualities exhibited by a series of acts and not by a single act. An engineer might from inattention omit to sound the whistle or ring the bell at a railroad crossing; but such fact would not tend to prove him a careless and negligent servant of the company. . . . The question in this case was whether the single occurrence detailed by the witness, in connection with other circumstances and with his general character and conduct, was such as to make it necessary for the defendant, in the exercise of proper care and prudence such as the law enjoins, to discharge this switchman. I am clearly of opinion that there was not sufficient evidence to go to the jury."

1905, Southern Pac. Co. *v.* Hetzer, 135 Fed. 272, 279, C. C. A. (negligence of a fellow-servant; "specific acts of incompetence of the servant, notice of which was brought home to the master before the accident" are admissible, and also acts "so notorious that they ought to have been known"; but not specific acts "of which the master had no notice or knowledge prior to the alleged accident"); 1905, Huntt *v.* McNamee, 141 Fed. 293, 299, C. C. A. (there must be either specific acts "brought home to the knowledge of the master" or acts "of such nature and frequency that the master in the exercise of due care must have had them brought to his notice"); 1909, Pittsburgh R. Co. *v.* Thomas, 3d C. C. A., 174 Fed. 591 (negligent motorman as a fellow-servant; two prior negligent acts here held insufficient; good opinion, distinguishing between the concrete negligence of the specific act and the incompetence of the man doing the act); *Indiana:* 1871, Pittsburg, F. W. & C. R. Co. *v.* Ruby, 38 Ind. 294, 311; 1895, Evansville & T. H. R. Co. *v.* Tothill, 143 Ind. 49, 41 N. E. 709 (that a train-dispatcher had often run trains ahead of their schedule time; admitted on the question of the employer's notice of incompetency); *Maryland:* 1886, Baltimore Elev. Co. *v.* Neal, 65 Md. 438, 452, 5 Atl. 338, *semble;* 1894, Norfolk & W. R. Co. *v.* Hoover, 79 Md. 253, 264, 29 Atl. 994; *Massachusetts:* 1898, Cox *v.* R. Co., 170 Mass. 129, 49 N. E. 97 (a watchman's habits of intoxication, for some years previous, receivable, as showing that the defendant might have discovered them by reasonable diligence); 1910, Igo *v.* Boston Elev. R. Co., 204 Mass. 197, 90 N. E. 574 ("Incompetence cannot be inferred from a single act of negligence"); 1911, Leary *v.* Webber Co., 210 Mass. 68, 96 N. E. 136 (prior instances admitted; opinion obscure); *Michigan:* 1870, Davis *v.* R. Co., 20 Mich. 105, 124; 1881, Michigan C. R. Co. *v.* Gilbert, 46 Mich. 176, 179, 9 N. W. 243; 1900, Shaw *v.* R. Co., 132 Mich. 629, 82 N. W. 618 (previous practice of mail agent in throwing mail-bag, admitted to show notice to the railroad company); *New York:* 1874, Chapman *v.* R. Co., 55 N. Y. 579, 585, *semble;* 1874, Baulec *v.* R. Co., 59 N. Y. 356 (see quotation *supra*); *Pennsylvania:* 1911, Rosenstiel *v.* Pittsburgh R. Co., 230 Pa. 273, 79 Atl. 556 (inconsistent statements, but apparently specific acts when known to the proper authority are admissible, contrary to Frazier *v.* R. Co., *infra*); *Texas:* 1895, Cunningham *v.* R. Co., 88 Tex. 534, 31 S. W. 629 (repudiating R. Co. *v.* Scott, 68 Tex. 694, 5 S. W. 501; R. Co. *v.* Rowland, 82 Tex. 171, 180, 18 S. W. 96 (disapproving the Frazier case, Pa., *infra*); 1898, Galveston, H. & S. A. R. Co. *v.* Davis, 92 Tex. 372, 48 S. W. 570 (provided the incompetence is otherwise shown); *Utah:* 1899, Stoll *v.* Daly Min. Co., 19 Utah 271, 57 Pac. 295 (usually a single act will not suffice);

Contra: 1894, Cosgrove *v.* Pitman, 103 Cal. 268, 275, 37 Pac. 232 (specific acts, not admissible; here, of intemperance; following Frazier *v.* R. Co., Pa.); 1896, Columbus R. R. Co. *v.* Christian, 97 Ga. 56, 25 S. E. 411 (following Frazier *v.* R. Co., Pa.); 1860, Frazier *v.* R. Co., 38 Pa. 104 (negligence of the defendant in employing a careless conductor; other acts of carelessness on the conductor's part, known to the defendant, rejected, because character is not to be evidenced by specific acts); 1913, Simon *v.* Hamilton L. Co., 76 Wash. 370, 136 Pac. 361 (acts of incompetency subsequent to the period of employment, excluded); 1913, Guy *v.* Lanark Fuel Co., 72 W. Va. 728, 79 S. E. 941 (company physician's competence; some specific instances of intoxication, held not enough on the facts to know defendant's knowledge of the physician's intemperateness).

While it is to-day generally conceded that such evidence is admissible, it is not usually specified whether the acts of incompetence must be *by other evidence* shown to have come to the *employer's notice*. It would seem that where the act is so flagrant that it would ordinarily be observed by or reported to the employee's superior officer, no other evidence would be required as a condition precedent to admission.

From the foregoing use distinguish the more controverted questions whether an employee's particular acts of negligence may be used directly to evidence the *character itself*, either as in issue (*ante*, § 208) or as offered evidentially (*ante*, § 199).

§ 251. (3) **Owner of Vicious Animal.** Where against the owner of an animal a *scienter* is to be proved (the knowledge of the animal's vicious quality), *reputation* of the animal is relevant, on the principle of the foregoing topics,[1] though the occasion for resorting to it is naturally rare. *Particular acts* of viciousness are also relevant, for similar reasons, and this application of the principle is long established in tradition.[2]

§ 252. (4) **Owner or Possessor of a Dangerous Machine or Place.** Of the four ways (*ante*, § 245) in which knowledge of the dangerous qualities of a thing or place might be obtained by its owner or possessor:

(1) (2) The first two seldom raise here any evidential question: Direct *exposure to the senses*[1] and *express communication*[2] are of course always legitimate modes of evidencing knowledge of the dangerous condition of a machine or place.

(3) The *reputation* of the place or machine, and the fact that its dangerousness or the existence of the defect was *reputed* or *generally talked about*, would be relevant as showing the probable carrying of information by some one

§ 251. [1] 1796, Jones *v.* Perry, 2 Esp. 482 (common report that defendant's dog had been bitten by a mad dog, admitted as indicating a duty to secure him); 1905, Palmer *v.* Coyle, 187 Mass. 136, 72 N. E. 844 (injury by a vicious horse; the reputation of the horse, admitted to show defendant's knowledge); 1889, Wormsdorf *v.* R. Co., 75 Mich. 472, 475, 42 N. W. 1000 (reputation of a horse among the railway employees for fractiousness).

[2] 1866, Worth *v.* Gilling, L. R. 2 C. P. 3 (previous attempts of a dog to bite, admitted to show the owner's knowledge of its disposition); 1856, Arnold *v.* Norton, 25 Conn. 92 (single bite of a dog); 1876, Graham *v.* Nowlin, 54 Ind. 391 (to show knowledge of the glandered condition of a mule sold, the fact was admitted of the existence of the same disease in the defendant's horses and his knowledge of it); 1906, Warren *v.* Porter, 144 Mich. 699, 108 N. W. 435 (injury by a runaway team; a former instance of its running away, known to the defendant, admitted); 1844, Kittredge *v.* Elliott, 16 N. H. 77 (single bite of a dog); 1850, Cockerham *v.* Nixon, 11 Ired. N. C. 269 (single attack of a bull); 1850, McCaskill *v.* Elliot, 5 Strobh. S. C. 196, 197 (single bite of a dog); 1876, Keenan *v.* Hayden, 39 Wis. 558 (dog).

§ 252. [1] 1883, Dotton *v.* Albion, 50 Mich. 129, 132, 15 N. W. 46 (injury at a cross-walk; "the further fact stands unquestioned that the street-commissioner actually resided in plain sight of this cross-walk"); 1888, Noyes *v.* Gardner, 147 Mass. 505, 508, 18 N. E. 423 (that one of the selectmen passed daily over a walk, admitted).

[2] 1892, Smith *v.* Whittier, 95 Cal. 279, 290, 292, 30 Pac. 529 (direction to the owner of an elevator by the maker, as showing the former's knowledge of its proper mode of use); 1916, Rockland & R. L. Co. *v.* Coe-Mortimer Co., 115 Me. 184, 98 Atl. 657 (negligence of dock-owner; dredging company's statements to the owner, admissible to show his reasonable belief); 1915, Dunn *v.* Salt Lake & O. R. Co., 47 Utah 137, 151 Pac. 979 (death by electric shock; operator's statement to deceased that wires were "dead", admitted).

to the person charged;[3] usually the question is one of constructive notice, not an evidential one.

(4) The *nature of the defect* itself, as likely to lead to discussion and report, is always a relevant circumstance.[4] The *length of time* of its existence (especially for a defect in a highway) is in such cases an additional circumstance always admissible;[5] but this becomes a question of substantive law, inasmuch as the length of time is commonly held to be capable of amounting in law to constructive notice, and by statute or otherwise a specific period is frequently established as constituting a default based on constructive notice.

The *occurrence of former injuries* at the same place or machine, and the existence of *defects in other parts of it*, are equally admissible, though less cogent in the probabilities suggested.[6] The element (*a*) (*ante*, § 245) re-

[3] 1891, Knowlton, J., in Chase *v.* Lowell, 151 Mass. 422, 426, 24 N. E. 212: "The fact that it [the highway-defect] was generally talked about in the community is a circumstance which may properly be considered. In such a case, notoriety derives its force as evidence, not merely from its suggestion that the defect was of such a kind that the authorities would have been likely to discover it in the first instance with their own eyes, but quite as much from the probability that their attention would have been brought by others to a matter which was generally talked about and in which they were interested." *Accord:* 1909, Miller *v.* Mullan, 17 Ida. 28, 104 Pac. 660 (mere rumor held inadmissible); 1867, Chicago & A. R. Co. *v.* Shannon, 43 Ill. 345 (admitting reputation of the unsafeness of a boiler); 1890, Chase *v.* Lowell, 151 Mass. 422, 426, 24 N. E. 212 (remarks made about a defect by persons looking at it, admitted); practically repudiating Hinckley *v.* Somerset, 145 Mass. 326, 328, 337, 14 N. E. 166 (1887), where conversations about it were excluded.

Distinguish here the use of a *local custom* for trespassers to walk on a railroad track at a certain part, as an element in determining the wanton management of a railroad train; here the custom does not evidence the knowledge; but the custom, plus knowledge by the engineer otherwise evidenced, may serve to fix his conduct as wanton: 1910, Birmingham So. R. Co. *v.* Fox, 167 Ala. 281, 52 So. 889.

[4] 1860, Donaldson *v.* Boston, 16 Gray Mass. 508 ("Upon the question of notoriety, the jury might consider whether the obstruction of travel was of such a nature that, if citizens passing by had seen it, they would have been likely to have forthwith informed such officers of its existence").

[5] 1890, Chase *v.* Lowell, *supra*.

[6] *Federal:* 1898, Valley R. Co. *v.* Keegan, 31 C. C. A. 255, 87 Fed. 849 (other defects in a railroad yard, admissible to show notice by an employee); 1882, District of Columbia *v.* Armes, 107 U. S. 519, 2 Sup. 840 (see the citation *post*, § 458, n. 2); 1914, Evans *v.* Erie R. Co., 6th C. C. A., 213 Fed. 129 (collision of a train with an automobile at a crossing; other accidents at the same place, admissible to show knowledge of the dangerous character of the place);
Alabama: 1904, Davis *v.* Kornman, 141 Ala. 479, 37 So. 789 (injury to an employee at a machine; prior similar defects of operation, admitted);
California: 1873, Malone *v.* Hawley, 46 Cal. 409, 413 (defect in an elevator; a former fall of the same elevator from a similar cause, admitted to show notice); 1903, Roche *v.* Llewellyn I. Co., 140 Cal. 563, 74 Pac. 147 (prior accident to a boiler on a third person's premises; held not admissible against the defendant on the facts);
Colorado: 1895, Colorado M. & I. Co. *v.* Rees, 21 Colo. 435, 42 Pac. 42 (leaving open an elevator-door on former occasions, admitted); 1908, Hotchkiss M. M. & R. Co. *v.* Bruner, 42 Colo. 305, 94 Pac. 331 (former mine accident, admitted to show notice; citing cases from Ind., Minn., N. Y., and Pa., and ignoring the foregoing case); 1913, Meeker *v.* Fairfield, 25 Colo. App. 187, 136 Pac. 471 (that other persons had before fallen at the same place, admitted to show notice);
Illinois: 1866, Chicago *v.* Powers, 42 Ill. 169, 173 (death by falling off a bridge insufficiently lighted; the fact that another person had fallen off the same bridge, admitted to show notice, on the part of the defendant's agents, of the condition of the bridge); 1894, Bloomington *v.* Legg, 151 Ill. 9, 14, 37 N. E. 696 (injury at a drinking-fountain; prior injuries admitted); 1905, Mobile & O. R. Co. *v.* Vallowe, 214 Ill. 124, 73 N. E. 416 (Chicago *v.* Powers approved); 1905, Frank *v.* Hanly, 215 Ill. 216, 74 N. E. 130 (employee's injury at a machine; prior injury to another employee at the same machine; and his notification to the defendant, admitted to show the latter's notice of the defect); 1907, Chicago *v.* Jarvis, 226 Ill. 614, 80 N. E. 1079 (prior falls at a coal-hole, admitted to show knowledge);
Indiana: 1881, Delphi *v.* Lowery, 74 Ind. 520,

quires that the prior injury or defect should be such as would probably lead to a general publication of it or to a report being carried to the person charged (or his agent); and the element (*b*) (*ante*, § 245) requires that the prior injury or defect should be one which if known would naturally warn the person charged of the existence of the defect in question; for example, if it is an injury or "accident", it should have occurred in substantially the same

523 (injuries of other persons at the bridge where the intestate was drowned, admitted to show notice to the city);
Iowa: 1878, Moore *v.* Burlington, 49 Ia. 136, 137 (previous pilings of lumber at a place, admitted); 1884, Ruggles *v.* Nevada, 63 Ia. 185, 18 N. W. 866 (condition of a sidewalk "along there", excluded, chiefly as not amounting to constructive notice of a particular defect); 1887, Armstrong *v.* Ackley, 71 Ia. 76, 80, 32 N. W. 180 (condition of another part of a continuously unsafe sidewalk, admitted; distinguishing the preceding case); 1897, Faulk *v.* Iowa Co., 103 Ia. 442, 72 N. W. 757 (defect in railing at or near the place in question, admitted); 1900, Wilberding *v.* Dubuque, 111 Ia. 484, 82 N. W. 957 (prior injuries at a highway defect, admitted); 1902, Yeager *v.* Spirit Lake, 115 Ia. 593, 88 N. W. 1095 (other injuries on the same sidewalk, admitted); 1903, Kircher *v.* Larchwood, 120 Ia. 578, 95 N. W. 184 (condition of adjacent sidewalk, admitted to show notice); 1904, Potter *v.* Cave, 123 Ia. 98, 98 N. W. 569 (injury at a stairway; "previous accidents on this stairway and warnings to the defendant that it was dangerous", excluded, on the singular theory that "if dangerous in fact, his knowledge would be immaterial"; wholly ignoring the above Iowa cases, citing a few of those in § 458, *post*, but ignoring the later ones; a reprehensible opinion); 1904, Harrison *v.* Ayreshire, 123 Ia. 528, 99 N. W. 132 (defect near the walk where plaintiff was hurt, admitted); 1905, Farrell *v.* Dubuque, 129 Ia. 447, 105 N. W. 696 (condition of other similar frames erected on the street, admitted to show notice);
Kentucky: 1904, Crigler *v.* Ford, — Ky. —, 82 S. W. 599 (previous falls of an elevator, admitted); 1904, Yates *v.* Covington, 119 Ky. 228, 83 S. W. 592 (see the citation *post*, § 458, n. 2);
Maryland: 1912, Maryland El. R. Co. *v.* Beasley, 117 Md. 270, 82 Atl. 157 (prior operation of an automatic bell alarm, admitted); 1921, Cordish *v.* Bloom, 138 Md. 81, 113 Atl. 578 (injury on sidewalk; cited more fully *post*, § 458); 1921, Hagerstown & F. R. Co. *v.* State, — Md. —, 115 Atl. 783 (death by fall of a tree-limb on an electric wire; prior fall of other limbs, admitted to show notice of dangerous condition);
Massachusetts: 1887, Hinckley *v.* Somerset, 145 Mass. 326, 328, 337, 14 N. E. 166 (prior similar highway-accident, about the same place, admitted); 1888, Noyes *v.* Gardner, 147 id. 505, 508, 18 N. E. 423 (the condition of other planks in the same sidewalk, admitted); 1910, Bleistine *v.* Chelsea, 204 Mass. 105, 90 N. E. 526 (adjacent sewer's condition, admitted); 1913, Williams *v.* Winthrop, 213 Mass. 581, 100 N. E. 1101 (highway defect; "generally in this Commonwealth evidence of this character has been excluded");
Michigan: 1883, Dotton *v.* Albion, 50 Mich. 129, 131, 15 N. W. 46 (other defects in the same cross-walk, admitted); 1886, Smith *v.* Sherwood, 62 Mich. 159, 165, 28 N. W. 806 (other horses' shying at the same hole, admitted; "as more or less publicity would naturally be given to such occurrences, it tended to show that knowledge of such dangerous character was brought to the attention" of the defendant); 1889, Dundas *v.* Lansing, 75 Mich. 499, 504, 507, 42 N. W. 1011 (the defective condition of a street-crossing being the cause of the injury, the condition of the sidewalks "in the vicinity", "a block or more each way", and even express notice of the latter condition, held inadmissible as "too remote and indefinite"; the source of error in the opinion is that it relies upon inapplicable line of precedents, cited in § 458, *post*, which are not the law in Michigan); 1889, Tice *v.* Bay City, 78 Mich. 209, 44 N. W. 52 (defective condition of sidewalk "at other places beyond the defect which caused the injury", excluded); 1890, Campbell *v.* Kalamazoo, 80 Mich. 655, 659, 45 N. W. 652 (other defects of various sorts in the sidewalk in front of the same lot of land, admitted); 1890, O'Neil *v.* West Branch, 81 Mich. 544, 546, 45 N. W. 1023 ("other defects of long standing, existing in close proximity to the defect which causes the injury", admissible); 1891, Lombar *v.* East Tawas, 86 Mich. 14, 20, 48 N. W. 947 (other accidents at the same hole, admissible as tending "to show constructive notice to defendant; and, where the accident results in death or great bodily injury, it may by reason of its publicity tend to show actual notice"); 1892, Fuller *v.* Jackson, 92 Mich. 191, 205, 52 N. W. 1075 (the three preceding cases approved); 1893, Corcoran *v.* Detroit, 95 Mich. 84, 86, 54 N. W. 692 (defects in other parts of the road in the vicinity, admitted); 1894, Edwards *v.* Three Rivers, 102 Mich. 153, 60 N. W. 454 ("condition of the walk in the vicinity of the accident", admissible); 1895, Strudgeon *v.* Sand Beach, 107 Mich. 496, 65 N. W. 616 (defective parts of the sidewalk in the same block, admitted); 1896, Moore *v.*

place and mode; if it is another defect (as, in another part of the same sidewalk), it should be so closely associated with the one in question that the discovery of the former would naturally lead to the discovery of the latter or would warn of its existence. The facts of prior injuries and of other defects are generally conceded to be admissible, subject to certain varieties in the phrasing of the rule.

Kalamazoo, 109 Mich. 176, 66 N. W. 1089 (that others stepped into the same hole in the sidewalk, admitted); 1898, Butts *v.* Eaton Rapids, 116 Mich. 539, 74 N. W. 872 (condition of a walk six or eight months previously, admitted; condition of "whole length" in front of certain premises, admitted); 1900, Boyle *v.* Saginaw, 124 Mich. 348, 82 N. W. 1057 (condition of sidewalk in front of other lots, admitted); 1904, Gregory *v.* Detroit U. R. Co., 138 Mich. 368, 101 N. W. 546; 1908, Woodworth *v.* Detroit U. R. Co., 153 Mich. 108, 116 N. W. 549 (prior highway accidents, admitted); 1905, Hunter *v.* Ithaca, 141 Mich. 539, 105 N. W. 9 (Strudgeon *v.* Sand Beach followed); *Minnesota:* 1883, Gude *v.* Mankato, 30 Minn. 256, 258, 15 N. W. 175 (condition of the sidewalk "at and near the place", admissible); 1895, Burrows *v.* Lake Crystal, 61 Minn. 357, [illegible] N. W. 74 (former accidents, admitted); 1898, Wüta *v.* Interstate Iron Co., 103 Minn. 93, 115 N. W. 169 (former mine accidents under similar circumstances, admissible); *Missouri:* 1899, Young *v.* Webb City, 150 Mo. 333, 51 S. W. 709 (admitted);
Nebraska: 1886, Plattsmouth *v.* Mitchell, 20 Nebr. 228, 230, 29 N. W. 593 ("bad condition of the sidewalk in general at the place", admitted);
New Hampshire: 1857, Willey *v.* Portsmouth, 35 N. H. 303, 310 (former giving way of a culvert); 1917, Fuller *v.* Maine Central R. Co., 78 N. H. 366, 100 Atl. 546 (collision at a railroad crossing; prior death at the same crossing, admitted to show notice of danger);
New Jersey: 1899, Exton *v.* R. Co., 62 N. J. L. 7, 42 Atl. 486 (former disorderly conduct making a carrier's premises dangerous, admitted to show notice);
Oklahoma: 1903, Kingfisher *v.* Altizer, 13 Okl. 121, 74 Pac. 107 (defective bridge; other accidents at the same place, and other defects in the bridge, admitted to show notice); 1915, Chickasha *v.* White, 45 Okl. 631, 146 Pac. 578 (injury in a highway; other accidents at the same place, admitted);
Pennsylvania: 1898, Potter *v.* Natural Gas Co., 183 Pa. 757, 39 Atl. 7 (condition of a road up to a few weeks before, admitted); 1901, Fitzgerald *v.* E. E. Illum. Co., 200 Pa. 540, 50 Atl. 161 (defective insulation; that the wire had given out sparks for several weeks, admitted, as showing the defect to have "existed for such a period that it ought to have been known", by reason of its duty of "constant oversight and repair"); 1903, Reid *v.* Linck, 206 Pa. 109, 55 Atl. 849 (prior instances of falling through an elevator-shaft, admitted to show knowledge of its danger);
Rhode Island: 1871, Smith *v.* R. Co., 10 R. I. 24, 27 (other fires set by the defendant's engines, but only prior, not subsequent, to the one in question; compare § 452, *post*); 1903, McGarrity *v.* R. Co., 25 R. I. 269, 55 Atl. 718 (condition of telltales in a freight yard at other times, admissible to show the defendant's knowledge of their defective condition); 1904, Nelson *v.* Union R. Co., 26 R. I. 251, 58 Atl. 780 (injury by a trolley-pole's breaking a light globe; prior similar breakages admitted to show knowledge); 1908, Carr *v.* American Locomotive Co., 29 R. I. 276, 70 Atl. 196 (prior trouble with a valve admitted);
South Carolina: 1887, Bridger *v.* R. Co., 27 S. C. 456, 3 S. E. 860 (injury at a turntable; former injuries of others there, excluded, unless knowledge of them had been brought home to the defendant; present question ignored);
South Dakota: 1903, Waterhouse *v.* Schlitz B. Co., 16 S. D. 592, 94 N. W. 587 (collapse of other buildings of like construction, admitted to show notice);
Tennessee: 1900, Illinois C. R. Co. *v.* Wyatt, 104 Tenn. 432, 58 S. W. 308 (condition of adjacent platform-planking, admitted to show notice);
Utah: 1894, Thomas *v.* Springville, 9 Utah 426, 430, 35 Pac. 503 (shying of other horses at a hole, inadmissible); 1904, Johnson *v.* Union P. C. Co., 28 Utah 46, 76 Pac. 1089 (prior defective operation of a mine-car, admitted); 1911, Harris *v.* Ogden Steam Laundry Co., 93 Utah 436, 117 Pac. 700 (injury while made dizzy by gasoline fumes; instances of the effect of such fumes on other persons, admitted);
Washington: 1897, Elster *v.* Seattle, 18 Wash. 304, 51 Pac. 394 (injuries to others at the same place in a sidewalk, a week or ten days before, admitted to show notice); 1900, Piper *v.* Spokane, 22 Wash. 147, 60 Pac. 138 (similar; and also "declarations of other persons at the same time"); 1903, Shearer *v.* Buckley, 31 Wash. 370, 72 Pac. 76 (condition of a street in the same block, admitted); 1904, Franklin *v.* Engel, 34 Wash. 480, 76 Pac. 84 (trap-door to a cellar; Elster *v.* Seattle followed); 1905, Hansen *v.* Seattle L. Co., 41 Wash. 349, 83 Pac. 102 (prior accidents at the same and similar cog-wheels, admitted); 1913, Armstrong *v.* Yakima Hotel Co., 75 Wash. 477, 135 Pac. 233 (prior fall at a step, admitted);
Wisconsin: 1870, Weisenberg *v.* Appleton, 26

Distinguish the use of such prior injuries or other defects to show *objectively the actual dangerous quality* of the thing or place (*post*, §§ 437–458), or to show *negligence of the employees* (*ante*, § 199); the precedents under those principles often incidentally deal with this use also.

253. (5) **Purchaser from an Insolvent or Lunatic.** Where a transfer of property by an insolvent is in issue as being in fraud of creditors, and knowledge by the transferee of the transferor's insolvency is to be shown, the reputation of the transferor as to solvency is relevant to show the probability of that knowledge, provided it is a reputation in a locality frequented by the transferee. This is equally true whether the offeror of the evidence is attempting to show that the transferee believed in the transferor's solvency or merely that he was aware of the latter's insolvency.

Such a reputation of *solvency* is evidence of a belief in that solvency upon the same principle that reputation of a deceased's dangerous character (*ante*, § 246) evidences an apprehension of danger from him: [1]

1855, METCALF, J., in *Bartlett* v. *Decreet*, 4 Gray 113: "The testimony is admissible . . . on the ground that man's belief, as to matters of which they had not personal knowledge, is reasonably supposed to be affected by the opinions of others who are about them."

1855, MERRICK, J., in *Heywood* v. *Reed*, 4 Gray 579: "Individuals cannot in general resort to the most authentic sources of information to ascertain the pecuniary responsibility of parties with whom they deal. They are obliged to act upon opinions entertained and adopted in view of circumstances which are merely external and apparent, and hence they may well be presumed to be in some degree influenced in their transactions by the business credit and pecuniary standing which a party has acquired and maintained among his neighbors and acquaintances. When his motives to action in pecuniary transactions are called in question, considerations of this kind deserve attention."

Such a reputation of *insolvency* is evidence of knowledge of that insolvency in the same way that reputation of an employee's incompetency (*ante*, § 249) evidences the employer's probable knowledge of it: [2]

Wis. 56, 58 (general condition of a sidewalk sufficient, if known, to involve negligence, irrespective of knowledge of a particular defect); 1872, Ripon v. Bittel, 30 Wis. 614, 620 (same); 1882, Sullivan v. Oshkosh, 55 Wis. 508, 513, 13 N. W. 468, *semble* (general condition of a sidewalk, available to show notice of a particular defect); 1885, Spearbracker v. Larrabee, 64 Wis. 573, 575, 25 N. W. 555 (holes in a bridge at other places, admitted); 1889, Shaw v. Sun Prairie, 74 Wis. 105, 42 N. W. 271 (condition of a sidewalk "in the vicinity", "or the general bad condition of the same street, sidewalk, or bridge", admissible); Spaulding v. Sherman, 75 Wis. 77, 79, 43 N. W. 558, *semble* (same); 1891, Propsom v. Leatham, 80 Wis. 608, 611, 50 N. W. 586 (condition of a bridge at other points, admitted); 1900, Shafer v. Eau Claire, 105 Wis. 239, 81 N. W. 409 (similar); 1904, Duncan v. Grand Rapids, 121 Wis. 626, 99 N. W. 317 (general condition of a sidewalk, admitted); 1904, Lyon, v. Grand Rapids, ib. 609, 99 N. W. 311 (similar evidence excluded, not being material to show notice here); 1904, Hallum v. Omro, 122 Wis. 337, 99 N. W., 1051 (general condition of a sidewalk, for three years past, admitted); 1905, Pumorlo v. Merrill, 125 Wis. 102, 103 N. W. 464 (similar); 1908, Fleming v. Northern T. P. Mill, 135 Wis. 157, 114 N. W. 841 (machine).

§ **253**. [1] *Accord: Mass.* 1855, Bartlett v. Decreet, 4 Gray 113; 1855, Heywood v. Reed, 4 Gray 579 (quoted *supra*); 1861, Carpenter v. Leonard, 3 All. 33; 1862, Whitcher v. Shattuck, 3 All. 319, 321 (mortgage); 1865, Metcalf v. Munson, 10 All. 492.

[2] *Federal:* 1893, Hinds v. Keith, 6 C. C. A. 231, 57 Fed. 10, 13 U. S. App. 222, 227 (notoriety of insolvency, not admissible to show buyer's knowledge, if not within the same community); *Alabama:* 1843, Branch Bank v. Parker, 5 Ala. 736 (Ormond, J., diss.); 1845, Lawson v. Orear, 7 Ala. 784, *semble;*

1858, STONE, J., in *Price* v. *Mazange*, 31 Ala. 701, 707: "Ability to pay, responsibility to the coercive power of an execution, is a weighty consideration with one who parts with his goods on credit. . . . It is difficult to believe that merchants and traders will not learn the pecuniary condition of their customers when that condition so vitally affects them and is notorious in the neighborhood in which they are operating it."

An *express communication* would also be receivable to show notice of insolvency;[3] and similarly, express *assertions by the transferor* would have some (if little) probative value to show the transferee's belief in his solvency.[4] The use of reputation to show *the fact of insolvency or solvency itself* is a different question, involving the propriety of making an exception to the Hearsay rule (*post*, § 1623).

On the same principle the reputation of the *insanity* of a transferor would be admissible to show probable notice of the insanity by the transferee.[5]

§ 254. (6) **Adverse Possessor, Receiver of Stolen Goods, Keeper of Premises for Illegal Business, and other Dealers with Property.** On the same principle, reputation of a *property-interest* may serve to evidence knowledge or good faith wherever that state of mind is important in dealings with the property. Thus, the owner's knowledge of an *adverse possession* set up as the foundation of a prescriptive title may be evidenced by the notoriety or repute of the possession.[1]

1858, Price *v.* Mazange, 31 Ala. 701, 704, 707 (that he was "notoriously insolvent"; see quotation *supra*); 1883, Humes *v.* O'Bryan, 74 Ala. 81 (Somerville, J.: "The rule should in our opinion have no application to persons living at a distance in another State, unless they are shown to have had an opportunity of hearing the common report by frequently visiting the residence of the alleged partners, or otherwise"); 1918, McAleer *v.* People's Bank, 202 Ala. 256, 80 So. 94 (recoverable preference; the assignor's reputation, admitted); *Georgia:* 1885, Kuglar *v.* Garner, 74 Ga. 765, 768 (note obtained by fraud and duress; "public notoriety" of the circumstances admitted to show the indorsee's knowledge); *Louisiana:* 1840, Brander *v.* Ferriday, 16 La. 296, 299 (mortgage); *Massachusetts:* 1848, Denny *v.* Dana, 2 Cush. 169 (setting aside a fraudulent preference; evidence that the business of the debtor was known in the community to be ruinous to those engaged in it); 1854, Lee *v.* Kilburn, 3 Gray 594; 1862, Cook *v.* Mason, 5 All. 212; 1875, Sweetser *v.* Bates, 117 Mass. 468; 1894, Bliss *v.* Johnson, 162 Mass. 323, 38 N. E. 446; *Missouri:* 1848, Benvist *v.* Darby, 12 Mo. 196, 205; *North Carolina:* 1899, Webb *v.* Atkinson, 124 N. C. 447, 32 S. E. 737. — *Peculiar:* 1916, Trimble *v.* Carlisle, 103 S. C. 411, 88 S. E. 28 (note executed by defendant to H. who fraudulently transferred to T.; H.'s good reputation for veracity having been testified to by T., to show T.'s good faith, defendant was not allowed to show H.'s bad reputation for veracity, in rebuttal; an extraordinary and impossible ruling).

[3] 1829, Vacher *v.* Cocks, M. & M. 355 (letters to a bankrupt, not as evidence of the fact of insolvency, but of his knowing that his condition was insolvent).

[4] 1861, Carpenter *v.* Leonard, 3 All. 33 (*bona fides* of a mortgagee; the express statements of the mortgagor admitted to show the former's grounds for believing in his solvency).

[5] 1860, Romilly, M. R., in Greenslade *v.* Dare, 20 Beav. 290, rejected it on the singular ground that "to admit evidence of general reputation to fix a defendant with knowledge of a fact, while that evidence would not be admissible to prove the fact itself, appears to me to be a violation of the first principle", etc.

§ 254. [1] 1894, Maxwell Land-Grant Co. *v.* Dawson, 151 U. S. 586, 603, 14 Sup. 458; 1858, Brown *v.* Cockerell, 33 Ala. 38, 47; 1899, Tennessee Coal I. & R. Co. *v.* Linn, 123 Ala. 112, 26 So. 245 (after evidence of the adverse possession); 1905, Henry *v.* Brown, 143 Ala. 446, 39 So. 325; 1906, Doe *v.* Edmondson, 145 Ala. 557, 40 So. 505 (title by prescription); 1899, Knight *v.* Knight, 178 Ill. 553, 53 N. E. 306 (title by prescription; reputation of ancestor's possession admissible to show notoriety of it and adversity of claim); 1880, Sparrow *v.* Hovey, 44 Mich. 63, 6 N. W. 93; 1904 Miller *v.* Shumway, 135 Mich. 654, 98 N. W. 385.

Distinguish the question whether reputation is admissible, under the Hearsay exception, to evidence title directly (*post*, §§ 1587, 1626).

So, too, a *purchaser's* knowledge of *equitable or other interests* may be evidenced by reputation;[2] and, the good or bad faith of one *purchasing* or *receiving stolen goods*,[3] or otherwise unlawfully dealing with chattels,[4] may be evidenced by repute or by express communications made to him. The leasing of premises for *gaming*, for *liquor selling*, for *prostitution*, or for any other illegal business likely to lead to general inquiry and discussion, may raise an issue of knowledge, which is provable by the repute of the house;[5] but usually other rules of evidence are involved (*post*, § 367).

§ 255. (7) **Dealer with a Partnership.** The modes usually available for showing notice of a dissolution of partnership, as against one who has dealt with its members after dissolution, are the first three already noted (*ante*, § 245), namely (1) exposure to observation, *i.e. publication* where the person would be likely to have seen it, (2) *express communication*, and (3) *reputation* or notoriety. (1) Here the only evidential question seems to be whether the newspaper containing the notice must be shown to have been subscribed to or taken by the person to be notified; but this question is rarely raised as one of admissibility, and is generally treated as one either of constructive notice or of the sufficiency of evidence on all the facts of the case.[1] (2) An

[2] 1901, Stephenson *v.* Kilpatrick, 166 Mo. 262, 65 S. W. 773 (to show notice, by a purchaser at a sale, of plaintiff's interest in the property, the community's general knowledge of certain litigation was held relevant). The following is another use: 1903, Jennings *v.* Rooney, 183 Mass. 577, 67 N. E. 665 (fact of a conversation admitted, to show that a vendee obtained first knowledge of the property from the broker and not from the vendor).

[3] *Eng.* 1824, R. *v.* Whitehead, 1 C. & P. 67 (conspiracy to defraud by B. and W.; to show W.'s good faith in the representations made to him by B., it was proved that "B. was a clergyman and most respectably connected"); 1859, R. *v.* Wood, 1 F. & F. 497 (receiving stolen goods; vendor's declarations to defendant, admitted); *Can.* 1908, Oldstadt *v.* Lineham, 1 Alta. 417 (ninety-three notes obtained by fraudulent misrepresentation; to show defendant's notice of the fraud when he purchased, his taking of similar notes from the same payee on former occasions was admitted); *U. S.* 1855, Spivey *v.* State, 26 Ala. 90, 93, 103 (larceny; statements to defendant of supposed owner, admitted to show defendant's good faith); 1879, State *v.* Waltz, 52 Ia. 227, 2 N. W. 1102 (larceny; information to the defendant that the things were not the property of the owner, admitted); 1904, State *v.* Simon, 70 N. J. L. 407, 57 Atl. 1016 (receiving goods; conversations with the seller, admitted); 1857, People *v.* Rando, 3 Park. Cr. N. Y. 336, 339, 341 (to disprove guilty knowledge of stolen goods possessed, evidence of the statements by the person bringing them, which induced the defendant to receive them, was offered; Peabody, J., diss.: "They should be admitted, not as evidence of the truth of the facts, but as evidence that such statements were made, without regard to the truth or falsity of them"; here rejected, erroneously, by the majority; but in 1881, in People *v.* Dowling, 84 N. Y. 485, the passage quoted was made the law).

Compare the cases cited *post*, § 1781 (declarations by the accused).

[4] 1870, State *v.* Graham, 46 Mo. 490 (maliciously killing H.'s hog; instructions given to defendant to kill his employer's hog, admitted to show his belief).

[5] 1905, Bashinski *v.* State, 122 Ga. 164, 50 S. E. 54; Ia. Comp. C.1919, § 988 (illegal liquor sales; "general reputation of the place kept, admissible to show "knowledge of the owner"); 1904, State *v.* Steen, 125 Ia. 307, 101 N. W. 96; 1906, State *v.* Brooks, 74 Kan. 175, 85 Pac. 1013 (knowingly permitting the use of a building for liquor sales; repute of the place as a liquor nuisance, admitted).

§ 255. [1] The earlier English cases are subjoined, in order to illustrate the method of dealing with such evidence: 1795, Godfrey *v.* Macauley, Peake 155 (notice of dissolution of partnership; Lord Ellenborough, C. J.: "The *Gazette* was not [conclusive] evidence of notice, any more than any other newspaper; . . . but in all cases, if published in the neighborhood of a person, it ought to be left to the jury whether he had notice of it or not"); 1816, Leeson *v.* Holt, 1 Stark. 186 (notice of a carrier's responsibility; Lord Ellenborough, C. J., "said that he would receive evidence of the advertisement in the *Gazette*, but that unless it were proved that the party was in the habit of reading the *Gazette*, the evidence would be of little avail. . . . The advertisement in the *Times* was not

express communication raises no evidential question. (3) A reputation or notoriety of dissolution serves to evidence knowledge;[2] but here the question tends to become one of constructive notice or ostensible partnership, and thus of substantive law.

§ 256. (8) **Maker of False Representations.** Where a representation is made as to the *credit of a third person* to whom a loan or a sale is to be made, and in an action of deceit the knowledge of the incorrectness of the representations is to be shown, the *reputation of the third person* as to solvency or insolvency is relevant (on the principle of § 253, *ante*).[1] In general, wherever the knowledge of the incorrectness of representations is to be shown, any of the modes of evidence already noted in § 245 may become available.[2]

§ 257. (9) **Seller or Transporter of Liquor.** (*a*) Where a statute forbids the selling of intoxicating liquor to a person of known intemperate habits, the *reputation* of the vendee for *intemperance* is relevant to show probable knowledge by the seller;[1] and the other modes noted *ante*, § 245, would be

admissible at all without proof that it was taken in by the party. The first instance in which such evidence was received was a case where a person . . . inserted a notice in a provincial Sunday paper, and the Court held that it was admissible in evidence because it was probable that the party had seen it, since he took in the paper and the advertisement related to his business." "It appeared that D. had occasionally read the *Times* newspaper, and Lord Ellenborough then admitted the advertisement contained in it to be read"); 1816, Jenkins *v.* Blizard, 1 Stark. 418, 420 (dissolution of partnership; "the notice had been advertised in the *Morning Chronicle* once only, and it did not appear that this individual paper had ever reached the plaintiffs", though it was proved that they took in the paper regularly; admitted); 1817, Munn *v.* Baker, 2 Stark. 255 (notice of a carrier's responsibility; an advertisement in the *Gazette*, rejected by Lord Ellenborough, C. J., "without proof of the plaintiff's having read the *Gazette*, since he might be expected to look into the *Gazette* for notices of the dissolution of partnerships, but not for notices by carriers of the limitation of their responsibility"); 1825, Rowley *v.* Horne, 3 Bing. 2 (notice by a carrier in a weekly paper to which the plaintiff subscribed; admitted, but held not sufficient); 1837, Hart *v.* Alexander, 7 C. & P. 746, 749, 751, 753; 2 M. & W. 484 (advertisements of dissolution of partnership in various newspapers, admitted). The following modern case illustrates that it is not a question of admissibility: 1898, Amer. F. I. Co. *v.* Landfare, 56 Nebr. 482, 76 N. W. 1068.

[2] 1883, Humes *v.* O'Bryan, 74 Ala. 81 (reputation of a dissolution of partnership, admitted; Somerville, J.: "It is based upon the probability that the plaintiff would be likely to know a fact of which no one else in the neighborhood seemed to be ignorant"); 1907, Bush & H. Co. *v.* McCarty Co., 127 Ga. 308, 56 S. E. 430 (evidence not here sufficient as offered); 1833, Cowen, J., in Halliday *v.* McDougall, 20 Wend. N. Y. 81, 89 ("Where a partnership has existed in fact, but has been dissolved, and a third person has yet dealt with one of the partners, and sues them all, insisting that he acted on the credit of the former concern, the question whether a partner who has retired shall yet be holden on a contract of the others, may depend on his having been known as a partner, for the notoriety of the fact may have influenced the conduct of the plaintiff").

§ **256.** [1] 1837, Ward *v.* Herndon, 5 Port. 382, 384 ("no man is presumed to be so much of a recluse as not to know what is generally known and talked of in his neighborhood").

[2] 1918, McLean Medicine Co. *v.* U. S., 8th C. C. A., 253 Fed. 694 (fraudulent misbranding of drugs under U. S. St. 1906, June 30; testimonials by persons using the drug, admissible to show good faith); 1839, Com. *v.* Call, 21 Pick. Mass. 515 (false pretences; collecting money by representing himself to be an agent; to show that he had before that time to his knowledge been dismissed from his agency, evidence was received that he was dismissed for having lost his employer's money at a house of ill-fame); 1905, Connelly *v.* Brown, 73 N. H. 193, 60 Atl. 750 (deceit by a tenant; the landlord's statements to her, admitted, to show her belief in the truth of representations by her to the plaintiff as to the landlord's intent).

§ **257.** [1] 1854, Elam *v.* State, 25 Ala. 53, 57; 1855, Stanley *v.* State, 26 Ala. 26 (excluded; but this case is repudiated in Stallings *v.* State, *infra*); 1859, Stallings *v.* State, 33 Ala. 425, 427 (indictment for selling liquor to one known to be intemperate; notoriety in the neighborhood admitted as indicating defendant's knowledge); 1876, Smith *v.* State, 55 Ala. 12; 1879, Tatum *v.* State, 63 Ala. 151.

equally available. (*b*) Where a statute forbids the knowing selling of liquor to a minor, the *appearance* of the vendee would be admissible as affecting the seller's probable knowledge (*ante*, § 222). (*c*) Where a statute forbids the knowing receipt of liquor for transportation, the *reputation* of the *consignor* as a trafficker in illegal liquor would be admissible.[2]

§ 258. (10) **Party Prosecuting or Arresting without Probable Cause.** (*a*) Where in an action for *malicious prosecution* for *defamation*, or for *false arrest*, the issue arises whether the prosecutor had reasonable grounds and acted in good faith, the bad *reputation* of the now plaintiff is a circumstance bearing on this state of mind, and is admissible.[1] There is no reason why the plaintiff's *good repute* should not be received in chief.[2] *Particular acts* of similar misconduct by the now plaintiff should be admissible, on the same principle (*ante*, § 248) that particular acts of violence by a deceased person are admitted to show the apprehensions of a defendant charged with homicide.[3] (*b*) In the same way, when in a prosecution for *assaulting an officer*

[2] 1920, State *v.* Crosswhite, 203 Ala. 586, 84 So. 813 (condemnation of property used in illegal transportation of liquors by defendant's bailee T.; notoriety of T.'s reputation as a "bootlegger", held admissible to show notice by defendant).

§ 258. [1] ENGLAND: 1773, Fabrigas *v.* Mostyn, 20 How. St. Tr. 94 ("While you knew Mr. Fabrigas what character did he bear? or how did he behave himself, as far as you had an opportunity of observing?" "As far as I could observe, he behaved very well, and had a very good character." . . . "While you knew him, I ask you, what was his behavior?" . . . "He always behaved with very great decency and decorum"; again at 142); 1799, Rodriguez *v.* Tadmire, 2 Esp. 721 (bad reputation as showing reasonable cause for suspicion, admitted); 1841, Downing *v.* Butcher, 2 Mo. & Rob. 374; CANADA: 1890, Halifax Banking Co. *v.* Smith, 29 N. Br. 462 (general principle conceded; but two judges dissenting as to its applicability); 1894, Olsen *v.* Lantalum, 32 N. Br. 526 (principle applied).

UNITED STATES: *Ala.* Martin *v.* Hardesty, 27 Ala. 458; *Ind.* 1873, Oliver *v.* Pate, 43 Ind. 132, 138; *Kan.* 1907, Emory *v.* Eggan, 75 Kan. 82, 88 Pac. 740 (but reputation in another city, such as not to be known to the defendant is inadmissible); *Ky.* 1811, Gregory *v.* Thomas, 2 Bibb 286; *Mass.* 1849, Bacon *v.* Towne, 4 Cush. 240; *Mo.* 1919, Boyers *v.* Lindhorst, 280 Mo. 5, 216 S. W. 536 (admissible, if known to defendant at the time); *Mont.* 1906, Martin *v.* Corrcadden, 34 Mont. 308, 86 Pac. 33; *Nebr.* 1887, Dorsey *v.* Clapp, 22 Nebr. 564, 568, 35 N. W. 389, *semble*; *N. H.* 1896, Beckman *v.* Souther, 68 N. H. 381, 36 Atl. 14 (as bearing on the plaintiff's replication of excess of force; the matter in each case to be left entirely to the trial Court's discretion); *Oh.* 1921, Melanowski *v.* Judy, — Oh. —, 131 N. E. 360 (reputation here excluded, because neither plaintiff nor defendant had ever even heard of one another; unsound, the reputation is admissible as evidence of the probable or possible knowledge by defendant of plaintiff's character; to require knowledge of the reputation first is to misapply the principle).

Contra, but unsound: 1817, Newsam *v.* Carr, 2 Stark. 69; 1876, Fitch *v.* Murray, Wood Man. 74, 88; 1906, Sinclair *v.* Ruddell, 16 Man. 53, 60.

[2] *Accord:* 1864, Ross *v.* Innis, 35 Ill. 487 (malicious prosecution; plaintiff's good character, admissible); 1919, Sappington *v.* Fairfax, 135 Md. 186, 108 Atl. 575 (good reputation, admissible in chief, to show lack of probable cause); 1897, Geary *v.* Stevenson, 169 Mass. 23, 47 N. E. 508 (plaintiff's good reputation, to negative probable cause); 1889, McIntire *v.* Levering, 148 Mass. 546 (malicious prosecution; plaintiff allowed "as part of her case", to introduce her good reputation); 1904, Thurkettle *v.* Frost, 137 Mich. 649, 100 N. W. 283; 1905, Shea *v.* Cloquet L. Co., 97 Minn. 41, 105 N. W. 552; 1884, Woodworth *v.* Mills, 61 Wis. 44, 56 (malicious prosecution; plaintiff's good character, offered "as a part of his case and not in answer to an attack", held admissible; leading opinion, by Taylor, J.); 1913, McIntosh *v.* Wales, 21 Wyo. 397, 134 Pac. 274 (plaintiff's good repute, admitted, even before it is impeached by defendant).

Contra: 1899, Claiborne *v.* R. Co., 46 W. Va. 363, 33 S. E. 262 (false arrest of a passenger; plaintiff's good character not admitted).

For the use of reputation in *mitigation of damages* in such actions, see *ante*, § 75. For the use of the *testimony* at the *original trial*, see *post*, § 1416.

[3] The precedents are for the most part to the contrary: 1799, Rodriguez *v.* Tadmire, 2 Esp. 721 (bad character as ground for suspicion and prosecution; particular acts excluded; though

or *resisting an arrest*, the officer's right to arrest, and incidentally his reasonable ground for suspicion, comes in issue, the *reputation* [4] of the arrested person, and also prior *particular acts* [5] of similar misconduct, should be receivable as affecting his grounds of suspicion. (*c*) So, too, in any of the preceding actions, or in an action for battery involving a similar issue, the *express communications* of third persons are relevant to show the belief or good faith of the person arresting or prosecuting.[6]

§ 259. (11) **Utterer of Forged or Counterfeit Paper or Money, Possessor of Stolen Goods, etc.** Knowledge or notice is an essential ingredient of

the plaintiff, suing for malicious prosecution, was allowed to ask); 1899, Williams *v.* Casebeer, 126 Cal. 77, 58 Pac. 380 (transaction ten years before, giving defendant ground to suspect plaintiff of larceny, inadmissible); 1811, Gregory *v.* Thomas, 2 Bibb Ky. 286 (excluded); 1902, Perkins *v.* Spaulding, 182 Mass. 218, 65 N. E. 72 (embezzlement of other articles from the same owner, admissible to show the owner's good faith in prosecuting); 1906, Martin *v.* Corscadden, 34 Mont. 308, 86 Pac. 33 (prosecution for larceny, the plaintiff's confession, communicated to the defendant, of prior larcenies, excluded, unsound); 1887, Dorsey *v.* Clapp, 22 Nebr. 564, 568, 35 N. W. 389 ("particular acts" of the arrested party said to be inadmissible to show the prosecutor's good faith; but the acts here excluded were such as could afford no reasonable suspicion of the charge made); 1909, Schoette *v.* Drake, 139 Wis. 18, 120 N. W. 393 (prior disorderly conduct of plaintiff on same day, admitted).

[4] *Contra*, but clearly wrong: 1864, R. *v.* Turberfield, L. & C. 495 (assault upon a constable; the issue being whether the constable had reasonable grounds for suspecting the accused of a felony; the question to the constable, "What did you know had been the prisoner's previous character?" was held improper); 1920, Little *v.* State, 150 Ga. 728, 105 S. E. 359 (murder of a police-marshal; to explain deceased's presence with intent to arrest defendant, defendant's reputation for violating the liquor law, held inadmissible; unsound).

[5] 1898, State *v.* Healey, 105 Ia. 162, 74 N. W. 916 (murder while deceased was attempting to arrest; robbery of third persons by other persons just before, received to show the deceased's reason for arresting); 1895, State *v.* Foley, 130 Mo. 482, 32 S. W. 973 (asking a defendant whether he was concerned in a former attempt to rob, allowed, as showing that the officer for an assault on whom he was now on trial had reason to arrest him on suspicion of the former offence).

Distinguish the following question: 1903, People *v.* Glennon, 175 N. Y. 45, 67 N. E. 125 (patrolman's neglect of duty in failing to arrest the keepers of a disorderly house; specific conduct of the inmates, admitted to show the defendant's knowledge of its character).

[6] *England:* 1773, Fabrigas *v.* Mostyn, 20 How. St. Tr. 137 (false imprisonment; defence, fear of the raising of a seditious mob by the plaintiff; statements to the defendant that a mob was being raised by plaintiff, admitted to show defendant's apprehensions; see the quotation *post*, § 1785); *Canada:* 1821, Redford *v.* Birley, 1 State Tr. N. S. 1071, 1174 (battery in dispersing a mob; whether persons expressed to the magistrates their apprehensions of danger, admitted, not as evidence of the alarm but as facts on which the magistrates might properly have acted; for a further consideration of the classes of evidence connected with mob violence, see *post*, § 1790); *United States:* 1913, Webb *v.* Gray, 181 Ala. 408, 62 So. 194 (defamation of plaintiff's chastity; purporting letters of plaintiff to L., admitting intercourse, shown by L. to defendant, admissible to evidence good faith); 1904, Griswold *v.* Griswold, 143 Cal. 617, 77 Pac. 672 (malicious proceedings in lunacy; the family physician's report to defendant, admitted to show his probable cause); 1922, Michel *v.* Smith, — Cal. —, 205 Pac. 113 (unlawful arrest of a deserter); 1854, Main *v.* McCarty, 15 Ill. 441 (battery; plea, resistance to the defendant while arresting; "what did persons in the crowd say" to the officers, admitted); 1870, Friend *v.* Hamill, 34 Md. 298, 308 (information to plaintiff, admitted in an action for malicious prosecution); 1849, Bacon *v.* Towne, 4 Cush. Mass. 240 (malicious prosecution; third person's information to the defendant, admitted); 1868, Simmons *v.* Holster, 13 Minn. 249, 258 (reasonable ground for charging the plaintiff as a thief, to disprove malice; the defendant had made the charge on the faith of Mrs. J.'s statement to him of what she had seen; Mrs. J.'s bad character for veracity was then admitted to show that the defendant "could not reasonably rely upon her statements"; compare Hastings *v.* Stone, Mass., cited *ante*, § 73); 1869, Castner *v.* Sliker, 33 N. J. L. 507, 508 (battery; plea, self-defence; statements of bystanders declining to interfere, admitted to show whether the defendant had reason to expect assistance).

For the application of the Hearsay rule here, see *post*, § 1789.

many crimes; and in some of these the knowledge may be acquired from former dealings with the same article or similar articles; *i.e.* on the principle of the fourth mode (noted *ante*, § 245), one experience with counterfeit money or with stolen goods may conceivably result in revealing the counterfeit or stolen character of the article, so that a knowledge arises which is applicable to the subsequent dealing now charged as criminal because done with knowledge. It is, however, so difficult to distinguish this use of former dealings to show Knowledge from the use of former dealings to show Intent or to show Design, that all three subjects are best dealt with together (*post*, §§ 300–371).

§ 260. (12) **Possessor of a Document.** The possession of a document is an important and often the only circumstance to show that its possessor has by reading it become aware of its contents; the inference rests on the probable operation of the element (1) already noted (*ante*, § 245):[1]

§ 260. [1] 1817, R. *v.* Watson, 2 Stark. 116 (placard); 1822, Scott *v.* Waithman, 3 id. 170 (possession by sheriff of writs giving information); 1843, R. *v.* Zulueta, 1 C. & K. 215, 224 (here not traced in fact to his possession); 1906, U. S. *v.* Greene, 146 Fed. 784, D. C. (a letter by defendant, in his letter-book, locked up and not sent, admitted); 1919, Galbreath *v.* U. S., 6th C. C. A., 257 Fed. 648, 659 (whether defendants as bank officers had authorized the false entries charged as offences; the defendant's knowledge of the contents of the bank records, not presumed, but required to be evidenced); 1916, People *v.* Halpin, 276 Ill. 363, 114 N. E. 932 (bribe-acceptance by a police officer; letters and telegrams received at the detective bureau of which defendant was chief and placed on file, admitted, though knowledge by the defendant was not expressly shown; the opinion however goes off on the ground of conspiracy, and fails to notice the present principle); 1907, State *v.* Ford, 76 Kan. 424, 91 Pac. 1066 (illegal sale of liquor; cited *ante*, § 150, n. 4); 1851, Holbrook *v.* Jackson, 7 Cush. Mass. 136, 147, 153 (transfer in fraud of creditors; books of the vendor, not a party, admitted to show his knowledge of his insolvency, irrespective of the authorship of the entries; "every merchant must be presumed to know and in fact from his balance sheet and books generally does know the state of his concerns"); 1901, People *v.* Higgins, 127 Mich. 291, 8 N. W. 812 (possession of a manuscript story of a murder, in the accused's handwriting admitted); 1885, State *v.* Stair, 87 Mo. 268 (murder; a written paper about how to kill the deceased, found in a pocket-book on defendant's person, admitted against him, after slight evidence of handwriting; but not admitted against his wife the co-defendant); 1883, Lovelace *v.* State, 12 Lea Tenn. 721 (larceny; postcard about the stealing, found in defendant's possession, admitted; "he is presumed to have known its contents"). For the question whether a partner or shareholder may be charged with notice of the *books* of the *firm or corporation*, see *post*, § 1074);

Distinguish the question whether *keeping a document* is a *waiver of the right to dissent or rescind:* 1898, McMaster *v.* Ins. Co., 30 C. C. A. 532, 87 Fed. 63, 171 U. S. 687, 18 Sup. 944, 183 U. S. 25, 22 Sup. 10; 1902, Bostwick *v.* Ins. Co., 116 Wis. 392, 89 N. W. 538, 92 N. W. 246; or is an *admission of the truth* of its contents (*post*, § 1073).

The following much-debated ruling rests on the present principle, together with that of § 148, *ante*, and the opinions are instructive, and are quoted *ante*, § 228, in considering evidence of insanity: 1837, Wright *v.* Tatham, 7 A. & E. 313, 325, 364, 369, 376, 390, 407; s. c., 5 Cl. & F. 670, 694, 703, 710, 716, 723, 736, 741, 767, 774 (a letter found in M.'s bookcase-cupboard, opened; if M. had been a person of sound mind, the inference would be that he had opened, read, and deposited it; but as his sanity was the main issue, the inference was not allowed by a majority of the judges). Here belongs also: 1909, Snell *v.* Weldon, 239 Ill. 279, 87 N. E. 1022 (obscene letters from a woman legatee to the testator, found in his trunk, excluded, on the ground that his moral delinquency was not material to insanity or to undue influence; but also on the erroneous ground that "the retaining the letters in his trunk did not necessarily imply assent to what they contained"; his retention of the series was at least some evidence of a sympathetic state of mind towards the writer, especially in view of his marginal comment on one of them, "the best letter of all, sure"; Wright *v.* Tatham not cited).

In Edmund Burke's speech, protesting against the rulings of the House of Lords excluding certain evidence in the trial of Warren Hastings, will be found a powerful argument on the subject of charging an official with knowledge of books existing within his control (1794, Cobbett's Parliamentary Hist., xxxi, 343–347).

1581, *Campion's Trial*, 1 How. St. Tr. 1050, 1066. Campion, the Jesuit, being charged with administering treasonable oaths, and a certain papist book being found in his "budget", *Anderson*, Queen's counsel, asked him: "To what end, then, should you carry this book about you if you were not purposed to do as it prescribeth?" *Campion:* "Many casualties and events may happen whereby a man may be endangered, ere he beware, by the carrying of a thing whereof he knoweth not, — as, either the malice of others that privily convey it amongst his other provisions, or his own negligence or oversight which marketh not attentively what he took with him."

1837, BOSANQUET, J., in *Wright* v. *Tatham*, 7 A. & E. 313, 364, 376: "Knowledge of letters and of other things found in a place accessible to him in his own house or apartments, may sometimes be presumed; such as writings connected with the charge, upon a charge of treason; notes or other documents forged or partly forged, upon a charge of forgery; instruments of coining or house-breaking, upon charges of coining or burglary."

This use of such evidence needs however to be distinguished from its use for other purposes, which are frequently associated in the same litigation; for (a) it may be used to evidence an *assent* to the document's contents or an *admission* of their truth (*post*, §§ 1073, 1074), or (b) the presence of the document *on a person's premises or among his effects* may be used to evidence his possession of it at a prior time (*ante*, § 157), and thus to lead to one of the above inferences; or (c) the possession of a document may serve *other evidential purposes already* sufficiently compared (*ante*, §§ 156, 157).

§ 261. (13) **Miscellaneous Instances of Belief or Knowledge evidenced by Circumstances.** In the four ways already noted (*ante*, § 245), belief or knowledge of various other facts may be properly evidenced. (1) By direct *exposure to the senses*, the observed appearance of a person or thing may evidence some quality material to the issue.[1] (2) *Express communication* is always a proper mode of evidencing knowledge or belief.[2] Communication to a *hus-*

§ **261.** [1] 1874, Jaques *v.* Sax, 39 Ia. 370 (a minor's being engaged in business; appearance admitted); 1888, Hermann *v.* State, 73 Wis. 248, 41 N. W. 171 (personal appearance of a girl, admitted to show whether the defendant knew the girl to be under 21, in a prosecution for keeping a house of ill-fame knowing an inmate to be under 21).

[2] 1831, Taylor *v.* Willans, 2 B. & Ad. 845, 855, 858 (a letter to a justice of the peace, purporting to be from a Judge; admitted merely to show why the justice admitted an accused to bail); 1906, Ditto *v.* Slaughter, — Ky. —, 92 S. W. 2 (duress of a wife in signing a note under threats by the payee to prosecute the husband; whether the husband's report to the wife that threats had been made to him was admissible; the Court divided evenly); 1858, Tobin *v.* Shaw, 45 Me. 347 (the issue being whether the plaintiff's voluntary destruction of letters would prevent her from producing secondary evidence of them under the principle of § 1198, *post*, her sister was allowed to tell what advice she gave the plaintiff about destroying them, so as to negative the charge of fraudulent destruction); 1857, Com. *v.* Castles, 9 Gray 121 (charge that the defendant substituted a false deed for a deed which W. supposed he was signing; the difference in the deeds being shown, a prior conversation of the defendant with a third person was admitted to show that the defendant knew what W. was really intending to sign); 1911, Washoe Copper Co. *v.* Junila, 43 Mont. 178, 115 Pac. 917 (knowledge of a lode, as essential at the time of an application for placer patent; a "declaratory statement" as to the lode, void in form, not admissible to show knowledge in the community; *sed quære*); 1869, Williams *v.* Poppleton, 3 Or. 143 (consultation by other surgeons with one charged with malpractice).

The following ruling, on the Court's theory, perhaps belongs here, though it might also belong under § 231, n. 1, par. 2: 1908, Curtice *v.* Dixon, 74 N. H. 386, 68 Atl. 587 (deed made while insane and unduly influenced; to show that the grantor disliked the defendant on account of her quarrelsome disposition, his statement to that effect had been received; specific instances of such disposition were then received in corroboration, though these instances were not known to the grantor).

In *defamation*, wherever the defendant's privilege involves good faith, and he has merely

band or *wife* is always receivable to show probable knowledge by the other (except where they are living apart or are not on good terms), because, while it is not certain that the one will tell the other, and while the probability is less upon some subjects than upon others, still there is always some probability, — which is all that can be fairly asked for admissibility.[3] (3) *Reputation*, or general discussion in a community or a part of it, may be useful in a variety of ways as showing the probability of knowledge or belief by a member of the community or a local circle.[4]

§ 262. (14) **Insane Belief, as shown by Facts told to the Party.** The present principle sometimes comes into play where a deranged mental condition is said to have been caused in part by a belief in certain facts. Here it may therefore be shown that the party was made aware of the supposed exciting facts by a *repute* or *rumor* or other form of communication, which thus tended to create the belief and cause the derangement.[1]

§ 263. **Disproof of the Facts communicated.** In some of the foregoing classes of cases — notably those of § 248 (deceased's violent acts) and § 262 (facts exciting mental derangement) — the question may arise whether the *objective facts themselves may be disproved*.

On the one hand, the non-existence of those facts seems at first sight to have no bearing; because it is the mere report or repute or communication (and not the truth of it) which has been introduced to show the party's state of mind; for example, in homicide, the reasonableness of the accused's apprehension of the deceased's aggression is equally great, if the accused has heard of a cruel and violent act of the deceased, even though that act was never committed. On the other hand, assuming that for any purpose the objective

repeated a statement originally uttered by a third person, the *name* of the original author may thus become relevant: 1917, Culligan *v.* The Graphic, 37 D. L. R. 134, N. B.

[3] The precedents tend to be too strict: 1842, Oden *v.* Stubblefield, 4 Ala. 41 (Collier, C. J.: "It by no means follows that the wife informs the husband of everything she may hear, especially if it be not likely to interest or affect him in some way. Now it does not appear [in a case where notice of a previous unrecorded sale of slaves by the plaintiff to a third party was charged] that the defendant had or was about to acquire an interest in the slaves at the time the wife heard the deed from the plaintiff spoken of, so that it cannot be reasonably intended that she repeated what she heard"); 1843, Petrie *v.* Rose, 5 W. & S. Pa. 364, 366 (slander by a wife; communication of suspicious facts, tending to negative malice, to the husband of the defendant, held properly rejected).

[4] 1875, Clinton *v.* Howard, 42 Conn. 294, 310 (to show the diminished value of a frightened horse, evidence was admitted as to the extent of local knowledge of the horse having run away through this fright); 1888, Tucker *v.* Constable, 16 Or. 407, 409, 19 Pac. 13 (statutory action for unlawfully gelding an animal knowing it to be kept for covering; reputation, *semble*, held admissible; but here the indefinite fact that the animal was "generally known" to be so kept, was held insufficient); 1911, Murphy *v.* Atlanta & C. A. L. R. Co., 89 S. C. 15, 71 S. E. 296 (incompetence of employee known to employer; declarations of trainmaster at time of employment, admitted); 1906, Gulf C. & S. F. R. Co. *v.* Matthews, 100 Tex. 63, 93 S. W. 1068 (whether a person knew of M.'s death; his reading of newspapers and hearing conversations on the subject, admitted); 1888, State *v.* Flint, 60 Vt. 304, 310, 319, 14 Atl. 178 (notoriety of a crime in a village by a certain time, admitted to show knowledge by one there); 1917, Porter Screen Mfg. Co. *v.* Central Vermont R. Co., 92 Vt. 1, 102 Atl. 44 (injury to goods by a flood; newspaper announcement of the flood, excluded, because not shown to have been seen by defendant's agents).

Compare also the cases admitting *character to show motive* (*post*, § 390, n. 1).

§ 262. [1] Cases cited *ante*, § 231.

fact has a bearing, the rule against contradicting a witness on a collateral point (*post*, § 1001) should not stand in the way; for if the fact is relevant at all, it is not any more collateral than the rumor of it (*post*, § 1005).

That the objective truth, however, of the fact reported or rumored, may sometimes be relevant seems clear, namely, when the *non-existence of the fact* is offered as tending *to show that the witness testifying to the communication of the alleged fact is not testifying truly*. For example, on a prosecution for murder, the defence being insanity caused by brooding over the deceased's persistent pursuit of the virtue of the defendant's wife, suppose that the defendant's wife testifies in his behalf to numerous reports, made by her to the defendant, of the deceased's attempts to seduce her; now if it could be shown indubitably that such attempts upon the witness never took place, would this not make it less likely that the alleged communications of them were made by her? In other words, would not the witness to these communications be discredited on the material question whether the communications were ever made? As a mere question of natural reasoning, (*post*, § 990), the affirmative answer would seem plain. If we add to this the feature that the wife further testifies (on cross-examination) that the deceased's alleged attempts did in fact take place, we thus add the circumstance that the witness is proved to have falsified on that point (*post*, § 1000); and thus the lie on the fact of the attempts enables the prosecution to argue additionally that the witness is falsifying on the other fact of the communication of the alleged attempts to the defendant. From both points of view, therefore, it seems proper to allow the opponent to disprove the alleged acts, the communication of which is alleged to have produced the party's mental condition.[1]

§ 263. [1] The following ruling and statute confirms this result: 1907, Knapp *v.* State, 168 Ind. 153, 79 N. E. 1076 (homicide; plea, self-defence; the defendant testified to having heard before the affray that the deceased had clubbed to death a certain old man while arresting him; this fact, if true, was admissible on the principle of § 248, *ante*, to evidence the defendant's state of mind; the prosecution offered to show that in truth the old man had not been clubbed, but had died of senility and alcoholism; this was admitted as tending to show the improbability of the clubbing having occurred and therefore of the witness having heard of it by report; good opinion by Gillett, J.; it will be noticed that this is in effect the same point that arose in the Thaw trial for murder, N. Y., March, 1907); Va. St. 1908, c. 59, p. 54 omitted in Code 1919 (in homicide or assault with intent or cases under Code § 3671, when the accused has evidenced "that he believed a wrong to have been committed upon some member of his family", etc., whether on a "defence of insanity or as evidence of extenuating circumstances", the prosecution may evidence "the truth or falsity of the existence of such a wrong", whereon the accused may "introduce evidence in rebuttal as to such truth or falsity"). *Contra*, in principle: 1883, People *v.* Hurtado, 63 Cal. 288 (murder; the wife's confession of adultery with the deceased was testified to by the defendant; evidence tending to prove the fact of that adultery was not admitted for the defendant as corroborating his testimony to her confession; nor would the prosecution have been allowed to prove her innocence); 1907, Shipp *v.* Com., 124 Ky. 643, 99 S. W. 945 (murder; defence, insanity, partly caused by his wife's confession of infidelity with S.; his wife's character for chastity, held not admissible for the prosecution to show that she "was not guilty of the conduct ascribed to her"); 1913, People *v.* Harris, 209 N. Y. 70, 102 N. E. 546 (wife-murder; the accused having testified that his wife had told him that "she was in the family way by T.", the prosecution offered to show that the wife was not pregnant at all, as evidence that she did not make such a statement to him; held inadmissible, conceding the relevancy of the fact, as pointed out above, but emphasizing the principle of avoiding confusion of issues on collateral points; the reply in this case must be that as the accused rested

2. Conduct, as Evidence of Knowledge, Belief, or Consciousness

§ 265. **General Principle.** It has already been pointed out (*ante*, § 244) that a second chief sort of evidence for proving that mental state which is termed Knowledge, Belief, or Consciousness, consists of Conduct of the person to whom the mental state is attributed. In this sort of evidence, we argue from an observed effect — conduct — to the probable cause — a specific mental state; and not, as in the preceding sort (*ante*, §§ 245, 261), from cause to effect, *i.e.* from outward events to an ensuing mental state. The basis of the inference, here as elsewhere, is our experience of the operation of human nature. The general principle of Relevancy (*ante*, §§ 31, 38) applies, that the evidential fact should be received whenever the 'factum probandum' is at least a fairly possible or a probable inference, though not the conclusive or the most probable one.

But it is not in the application of the principle of Relevancy that the special difficulties of this subject are found. In only two or three of its applications are there any controverted points; the notable ones, perhaps, are the questions as to the inference from Innocent Conduct (*post*, § 293) and the inference from Non-Production of Testimony (*post*, §§ 285–291). The peculiar problem of this subject lies rather in the fact that conduct admissible enough from the present point of view may also be regarded as being in effect an assertion and therefore as *obnoxious to the Hearsay rule*, which excludes the use of testimonial assertions made out of court. For example, on an issue of legitimacy, the parents' conduct, in treating the child as legitimate, is a circumstance from which may easily be inferred their belief in his birth since

his defence largely on the provocation involved in the alleged statement, the fact of the making of the statement could not be deemed collateral in any real sense; for nobody ever heard of an alleged threat by a deceased in a homicide case being excluded from refutation because it was collateral, and yet it plays precisely the same important part in the issue as the wife's statement here); 1907, Jones *v.* State, 51 Tex. Cr. 472, 101 S. W. 993 (homicide; the defendant's wife had told the defendant that the man had raped her; proof of a continued illicit intimacy between deceased and the wife, tending to show that her intercourse had been voluntary, excluded).

The judicial view contrary to that above expressed was given general notoriety in consequence of 'nisi prius' rulings in the Thaw trial (N. Y. City, March, 1907; murder of one believed to have seduced the defendant's wife), and the Loving trial (Houston, Va., June 27, 1907; murder of one believed to have ravished the defendant's daughter). The public comment called forth by these cases emphasized further the unfortunate possibilities of abuse inherent in that solution for unscrupulous or reckless persons.

The following case ignores this principle: 1914, People *v.* Jung Hing, 212 N. Y. 393, 106 N. E. 105 (murder; the defence being that the deceased had charged the defendant with taking a ring which deceased said he had given to his girl G. W., the prosecution called G. W. to prove that she did not know defendant, that she had never given him a diamond ring, and that deceased had never given her a diamond ring; held inadmissible, on the ground that deceased's supposed statements were evidenced merely as words provoking a quarrel, on the principle of § 1768, *post*, that hence their truth was immaterial, and hence G. W.'s testimony was erroneous; yes, but *also*, the facts, if facts, that deceased had *not* given her a diamond ring, etc., were evidence that deceased did not make any such charge to the defendant, and that defendant's witnesses were falsifying; this is so obvious to the plain man, and was so obviously the reason for introducing the evidence, that it is curious to find the Court of Appeals ignoring it; they could hardly avoid at least facing the point).

Compare the citations *ante*, § 228, n. 6, § 231, n. 1, § 1005, n. 7.

marriage, and from that belief may be inferred the ultimate fact; yet, this conduct of theirs is also, in another view, equivalent to a declaration of his legitimacy, and thus a hearsay statement, not to be received except as an admission of the parties to the suit or under some specific exception to the Hearsay rule. It is this double aspect of the conduct-evidence that presents the chief difficulty of principle. Again, when a person's utterances are offered as indicating his knowledge of a fact mentioned by him, the utterance may circumstantially reveal the 'factum probandum', his knowledge; yet the utterance cannot be used as an assertion, to evidence the truth of the fact asserted, because the Hearsay rule forbids; and thus it is necessary constantly to discriminate between the circumstantial and the testimonial use of such utterances.

The specific uses of conduct-evidence may now be noticed in detail, keeping in mind that the circumstantial use of such evidence presents little difficulty on principles of relevancy, and that it is the testimonial use which is obnoxious to Hearsay rule and thus creates a special complication.

§ 266. **Conduct and Utterances, as Evidence of Knowledge or Belief, when a Fact in Issue.** Conduct and word-utterances may betray the knowledge or belief of the actor or speaker, in so far as the specific act or utterance is of a tenor which cannot well be supposed to have been willed without the inner existence of that knowledge or belief. For example, A's act of boarding a railroad train is some evidence of his belief as to the destination of the train; B's act of taking a purse, found by him in the street, to the house of X, is some evidence that he knows or believes X to be the loser of the purse. So, also, for the verbal [1] utterance; A's mention of Charles the Great or selenium or the Klondike is some evidence that he knows or is aware of the existence of such a person, thing, or place.

For such instances of conduct, including utterances, as evidence of Knowledge or Belief, there can be no general test of Relevancy. Ordinary experience usually suffices, without controversy, to tell us whether the inference is at least a fairly possible one, and therefore whether the evidence is admissible. Every trial illustrates the principle; and such judicial rulings as have been made are seldom of use as precedents: [2]

§ 266. [1] "Verbal" is here used in its proper sense of "that which is expressed in words"; it is not synonymous with "oral", which is the term of contrast with "written."

[2] ENGLAND: 1759, Eugene Aram's Trial, Eng. (one Daniel Clark having been missing for thirteen years, a human skeleton was discovered and suspected to be his; at an inquest, Aram and Houseman, with whom Clark had been seen just before his disappearance, were summoned; and Houseman, when shown the bones, said: "This is no more Daniel Clark's bone than it is mine"; whence it was inferred that he knew something of the whereabouts of Clark; and he subsequently confessed, pointing out Clark's skeleton at an entirely different place);

UNITED STATES: *Federal:* 1899, Slavens *v.* R. Co., 38 C. C. A. 151, 97 Fed. 255 (injured person's declarations showing knowledge of danger, admitted; here justified under the 'res gestæ' notion, *post*, § 1745); *Connecticut:* 1879, State *v.* Allen, 47 Conn. 132 (language by the accused implying knowledge); 1904, State *v.* Kelly, 77 Conn. 266, 58 Atl. 705 (murder by strychnine; the defence being suicide, the deceased's statement when speaking of suicide, "I have got the stuff to do it with", not admitted to show possession of strychnine or knowledge of its qualities; also

1703, *Hathaway's Trial*, 14 How. St. Tr. 639, 654; cheating by pretending to be bewitched; one Dr. M. had been reviled by the populace for helping to exonerate Sarah M., who had been tried for bewitching the defendant; it was argued that "other people's censuring the doctor cannot be brought as evidence against my client"; but L. C. J. HOLT answered: "What other people have said, abstractedly considered, ought not to affect Richard Hathaway. But if there be evidence that Hathaway hath been guilty of deceit and a design to deceive people, will you not allow it to be given in evidence that the people have been deceived? . . . Now Dr. Martin's evidence is what Hathaway did and that people did believe him to be bewitched."

The important thing is that, so far as the evidential fact consists in an utterance of words, it is receivable for the present purpose, as circumstantial evidence; and that, so long as it is offered for that purpose only and not as an assertion to be credited like testimony, it is *not obnoxious to the Hearsay rule.* For example, A's mention of X's insolvency is receivable as circumstantial evidence of A's knowledge, but not as testimonial evidence of X's insolvency. The distinction is elsewhere examined, from the point of view of the Hearsay rule (*post*, § 1790); it is enough to note here that it is well established:

1810, *DuBost* v. *Beresford*, 2 Camp. 511; libel. Lord ELLENBOROUGH held "that the declarations of the spectators while they looked at the picture in the exhibition-room were evidence to show that the figures portrayed were meant [rather, were understood] to represent the defendant's sister and brother-in-law."

1890, KNOWLTON, J., in *Chase* v. *Lowell*, 151 Mass. 422, 24 N. E. 212 (notice of the rottenness of a tree's roots was in issue, and to show knowledge by the city the evidence mentioned was offered): "The acts of persons in looking at the roots were an important part of the evidence. From this it might be inferred that they noticed the decayed condition of the roots. . . . The remarks made at the time rendered it certain that the view of the roots gave notice of the defect to those who then saw them."

1892, FIELD, C. J., *Com.* v. *Trefethen*, 157 Mass. 188, 31 N. E. 961: "Suppose that it

excluding the deceased's statements, on finding dead chickens, "They are dead from strychnine", etc., on the ground of the 'res gestæ' rule, *post*, § 1773; this is unsound; the accused may have been plainly guilty, in the Court's opinion, and no new trial needed (*ante*, § 21), but that does not excuse the distortion of the rules of evidence; all the above evidence was admissible on the present principle); *Florida:* 1895, Leslie *v.* State, 35 Fla. 182, 17 So. 558 (an offer to return stolen property, as showing knowledge that it was stolen); *Massachusetts:* 1850, Com. *v.* Webster, Mass., Bemis' Rep. 178 (the defendant had asked whether they had found the whole of Dr. Parkman's body; indicating a knowledge that it had been cut up); 1896, Com. *v.* Crowe, 165 Mass. 139, 42 N. E. 563 (laughter, showing knowledge of the place of arson); 1903, Hayes *v.* Pitts-Kimball Co., 183 Mass. 262, 67 N. E. 249 (whether deceased was conscious before death; his utterances admitted); *New York:* 1905, Fox *v.* Manchester, 183 N. Y. 141, 75 N. E. 1116 (negligent maintenance of an electric wire; the defendant's officer's testimony at an inquest after the injury, stating that he knew of the defective wire before the injury, held to be a hearsay assertion of a past fact; a good illustration of the limits of the principle); *North Carolina:* 1880, State *v.* Howard, 82 N. C. 627 (murder; language showing that the defendant knew the deceased had money in his house); *Ohio:* 1853, Moore *v.* State, 2 Oh. St. 500, 506 (a few days after a murder by strangling, the defendant remarked that he could kill a man by strangling and described the process; admitted as indicating that the accused's mind was running on the subject, as the guilty person's would be); *Vermont:* 1896, Forbes *v.* Morse, 69 Vt. 220, 37 Atl. 295 (to show that a letter was written after July 30, the mention therein of facts occurring since that date was held some evidence); *West Virginia:* 1901, State *v.* Sheppard, 49 W. Va. 582, 39 S. E. 676 (language indicating a knowledge of the circumstances of the murder, admitted).

The following case rests on peculiar facts: 1886, R. *v.* Gunnell, 16 Cox Cr. 154 (under a statute exempting a bankrupt who first "disclosed" his malfeasance under examination, certain remarks of M. indicating his knowledge of the malfeasance were excluded).

had been denied at the trial that the deceased knew that she was pregnant, testimony that she had said that she was pregnant would be some evidence that she knew it [though not that she was so]." [3]

It is to be noted that there is a specific *Hearsay exception* for assertions as to declarant's mental condition; and thus an utterance of that particular sort — *e.g.* "I know where the money is", as distinguished from "The money is hid in my house" — is receivable equally by either of the two avenues, as circumstantial evidence and as a testimonial assertion; so that Courts seldom discriminate carefully; the use of such utterances under the Hearsay exception is considered *post*, §§ 1714, 1731. This exception includes also assertions of an internal state of physical suffering, existing at the time of the assertion, *but not of a past condition* (*post*, 1718).

When these utterances are by a *party* or privy in interest, they are of course receivable as Admissions (*post*, §§ 1076, 1081, 1083, 1086).

Nevertheless, the Hearsay exception, being subject to certain limitations, and the rule for a party's admissions, will often not suffice for the purpose in hand, and the present, or circumstantial, use of such utterances may become the only available one. For example, in actions on *life-insurance policies*, where the deceased's misrepresentations as to his health are in issue, his *statements as to a prior illness* would be inadmissible under the Hearsay exception to prove that illness, and might also not be receivable as a party's admissions (under § 1081, *post*); and yet, if the fact of the illness were otherwise evidenced, the deceased's statement might be receivable as circumstantial evidence of his knowledge of it.[4]

[3] Other illustrations are found in the preceding note. The following case ignores this principle: 1906, Salem News P. Co. *v.* Caliga, 144 Fed. 965, C. C. A. (libel for asserting that the plaintiff's picture was a mere copy of T.'s picture; conversations of persons showing their belief in the assertion, excluded).

[4] *Federal:* 1896, Mutual L. I. Co. *v.* Selby, 19 C. C. A. 331, 72 Fed. 980 (affidavits of third persons, the contents not being known to insured, excluded; Swift *v.* Ins. Co. cited); *Illinois:* 1901, Towne *v.* Towne, 191 Ill. 178, 61 N. E. 426 (insured's conduct and declarations admitted, on the issue of his knowledge of the contents of a certificate held by him); *Indiana:* 1905, Haughton *v.* Ætna L. Ins. Co., 165 Ind. 32, 73 N. E. 592 (insured's statements pending application for insurance, admitted to show "knowledge of his physical condition at the time of making the alleged false and fraudulent statements"); *New York:* 1875, Swift *v.* Ins. Co., 63 N. Y. 187 (the issue being whether a statement by the insured that he had not had scrofula was knowingly false, the insured's statements, made within a year previous, to persons who saw him walk lame and saw a sore in his side, as to the cause of the ailment, were admitted, as tending "to prove with more or less certainty, as the cause and character of the ailment are more or less in the common and unskilled knowledge of men, that the cause and character of it are known to him"; the opinion somewhat obscurely justifies the use of these statements also as admissions; it also requires that the statements be not too remote); 1876, Edington *v.* Ins. Co., 67 N. Y. 193 (similar); 1877, Dilleber *v.* Ins. Co., 69 N. Y. 256, 260 (similar); *Pennsylvania:* 1906, Nophsker *v.* Supreme Council, 215 Pa. 631, 64 Atl. 788 (rule of Swift *v.* Ins. Co., N. Y., applied, but not with a careful statement of the principle); *Wisconsin:* 1899, McGowan *v.* Supreme Court, 104 Wis. 173, 80 N. W. 603 (insured's statements of a condition of disease too remote in time to be material, not received as admissions; but, after other evidence of his condition at the time of application, held admissible to evidence his knowledge of that condition); 1902, Rawson *v.* Ins. Co., 115 Wis. 641, 92 N. W. 378 (insured's statements in 1895, admitted to show his knowledge of a disease, regardless of their remoteness from the issuance of a policy in 1896, where the alleged false representation was that he had never had the disease).

If the insured's knowledge is immaterial under the issues, then his statements are not receivable: 1880, Union Cent. L. I. Co. *v.* Cheever, 36 Oh. St. 201, 208.

§ 267. **Conduct as Evidence of Belief, and thus of the Fact Believed; General Principle.** In the cases dealt with in the foregoing section, the knowledge or belief — *i.e.* the mental condition — to be evidenced was of itself material to the issue as a 'factum probandum', — *e.g.* whether an insured knew of his illness, or whether the public were made to believe in a certain defamatory meaning. There is however a large class of cases where the belief or knowledge or consciousness (whatever may be the appropriate usage of terms for the mental condition) is of service only evidentially, as forming a *second step of inference to some other fact* which forms the ultimate object of proof.

It has already been noted (*ante*, § 172) that an act or event may be evidenced, retrospectively, by the traces left by it, and that, in theory, these evidential traces may be not merely physical and organic, but also mental or psychical, *i.e.* the evidence would consist in the consciousness or belief of some person as to the happening or doing of the prior event or act, which has left its impression on him. But, since his belief or consciousness can itself be evidenced only by his conduct or utterances, there would always be two steps of inference involved in using that belief or consciousness, — first, the conduct or utterance to evidence the belief, and next, the belief to evidence the act or event believed. Now the former of these inferences is of the class here concerned; and it is at this point, therefore, that we are able to take up the question whether, as a whole, this double step of inference is allowable.

What, then, are the objections to it? Plainly, that it is practically often equivalent to the inference from testimonial evidence, and that therefore we should be violating the Hearsay rule by accepting an extra-judicial assertion as evidence of the fact asserted. For example, on an issue of the existence of a lost will, suppose the fact to be offered that the deceased on his death bed told his daughter, "My will is in the iron chest"; or, on an issue of legitimacy, suppose the fact to be offered that the parents always treated the child as their own. In these instances suppose it to be argued that the deceased's utterance indicates circumstantially his belief in the will's existence, and that his belief in turn indicates the fact of the will's existence; or that the parents' conduct leads to the inference that they believed the child to have been born to them after marriage, and that this belief evidences the fact of such birth. Such a double circumstantial inference is in theory perfectly possible and proper. But, after all, is not the process practically equivalent to accepting the deceased's declaration and the parents' conduct in a purely assertive and testimonial fashion, *i.e.* to admitting directly their assertions about the will and the child, precisely as if they were on the stand and credit were asked for their testimonial assertions to that effect? And if such evidence were allowed to come in as circumstantial, could not any and every hearsay statement be brought in upon the same plea, by resolving it into a double inference, namely, by translating A's assertion, that he saw M strike

N, into an inference from his utterance to his belief and from his belief to the fact asserted? Short of such an extreme deduction, it seems at first sight impossible to stop. It is plain enough that the settled analogies in the rules of circumstantial inference, as well as the modes of reasoning in every-day affairs, justify us in claiming that the inference from conduct to belief and from belief to the fact believed is, in theory at least, a legitimate one. Yet, on the other hand there is force in the argument that the pretended double inference of a circumstantial sort is equivalent to giving credit to a testimonial assertion, and involves therefore a danger of evasion of the Hearsay rule. The latter argument has been well set forth in the following passages:

1838, VAUGHAN, J., in *Wright* v. *Tatham*, 5 Cl. & F. 670, 738 (the sending of letters to a testator by various persons was offered as conduct or "treatment" tending to show their belief in his sanity, and thus the fact of that sanity): "Acts performed by strangers, expressive not merely of opinion, but of the strongest conviction, even in cases where such conviction conflicts altogether with the interest of the person entertaining it, — even such acts as these the law will not allow to be presented to the minds of jurymen as evidence. They are merely opinions expressed in different language, — in the language of conduct, instead of the language of words. They may be acts involving a great sacrifice of personal interest, as the payment of a policy of insurance by an underwriter on a marine loss; and therefore as moral evidence they may be very cogent. Yet does the law, more rigid and inflexible, resist the weight of such moral evidence, although in the ordinary transactions common sense and experience might possibly yield to it. As acts of strangers, the law regards them as personal admissions, which cannot affect third parties; as the opinion of strangers, they bear the general insufficiency and infirmity of hearsay evidence, without any claim to the privilege which in some peculiar subjects of inquiry is extended to that class of proof."

PARKE, B., in the same case (in the lower Court), 7 A. & E. 313, 386: "For example, if a wager to a large amount had been made as to the matter in issue by two third persons, the payment of that wager, however large the sum, would not be admissible to prove the truth of the matter in issue. You would not have any right to present it to the jury as raising an inference of the truth of the fact on the ground that otherwise the bet would not have been paid. It is after all nothing but the mere statement of that fact with strong evidence of the belief of it by the party making it. . . . [To the same sort of evidence] belong the supposed conduct of the family or relations of a testator, taking the same precautions, in his absence, as if he were a lunatic; his election, in his absence, to some high and responsible office; the conduct of a physician, who permitted a will to be executed by a sick testator; the conduct of a deceased captain on a question of seaworthiness, who, after examining every part of the vessel, embarked in it with his family. All these, when deliberately considered, are, with reference to the matter in issue in each case, mere instances of hearsay evidence, mere statements, not on oath, but implied in or vouched for by the actual conduct of persons by whose acts the litigant parties are not to be bound. The conclusion at which I have arrived is that proof of a particular fact, which is not of itself a matter in issue, but which is relevant only as implying a statement or opinion of a third person on the matter in issue, is inadmissible in all cases where such a statement or opinion not on oath [in court] would be of itself inadmissible."

What exit did the common law take from this dilemma? It followed that instinct of compromise which has affected so many British institutions; it conceded something to both principles. In a few specific instances, mostly of traditional inheritance, it yielded fully to the theory of circumstantial in-

ference; in a large group of other instances, it yielded in fact, but only because the evidence was commonly there also admissible for other reasons, and thus it became practically of no consequence which theory was relied on for its reception; and in all remaining instances it denied the propriety of the circumstantial inference and insisted on the application of the Hearsay rule to conduct which was equivalent to an extra-judicial assertion. These three classes of cases may now be briefly noticed in advance.

(*a*) First, where the desired inference leads up to a *personal deed*, of radical force and natural psychologic significance, and thus the circumstantial nature of the inference strongly dominates the testimonial aspect, a few classes of cases are recognized in which the former is conceded to be legitimate.

The distinction thus reached is a fairly practical one. For example, a criminal act leaves usually on the mind a deep trace, in the shape of a consciousness of guilt, and from this consciousness of guilt we may argue to the doing of the deed by the bearer of the trace. The reliance is not upon the testimonial credit of the person, but upon psychologic forces closely analogous to the forces of external nature. As an axe leaves its mark in the speechless tree, so an evil deed leaves its mark in the evil doer's consciousness. But as soon as that type of consciousness is left aside, and we turn to a consciousness based upon any other past experience, *i.e.* upon the impressions from hearing or seeing another's deed or an outward event in general, we are dealing with that commonplace sort of mental trace or impression which is the basis of ordinary assertions and testimony, and the circumstantial use of it becomes merged and swallowed up in the testimonial use. On some such real basis of distinction as this, then, we find that the circumstantial use of conduct and belief is plainly allowed by the law to be resorted to in a few classes of cases covering some sort of personal deed of emphatic significance and effect.

Of those classes, the following are chiefly to be noted: (1) a *Consciousness of Guilt*, as evidenced by flight or the like (*post*, §§ 273–291); this is ordinarily offered against the defendant in the case, and thus might be accounted for under the second class (*b*, *infra*), but it is also receivable of a third person, to show him to be the guilty one and thus to exonerate the defendant (*ante*, § 142), and must therefore be reckoned under the present head;[1] (2) a *Belief in a Marriage*, as evidenced by the conduct of a pair living and treating each other as husband and wife (*post*, § 268); this has been from time immemorial received, whether or not the persons are parties or privies to the suit, and is a plain use of the double circumstantial inference; (3) a *Belief in Legitimacy*, as evidenced by the treatment of a child by its alleged parents (*post*, § 269); this, again, is a tradition of long standing, and can be justified only on circumstantial grounds; (4) a *Belief in Personal Name*, Family History, and the

§ 267. [1] This is also shown by the fact that the rules for Confessions (*post*, § 821) are treated as not applicable to such conduct.

like, as evidenced by conduct and language, and as tending to prove identity with a person in issue (*post*, § 270); this is recognized in a few instances only, but seems nevertheless orthodox; (5) a *Belief in a Testamentary Act*, as evidenced by the alleged testator's conduct and utterances (*post*, § 271); this use of such evidence has been sanctioned by a few judges, but there is a decided repudiation of it by others.[2]

(*b*) In the second class of cases is to be included that sort of conduct which is received only when it emanates from a *party to the cause* or a *witness*, and can therefore be equally justified as involving an *admission* or a *self-contradiction*. Such conduct, for example, as the fabrication or suppression of evidence, the failure to produce important witnesses or documents, indicates a consciousness that one's cause is a bad one or a weak one, and from this consciousness or belief may be inferred the fact that it is bad or weak, *i.e.* that facts essential for its support are lacking (*post*, §§ 273–293). So also, from a witness' failure on a former trial to state a fact which he now asserts, may be inferred that he did not then believe it and thus that it did not in truth occur. In criminal causes, such guilty conduct on the part of the accused may be treated as a trace of his own criminal deed, and thus would fall under the first class (*a*), above examined; and it is in fact so treated, by receiving it also when proved for persons other than the accused and by not applying to it the rules for confessions. But in civil causes, and for witnesses, the belief or consciousness relates back usually to some act or event not a personal deed, — as, for example, in the case of the assignee of a contract or the principal of a tortious agent, — and thus would fall usually without the class in which the circumstantial inference would be the primary one. Accordingly, while the circumstantial inference is always an underlying one and a real one, the assertive value of the evidence becomes more apparent; and in consequence, such conduct can be received only so far as there is some other avenue of entrance which removes from it the obstacle of the Hearsay rule.

Two such ways are open; such conduct from a party, even if treated as a plain assertion, is at any rate an Admission, and is therefore receivable as such in any case; such conduct from a witness is receivable of a self-contradiction or an act of corruption, and therefore receivable in any case. The result is that while the evidence is indeed conduct, and not assertion, yet the objection that it is equivalent to assertion, and therefore obnoxious to the Hearsay rule, is obviated by receiving it only when it is predicated of a party or a witness. In other words, the inference from conduct remains essentially circumstantial, but the danger of the conduct being accepted also as assertion is cured by restricting it to those cases where it would be received even though it were unmixed assertion. Hence it is sometimes judicially spoken of as an

[2] Another class of cases, not properly belonging here, consists of those in which the conduct of third persons is received as evidence of the dangerousness of a place, or the like (*post*, §§ 459 ff.).

admission, or an "admission by conduct." More correctly speaking, it is still conduct, but the doctrine of Admissions serves to remove from it the reproach of its potential quality as an assertion. In short, the doctrine of Admissions is not the reason for its reception, but is the reason for its not being excluded.

All evidence, therefore, of that class is properly to be treated here, in collation with other inferences of a similar sort from conduct to belief or consciousness; except that, so far as *witnesses* are concerned, it is impracticable, in treatment, to separate this sort of evidence from other analogous sorts of impeaching evidence, and the principles are discussed together, *post*, §§ 956 ff., 1040 ff.

(*c*) Whatever remains, then, in the way of conduct-evidence as supporting an inference of the person's belief and thus of the fact believed, is in general, apart from the two preceding groups, declared inadmissible, as being too open to construction as assertions and therefore as mere hearsay. The reasoning on which this result is reached is sufficiently set forth in the passages from Wright v. Tatham, above quoted. The language of those opinions ignores, to be sure, the well-settled exceptions of the first group (*a*) just summarized; but, apart from these allowances, it fairly represents the general attitude of the law. Whatever instances of opposite tendency may be noted in the following sections, and however well-founded these may be in a given case, they must be regarded as casual and unusual.

§ 268. **Marriage, as evidenced by Conduct, or "Habit."** When the fact of marriage is in issue — whether a consensual or a ceremonial marriage — the subsequent *conduct of the man and the woman* said to have been the parties to it is receivable to evidence the marriage. This conduct is traditionally spoken of as "habit"; and this common source of proof, with the reputation-evidence which usually accompanies it, has come to be known by the phrase "habit and repute."

The logical nature of the argument indicates it plainly to fall under the present principle; that is, from the conduct of the man and the woman as married persons may be inferred their firm belief that they were at some prior time made husband and wife, and from this belief may be inferred the fact. That this sort of evidence is admissible seems not to have been questioned; there is an important question, depending upon a different principle, whether it is alone *sufficient evidence* of a marriage (*post*, §§ 2082–2088); there is another principle which governs the use of *reputation* as evidence of marriage (*post*, §§ 1602–1604); and there is still another principle which admits *hearsay declarations* of marriage under the Family-History exception to the Hearsay rule (*post*, § 1480 ff.); but the propriety of the present sort of evidence, exceptional though it is (as already pointed out in § 267), seems not to have been doubted. This is partly due to the circumstance that in any event it would commonly have been receivable from another point of view, — for example, as falling under the above Hearsay exception, when the persons

in question were deceased; or as Admissions of a party, when the person whose conduct was offered, or his successor in interest, was a party to the cause. But, at any rate, it has commonly been used when no such mode of justifying it was tenable, and its propriety is now too firmly established to be for a moment questionable.

The following passage, from a writer the most learned and comprehensive in his familiarity with the traditions and the lore of genealogical controversies, serves to illustrate the scope of this class of evidence:

1844, Mr. *J. Hubback*, Succession, 247: "The parties' assertions of marriage and the general reputation of the fact may be evidenced with as much strength and distinctness by actions as by words. Thus the former may appear by their elopement and return as married persons. Their visiting with families of respectability was successfully relied on in the claim to the Say and Sele Barony, and was dwelt upon as a strong fact by Abbott, C. J., in summing up the evidence in the case of Beer *v.* Ward. And similar weight was ascribed to the fact of a husband procuring a woman to be presented at Court as his wife. . . . Proof of the observance of customs which are peculiar to the entry upon or subsistence of the state of marriage is evidence of the same description, and will assist the inference that the contract has been duly constituted. By the civil law the Roman custom of 'traductio ad domum' was a conclusive presumption of matrimony, and by the canon law similar weight was ascribed to it. if observed in places where it was a solemnity usual upon bringing brides to their husband's houses. So in England the circumstances of the man impaling the woman's arms with his own upon his plate, seals and carriage, and in another case that of the father of the person whose legitimacy was disputed having appointed with the clergyman a day for the mother to be churched, were severally treated as carrying considerable weight in evidence of marriage. On the same principle, the assumption by the woman of the name of the man, the 'gestatio annuli', or wearing by her of her wedded ring, or (in countries where a difference exists) of apparel peculiar to married women, are acts, which, if they be done 'sciente, vidente, et patiente viro', may be considered as so many tacit declarations by the parties of the existence of a marriage between them. To these circumstances may be added that of the parties joining as husband and wife in fines or other assurances for the purpose of passing the right of the latter to dower, and the entry in the register of the woman's burial by the description of the wife or widow of the man. And the mere cohabitation of two persons of different sexes, or their behavior in other respects as husband and wife, always affords an inference of greater or less strength, that a marriage has been solemnized between them. Their conduct being susceptible of two opposite explanations, is to be moral rather than immoral, and credit is to be given to their own assertions, whether express or implied, of a fact peculiarly within their own knowledge."

It may be noted that upon this principle a *certificate of marriage* which otherwise would be receivable only under the Hearsay exception (*post*, § 1645) may, if found in the person's possession, be admissible as exhibiting the person's belief as to his marriage.[1] The principle is also sometimes extended to

§ 263. [1] 1886, Camden *v.* Belgrade, 78 Me. 204, 209, 3 Atl. 652 ("a paper found in the possession of one of the parties to the alleged marriage, or produced by such party, purporting to be a marriage certificate, is admissible upon the ground that such a possession or such a production of it is equivalent to a declaration of such party that the facts stated in the certificate are true, . . . without separate and distinct evidence of its genuineness or that it was given by one acting in an official capacity"). Distinguish the following: 1848, Com. *v.* Morris, 1 Cush. Mass. 391 (adultery; unauthenticated certificate in possession of a woman said to be defendant's wife, excluded, her conduct not being evidence against him).

It has been suggested that conduct as a married person *after cohabitation is ended* is inad-

admit, on an issue of *breach of marriage-promise*, the woman's subsequent conduct (in preparing a wedding-outfit, and the like) as evidence of her prior act of assent to the promise (*post*, § 1770).

§ 269. **Legitimacy, as evidenced by Parents' Conduct.** Upon an issue of the legitimacy of a child, the conduct of the parents towards the child is admissible on the present principle, as involving an inference from the parents' conduct to their belief as to the fact on which the legitimacy depends (time of birth, time of marriage, identity of the child, and the like), and then from that belief to the fact itself. Such evidence has traditionally been received since Solomon's day; though perhaps the more easily, inasmuch as it would usually, like the case of marriage-conduct (*ante*, § 268), be also defensible under the Family-History exception to the Hearsay rule, when the parents were deceased, or under the doctrine of Admissions, when the parents or their successors in interest are parties to the cause. But its orthodoxy from the present point of view is not only established by its traditional reception free from any reference to the limitations of those two special doctrines, but also is plainly declared as a matter of theory by the exposition of eminent judges: [1]

The Judgment of Solomon, First Book of the Kings, III, 16: "Then came there two women, that were harlots, unto the king, and stood before him. And the one woman said, O my lord, I and this woman dwell in one house; and I was delivered of a child with her in the house. And it came to pass the third day after that I was delivered, that this woman was delivered also: and we were together; there was no stranger with us in the house, save we two in the house. And this woman's child died in the night, because she overlaid it. And she arose at midnight, and took my son from beside me, while thy handmaid slept, and laid it in her bosom, and laid her dead child in my bosom. And when I rose in the morning to give my child suck, behold, it was dead: but when I had considered it in the morning, behold, it was not my son, which I did bear. And the other woman said Nay; but the living is my son, and the dead is thy son. And this said, No,

missible, but this is perhaps not necessarily so; 1881, Dysart Peerage Case, L. R. 6 App. Cas. 489, 499, 502 (legitimacy of a child born in 1863, of an alleged informal marriage with A in 1844, another marriage with B having been openly celebrated in 1851; the husband's declarations, after 1851, of the first woman being his lawful wife, excluded; his conduct and statements "as one of the alleged marrying parties" up to that date would have been receivable; but after that date, the 'res gestæ' of the first cohabitation being ended, his statements were solely testimonial; the principle of party's admissions or of the pedigree exception being not here available).

Contra: 1886, Camden *v.* Belgrade, 78 Me. 204, 212, 3 Atl. 652. Compare the citations *post*, § 1770.

§ 269. [1] The authorities are few, because the matter has seldom been disputed; compare the cases cited under the Hearsay exception, *post*, § 1497, and also the following: *England:* 1856, Legge *v.* Edmonds, 26 L. J. Ch. 125, 139 (admitting the parents' conduct, but excluding letters as not mere conduct); 1914, Lloyd *v.* Powell Duffryn S. C. Co., Cl. C. 733 (whether a deceased workman was the father of an illegitimate child claiming as dependent; the deceased's acknowledgment of paternity, admitted; cited more fully *post*, § 1461; the opinions do not clearly state the principle). *United States:* 1904, Locklayer *v.* Locklayer, 139 Ala. 354, 35 So. 1008 (negro birth); La. Rev. Civ. C., 1920, §§ 193–195, 209 (quoted *post*, § 1492); 1906, Breidenstein *v.* Bertram 198, Mo. 328, 95 S. W. 828 (but here the further question is involved of the effect of a statute declaring that recognition of an illegitimate child, after marriage with the mother shall legitimate it); 1898, Erwin *v.* Bailey, 123, N. C. 628, 31 S. E. 844 (quarrels as to child's legitimacy, admitted).

For the question *whose declarations* as to *illegitimacy* are receivable under the Family-History exception to the Hearsay rule, see §§ 1492, 1494, *post*.

Compare also § 1790, *post*.

but the dead is thy son, and this is my son. Thus they spake before the king. Then said the king, The one saith, This is my son that liveth, and thy son is the dead; and the other saith, Nay; but thy son is the dead, and my son is the living. And the king said, Bring me a sword. And they brought a sword before the king. And the king said, Divide the living child in two, and give half to the one, and half to the other. Then spake the woman whose the living child was unto the king, for her bowels yearned upon her son, and she said, O my lord, give her the living child, and in no wise slay it. But the other said, Let it be neither mine nor thine, but divide it. Then the king answered and said, Give her the living child, and in no wise slay it: she is the mother thereof. And all Israel heard of the judgment which the king had judged; and they feared the king: for they saw that the wisdom of God was in him, to do judgment." [2]

1810, L. C. ELDON, in *Banbury Peerage Case*, App. to LeMarchant's Gardner Peerage Case, 490:[3] "Evidence of the conduct of the supposed parents of the child appears to me to be admissible evidence upon this question [of legitimacy]. My lords, when two women each claimed a particular child as hers, and called upon a person to decide between them, he ordered that the child should be severed into two parts, and that each take half; the true mother instantly waived her claim; and he decided, upon that, that the child was hers. What is the lesson which this story teaches? Not, perhaps, that mere declarations are evidence in such a case; for such declarations may be made for a temporary purpose (in that case both women made declarations, and one of course made false declarations); but it teaches that the conduct of a parent, the feelings of a parent — those feelings being inferred from such conduct — afford us some evidence assisting us in arriving at a right conclusion as to the matter in controversy. It has been argued at the bar that mere declarations of parents on such subjects are not admissible evidence to affect a question of legitimacy, and that conduct is precisely the same thing; that it is substantially nothing more than a declaration; that it is only a declaration by deed instead of by word. I will not say that all simple declarations are evidence in such a case; but I will say that the conduct of a husband and wife towards a person claiming to be their legitimate child is in some cases admissible evidence upon the question whether the husband and wife had sexual intercourse at such time as by the course of nature that child might have been the fruit of that intercourse. It is often a most material species of evidence. It is not always, but it is frequently a safe ground for inference; for it comes from the least suspicious source, that is, from the very individuals who are the most interested to give a different testimony. If there ever was a case where circumstantial evidence of this description is admissible, it is this."

1810, Lord REDESDALE, ib. 439, 447: "Acknowledgment of a child by the reputed father and mother as their child is generally the only evidence of the fact even that the child is the child of the woman, unless evidence of the persons present at its birth can be produced; and such acknowledgment is sufficient evidence, if not rebutted by clear evidence to the contrary."

1890, CLARK, J., in *Woodward* v. *Blue*, 107 N. C. 407, 12 S. E. 453 (Mourning Crisp, a mulatto, claimed as widow of Underzine Pelot, a slave of Greenlea, and Emily Woodward Blue as daughter of the marriage; the defence denied the marriage, and affirmed Greenlea to have been the father of Emily by Mourning; Greenlea's treatment of Emily was offered in evidence): "There being evidence to show non-access by the husband, the jury should not have been cut off from a knowledge of how Greenlea treated the child.

[2] A similar judgment is attributed in Japan by tradition to the great judge Oka Tadasuke, who lived in the early 1700s. By the Japanese version, the judge orders the two claimants to grasp the child and pull each one towards herself, the strongest to be the victorious claimant. The judgment is found in a popular collection known as "Oka Seidan", and has been translated by Mr. Walter Dening, in his "English Readers for Japanese High Schools", Book I, p. 131.

[3] Lord Eldon's remarks are also given in Nicolas, Adulterine Bastardy, 524.

It may be that it could have been shown that he betrayed fondness and affection for it, showed anxiety in its illness, lavished money on it, or educated it; and surely these things would be strongly corroborative of the evidence of the defendant, for it would be hardly expected that a white man should so act towards the child of Underzine his negro slave. Was not the violent grief of David the king upon the death of the child, some corroboration that he and not Uriah was its father?"

This conduct of recognition has by statute in some States been given an intrinsic effect in substantive law, *i.e.* the father's recognition, when "general and notorious", of a child as his child, suffices of itself to give the child a status of filiation, and thus to enable it, though illegitimate, to have such rights as the law gives to children. This aspect of "recognition" is examined *post*, § 1606.

§ 270. **Identity, as evidenced by Belief and Knowledge of Personal Doings, Family History, and the like.** On an issue of personal identity, the present principle finds one of its simplest and commonest applications. The situation is this: Whether X is A is the fact in issue; A is shown to have done a certain act, to have had certain marked and individual experiences; if X did this act or had this experience, he probably is A; thus, as indicating whether X did or had it, the fact of his present belief or consciousness or recollection becomes relevant, and therefore his conduct as evidencing that belief. This sort of evidence, of the commonest use in the affairs of every-day life, has of course its weaknesses; the fact of X's belief or recollection of the act may be explained away as due, not to his having actually done the act. but to his having heard of it from others; while the fact of his non-recollection may also be explainable as due merely to that failure of memory which increases in proportion to the lapse of time and the insignificance of the act. Thus the strength of the inference is proportionate, on the one hand (when he claims to recollect), to the improbability of the person's having learned of the act from others, and, on the other hand (when he fails to recollect), to the improbability of a forgetfulness of the particular act. The theory of this sort of evidence, and its application, are well expounded in that marvellous feat of judicial skill and endurance, the charge of the presiding judge in the second Tichborne trial:

1874, COCKBURN, C. J., in *R.* v. *Castro* (alias Orton, alias Tichborne), Official Report [1] of the Charge, I, 16; II, 327, 403; the claimant to the rich Tichborne estate purported to be Roger, the long-lost son, who had been given up for dead, after the news of his loss at sea, some twenty years before, in a vessel last heard of off the coast of South America; Roger had been brought up a Catholic, and attended a Catholic school at Stonyhurst, but had spent most of his youth in France, where he became more fluent in French than in English; he afterwards served a while in the army; he was some twenty-five years of age when he left on his travels. The claimant had lived for most of his manhood-life in the backwoods of Australia; and was said to be really Arthur Orton, a butcher of Wapping. At the civil trial for the title to the estates, in 1871,[2] the claimant's case finally broke down

§ 270. [1] The charge alone occupies two printed octavo volumes of some seven hundred pages each.

[2] Reported by Heywood, s. v. Tichbourne *v.* Lushington, in book form; the above-cited passages are found at pp. 200 ff., 390 ff.

and was not submitted to the jury; he was then, in 1874, put on trial for perjury and convicted; in this trial he was not competent as a witness, but his testimony at the civil trial was used against him; and it is in this cross-examination that most of the instances referred to by the Chief Justice were found. On the claimant's cross-examination by Sir J. Coleridge, it appeared that though Roger had been three years at Stonyhurst School and lived on the quadrangle, the claimant thought that the quadrangle was "a part of a building"; that, though Roger had studied Latin and Greek, the claimant replied, when asked "Was Cæsar in verse or prose," "I don't recollect"; and "Was Cæsar a Latin writer or a Greek writer?" "I can't say; I suppose it was Greek"; and when shown a copy of Virgil, "It appears to me to be Greek"; and when asked, "Is mathematics the same thing as Chemistry?" "I have no recollection"; and "Has Euclid anything to do with mathematics?" "I don't know"; and when asked, "What is physiology?" "The formation of the head, I believe"; and when asked the meaning of the Stonyhurst motto, "Laus Deo Semper", answered "They mean, 'The laws of God forever.'" A list of Roger's library was read to him; he thought that the "Theatre de P. Corneille" was written "by one of the Fathers"; asked as to the "Life of John Bunyan", whether he was "a sportsman, a general, a bishop, a master of fox hounds, or a prizefighter", the claimant said it was "difficult to give an answer to such a question." Taking up these instances, the Chief Justice commented as follows: "Although outward appearance may deceive, yet if you are acquainted with what has passed through the mind of a man, and another man were to come forward and say, 'I am that man', you have only to ask him as to the events of the other man's life, those at least which must have remained impressed on his memory, and which, therefore, if he be the man, he must of necessity retain, to enable him to demonstrate that he is the man he says he is, or to enable you to pronounce that he is not. If his memory is not the memory of the man he seeks to personate, if he does not know the events of that man's life, if he does not know what thoughts, what feelings, what emotions, that man's mind underwent, he cannot be the individual. . . . Now you are in danger, in an inquiry of this nature, of being led into error by one of two alternatives. You may require too much; you may be satisfied with too little. You may require too much if you expect a man . . . to recollect every trifling individual occurrence of his life. . . . But there are things which it is next to impossible any one should forget, and in respect of those things we are entitled to require that a man should exhibit some knowledge when you know that they happened to a person whom he represents himself to be. . . . You must consider what it is you may fairly and reasonably and justly expect that a man should recollect. . . . Again, you may . . . also be satisfied with too little if you are led to accept, as true genuine knowledge, that which is not the honest production of the unaided memory, but knowledge derived from extraneous and adventitious sources. This is the danger into which persons too credulous have before now been led by imposture. . . . [He] may have acquired that knowledge from without, instead of possessing it from within. . . . What, then, are the things which would have impressed themselves on the mind and memory of a boy growing up into the period of adult life? For the recollections of boyhood still cling to us in after years with the freshness of the age to which they belong, and, though less vivid, even those of childhood do not wholly disappear. . . . [After the recital of various instances, the cross-examination is then quoted]: 'Do you recollect [from your studies] whether Cæsar was written in verse or prose? No, I do not. — . . . Did you ever do any Cæsar? I do not remember whether I did or not. — Is Cæsar a Latin writer or a Greek?' . . . To which comes the memorable answer, 'I should suppose Cæsar is Greek.' . . . Cæsar a Greek! Would Roger, do you think, have made that mistake? When Roger read Cæsar, did he believe he was reading Latin, or did he believe he was reading Greek? Is that a thing about which a person could make a mistake? Do you think that is what a man would be likely to forget?" [3]

[3] A neat summary of the various points of identity and difference between the defendant and Roger Tichborne and Arthur Orton will be found, in the form of an itemized list, in Charles Reade's "Readiana", in the chapter on "The Doctrine of Coincidences", first letter.

This application of the principle receives constant use in trials where personal identity is in issue, though few rulings need to be made or come to be recorded.[4] When the person in question is deceased, the Family-History exception to the Hearsay rule has usually served to admit his statements and his conduct; yet it is important to remember that much would properly be received from the present point of view which would be excluded if offered under the hearsay exception.[5]

§ 271. **Testamentary Execution, as evidenced by the Testator's Belief and Declarations.** If the fact of recollection or belief or knowledge of a past act is generally indicative as a mental trace of the doing of the act, and if the person's conduct and utterances are indicative of that belief, it would follow that the theory applies equally where the doing of a testamentary act is in issue. If A, for example, an alleged testator, has clearly exhibited a belief in the existence of a certain will of his the inference is natural that he has in fact executed it; otherwise, except on the hypothesis of an insane delusion, he could hardly have acquired the belief or consciousness of having done the act. So, too, if he has the belief that he has made no will, this tends to persuade us that in fact he has not.

Besides the instances above quoted, there were scores of others, notably, the defendant's ignorance of the contents of the sealed packet deposited by Roger when leaving England (Charge, I, 630 ff.), and of Roger's peculiar amusement of stupefying flies with cigar-smoke (Charge, II, 162, 167). It may be supposed that the strong presumption created by the extraordinary fact that Roger's own mother recognized and to the day of her death received the defendant as her son could never have been satisfactorily met except by this mass of striking evidence of the defendant's lack of the mental traces of Roger's early life.

[4] 1846, Smith *v.* Earl Ferrers, Cherer's Rep. 34, 323 (breach of marriage-promise; the plaintiff put in a long series of letters alleged to have been written to the plaintiff by the defendant, containing promises of marriage; the defendant claimed that the plaintiff had forged the letters herself; from the matters mentioned in the letters it was sought to be inferred that the plaintiff alone could not have known the things mentioned, but in fact they equally indicated that the defendant could not have written them because they mentioned numerous things that never happened to him; the defendant's case was clearly made out, and a nonsuit was taken; the case is an extraordinary one, in respect of the audacity of the claim, the ingenuity of the young woman, and the narrow escape of the defendant from the imposture); 1906, Thompson *v.* U. S., 144 Fed. 14, 20, C. C. A. (a witness allowed to identify a man by name, though she had "come to know" his name subsequently; "knowledge of the name by which the person is generally known is of sufficient reliability to be put in evidence"); 1889, Howard *v.* Russell, 75 Tex. 171, 179, 12 S. W. 525 (the identity of B. with S. being in question, B.'s statements as to his change of name, his residence, and his reasons for the change, were admitted); 1900, Smith *v.* Russell, 23 Tex. Civ. App. 554, 56 S. W. 687 (statements, by a person to be identified, as to coming from South Carolina, and being a single man, admitted); 1900, Nehring *v.* McMurrian, 94 Tex. 45, 57 S. W. 943 (statements by the person as to his name, family members, birthplace, etc., admitted).

The conduct of *third persons* seems equally admissible to identify: 1885, Willis *v.* Quimby, 31 N. H. 485, 487 (trespass; to prove defendant's identity, a deposition was offered, referring to "a man they said was J. M. I."; admissible, since "the only knowledge men generally have of the names of others is derived from the fact that they hear them so called"); 1877, Gillian *v.* State, 3 Tex. App. 132, 134 (conspiracy; "there was a man present that the crowd called W. G.", held not alone sufficient to prove identity, because of the motives for false appellation under the circumstances; but held admissible on the principle of Willis *v.* Quimby).

[5] See the citations under the Family-History exception to the Hearsay rule, *post*, § 1502, and also the discussion of principle in § 1791, *post*. In §§ 413, 667, *post*, are collected cases involving other modes of proving Identity; the use of Traces of Crime, as examined *ante*, §§ 149–154, sometimes involves what would loosely be termed a question of identity.

Compare the cases cited (*ante*, § 87, *post*, §§ 2024, 2148, 2149 (handwriting, typewriting, spelling, etc.).

The truth is that there is, for that step of the inference (*i.e.* from his belief to the past act) no ground for hesitation, either in principle or in practical good sense. The real doubt and weakness lies in the other and prior step of the inference, namely, from the person's *conduct and utterances to his belief*. Were we once firmly persuaded that the person actually possessed such a belief, we could not refuse to treat it as a strong piece of evidence. But how are we asked to conclude that he has the belief? From his conduct and utterances, by circumstantial inference, and it is here that the objections begin to have force. In the first place, and as a matter of circumstantial inference purely, it must be conceded that the probability of his feigning this conduct, in order to deceive designing relatives and to obtain peace and quiet, is in general experience not a small one; the circumstantial value of such evidence of his real belief may thus be thought too trifling. In the next place, it may be objected that the conduct and utterances thus offered are after all equivalent to mere assertions by him of the fact of his execution (or non-execution) of a will, and are therefore inadmissible as hearsay statements, since their assertive significance is so plain that their circumstantial use becomes a mere pretext. If, however, we can bring ourselves to consider these objections as forced and captious, the plain fact remains that such evidence would be admissible, in strict accordance with the general principle already examined (*ante*, § 267). This view has been taken by a number of Courts, more or less explicitly. In the following passages this view is phrased in one form or another:

1876, HANNEN, J., in *Sugden* v. *St. Leonards*, L. R. 1 P. D. 203: "Believing, as I do, the testator . . . [showed] a belief in his mind that the will was in existence at a time subsequently to that at which he could have revoked it, I am led to the conclusion that he had not in fact revoked it."

1844, MARSHALL, J., in *Steele* v. *Price*, 5 B. Monr. 69 (admitting, on the question of revocation, evidence of intention at different times and of a belief, just before death, that he still had a will, the will being in fact lost): "There is no principle of law or reason which either requires or can enable the mind to resist the accumulated force of that evidence of internal feeling and intention which is furnished by the uniform and unvarying tenor of a man's conduct and conversations through a long series of years."

1847, ORMOND, J., in *McBeth* v. *McBeth*, 11 Ala. 60 (the testator's declarations as to the existence of a will which could not be found were admitted on the issue of revocation): "It is then very clear that at this time he supposed the will to be in existence, and [this] repels the presumption of a voluntary cancellation or destruction of it previous to that time. . . . The necessary inference from the declarations of the testator a short time before his death is that he supposed it was then in existence, consequently did not by any act of his destroy or revoke it."

1867, APPLETON, C. J., in *Collagan* v. *Burns*, 57 Me. 458 (a subsequent intention not to revoke, as declared by the testator to his wife in various ways, was held admissible on the question whether the tearing of a torn will had been done by him and with intent to revoke): "The condition of the testator, . . . the state of his affections, when proved, may raise an improbability almost amounting to an impossibility that the testator himself intentionally destroyed his will; . . . they may show that up to the time of his death he believed his will was existing and would act upon his property, and consequently that its

non-appearance, or its torn appearance, was the result of some cause other than the wish or intentional act of the deceased. . . . The evidence of the testator's declarations was offered to negative the intention to destroy and the fact of destruction of the will in question, by showing the true relation of the parties, the entire absence of intention to destroy, and hence the improbability of any destruction, intentional or otherwise, of the will by the party by whom it is conceded to have been made."

But this mode of reasoning has not been accepted by a majority of Courts. Some judges prefer, in admitting such evidence, to treat it frankly as a direct hearsay assertion which merits an exception of its own to the Hearsay rule. Others, representing perhaps the greater number of Courts, also regard the conduct and utterances as obnoxious to the Hearsay rule, but refuse to concede any exception for their benefit, and thus exclude them.[1] This variety of views, together with the possibilities of using a testator's declarations for certain other purposes by general concession, make it impracticable to examine at this point the general state of the law in regard to these related uses of such evidence; the authorities are collected and the various principles examined in dealing with the Hearsay rule (*post*, §§ 1736–1740). It is enough here to note that there is a plausible place, under the present principle, for the circumstantial use of such conduct and utterances.

§ 272. **Sundry Inferences from Belief to Past Acts; Contracts, Appointments to Office, etc.** The same mode of reasoning may of course, upon occasion, be resorted to in evidencing the execution of a contract or the doing of any other important act. No doubt this would frequently bring us into plain conflict with the Hearsay rule. But no doubt also such a reasoning process is constantly illustrated in the trials of every day, without any objection being conceived; and the following passage illustrates how wide an application the principle may receive while remaining within orthodox analogies:

1858, ERLE, J., in *R.* v. *Forderingbridge*, E. B. & E. 678, 684 (admitting conduct of master and apprentice to show the previous execution of an indenture of apprenticeship); "The execution here is whether upon this evidence a reasonable man would infer that the man had been bound apprentice. I know of no rule of law requiring technical proof of the existence of an indenture of apprenticeship, or of any other deed, or which prohibits the presumption of the existence of the deed from the circumstances. . . . The relations of landlord and tenant, of partnership, of marriages, are frequently presumed from the conduct of the parties being consistent with that state of things, and more consistent with that than with any other."

§ 271. [1] Very rarely, however, has a Court plainly considered and rejected the circumstantial argument as above explained; it is usually merely ignored. In the following case it was expressly repudiated: 1860, Boylan v. Meeker, 28 N. J. L. 274, 279 ("the plaintiffs relied upon the declarations and conduct of M. . . . to show that while living he never knew of the existence of such a will, and that therefore he had never knowingly executed the paper"; Whelpley, J., alone noticed this argument, in saying, "nor does ignorance of a fact, at a time long subsequent to its occurrence, raise a necessary presumption that the mind was never acquainted with it"; but his real reason for exclusion seems to have been the Hearsay rule, *post*, § 1736).

In its application to *contracts* and *deeds*, the principle is probably oftener applied than the number of recorded rulings indicates.[1] It has also an application in proof of the fact of appointment or election to office,[2] although here the reputation-element is probably the most important; the inference is at any rate so well conceded that the *presumption of title to office* (*post*, § 2535) is founded upon it. In other instances than these there seem to be few rulings upon this use of the inference.[3]

§ 273. **Conduct, as evidence of Guilt; (1) Conduct in general; Demeanor when Charged or Arrested.** It has already been seen (*ante*, § 267) that one of the common and established uses of the mode of reasoning here involved is the inference from guilty conduct to the commission of the guilty deed; and the place of this inference in the general scheme of Evidence-rules need be no further considered. So far as the employment of it in practice is concerned, the real opening for controversy arises in the first step of the inference, and not in the second. No one doubts that the state of mind which we call "guilty consciousness" is perhaps the strongest evidence (on the principle of § 172, *ante*) that the person is indeed the guilty doer; nothing but an hallucination or a most extraordinary mistake will otherwise explain its presence.[1] But, in the process of inferring the existence of that inner consciousness from the outward conduct, there is ample room for erroneous inference; and it is in this respect chiefly that caution becomes desirable and that judicial rulings upon specific kinds of conduct become necessary.

In general, it may be premised, any and all conduct *may* be open to this inference. The kinds of behavior which may properly suggest such a cause are beyond enumeration; they are as various and as changeable as men's dispositions and emotions. No conduct is conclusive; but, on the other hand, no conduct is entirely without significance, greater or less according to the circumstances:

§ **272.** [1] 1858, R. *v.* Forderingbridge, E. B. & E. 678 (to prove that J. D. had executed with B. an indenture of apprenticeship, the fact of J. D.'s working in the shop of B. like other apprentices, of B.'s treating him as an apprentice, etc., was held sufficient); 1896, Wrigley *v.* Cornelius, 162 Ill. 92, 44 N. E. 406 (issue whether the defendant had ordered of the plaintiff 10,000 pictures or only 5,000 and as many more as he should need; evidence admitted that the plaintiff, immediately after receiving the order, had made a contract with a third person for 10,000 frames, to be delivered to the defendants, as throwing light on the terms of the contract).

Compare the cases under Interpretation, *post*, § 2465.

[2] 1860, Com. *v.* McCue, 16 Gray Mass. 226 (assault on the field-driver of a town; "the testimony of H. that he was a field-driver and had acted as such implies that he acted under the belief that he had been legally elected and qualified").

[3] 1743, Annesley *v.* Anglesea, 17 How. St. Tr. 1139, 1144 (to prove the delivery of Lady Altham of a child and heir in 1715, the fact was offered "that a bonfire was made upon this happy event, and drink publicly given to the neighbors and people who came in to testify their joy"; perhaps this rather illustrates § 269, *ante*); 1897, State *v.* Lee, 69 Conn. 186, 37 Atl. 75 (abortion; subsequent fear of the defendant shown by the woman just after the alleged attempt at abortion, admitted to indicate the fact of the alleged violence).

§ **273.** [1] That this sort of evidence may be used for a defendant to prove a *third person* guilty, see *ante*, § 142.

That the rule for *confessions* does not apply to the use of guilty conduct, see *post*, § 821.

On the general nature of the inference, see the materials collected in the present author's "Principles of Judicial Proof" (1913), §§ 147-155.

1850, PARSONS, J., in *Johnson* v. *State*, 17 Ala. 618, 624: "We cannot say that facts, such as silence, which indicated unusual seriousness at such a moment, are inadmissible as evidence tending in some degree to show the prisoner's guilty knowledge of the condition of his wife, or to show his crime itself. Doubtless such a circumstance by itself should weight but little and it should be received with great caution, but we cannot say that it was wholly inadmissible. . . . A flight is universally admitted as evidence of the guilt of the accused, though not conclusive. If we take a flight as evidence of fear, and fear as evidence of a known cause of dread or apprehension, we arrive thus at the inference of crime. But it is sufficient perhaps for all practical purposes to regard a flight as immediate evidence of crime, because it betrays conscious guilt. In this instance, then, we take the flight, a thing of itself harmless and innocent, as evidence of conscious guilt, a necessary consequence of the crime itself, and the conscious guilt, of which the flight was evidence, is proof, in its turn, of the crime. In this instance, therefore, it is certain that the law admits evidence of the party's conduct, merely to prove his conscious guilt, which is proof of crime. Now this conscious guilt is merely internal, but the law allows that proof of it which consists of outward signs. Is a flight the only outward evidence of conscious guilt? So far from it, any indications of it, arising from the conduct, demeanor, or expressions of the party, are legal evidence against him. The law can never limit the number or kind of such indications."

1853, CALDWELL, J., in *Moore* v. *State*, 2 Oh. St. 502: "From our knowledge of the human mind and its workings, we expect, with almost positive certainty, that when it is the sole repository of so dreadful a secret it will affect the conduct and sayings of the person; hence the mind naturally looks to these with the most anxious scrutiny, and would require for its satisfaction, if such a thing were possible, a complete transcript of the person's conduct and sayings. . . . Sometimes a person is detected as the author of a crime by showing an unusual anxiety to discover the perpetrator; at other times the discovery is led to by the person showing too much indifference. In some instances the observation that the person appears to know too much about the transaction leads to the discovery; at other times the inquiry is started by his appearing to know too little. These are generally acts that in themselves show no disposition to do mischief; but it is because they are unnatural, because they tend to the conclusion that they are produced by a mind conscious of its guilt, that they are provable against the accused. They are in themselves nothing, except as showing the state of mind of the party."

1878, BRICKELL, C. J., in *McAdory* v. *State*, 62 Ala. 154, 159: "Any indications of a consciousness of guilt by a person suspected of or charged with crime, or who may after such indications be suspected or charged, are admissible evidence against him. The number of such indications it is impossible to limit, nor can their nature or character be defined. Presumptions or inferences may be, and often are, founded on circumstances which, of themselves, independent of the accusation, would not be ground of crimination. It is largely a question of fact, rather than a question of law, for the determination of the jury, whether particular conduct, or particular expressions of the accused, refer to a criminal offence, and spring from his consciousness of guilt. When it is clear that they have no relation to the offence, and that they ought not to have any influence with the jury, it is the duty of the Court to reject them as evidence. But however minute or insignificant they may be, shedding but a dim light upon the transaction, if they have a tendency to elucidate it they must be admitted."

Yet experience tells us that no fixed relations of inferences can be predicated for the same conduct in different persons. The same symptom is often the result of exactly opposite psychological conditions. This sort of evidence is admitted because there is a certain degree of uniformity in its meaning, but the variations from uniformity are so frequent, and depend so much upon

personal character and local circumstances that *no fixed rules should be laid down*. Repeated judicial warnings tell us that the evidence is merely to be estimated as best we can in the light of our knowledge of human nature in general and of the accused in particular:

1846, ORMOND, J., in *Smith* v. *State*, 9 Ala. 990, 995: "The conduct of one accused of crime is the most fallible of all competent testimony. Those emotions or acts which might be produced in one person by a sense of guilt, or by the stings of conscience, might be exhibited by another, differently constituted, by an overwhelming sense of shame, and the degradation consequent upon a criminal accusation; the same cause producing opposite effects in different persons, owing to weakness or strength of nerve, and other inexplicable moral phenomena."

1850, SHAW, C. J., in *Webster's Trial*, Mass., Bemis' Rep. 486: "Such are the various temperaments of men, and so rare the occurrence of the sudden arrest of a person upon so heinous a charge [as murder], that who of us can say how an innocent or a guilty man ought or would be wholly likely to act in such a case, or that he was too much or too little moved for an innocent man? Have you any experience that an innocent man, stunned under the mere imputation of such a charge, though conscious of innocence, will always appear calm and collected? Or that a guilty man who, by knowledge of his danger, might be somewhat braced up for the consequences, would always appear agitated? Or the reverse? Judge you concerning it."

1881. MILLER, J., in *Greenfield* v. *State*, 85 N. Y. 86: "Such indications, however, are by no means conclusive, and must depend greatly upon the mental characteristics of the individual. Innocent persons, appalled by the enormity of a charge of crime, will sometimes exhibit great weakness and terror, and those who have been crushed with the weight of a great sorrow will manifest the greatest composure and serenity in their grief and meet it without the shedding of a tear. While the manifestations at such a time sometimes indicate excitement and great disturbances of the physical system, and do not always sanction an inference of guilt, they are admissible evidence for the jury to pass upon in view of the circumstances."

The general principle, as applied to the conduct of one accused of crime, finds illustration in a great variety of instances.[2] In those which have led to judi-

[2] *Ala.* 1850, Johnson *v.* State, 17 Ala. 618, 623 (see quotation *supra*); 1875, Levison *v.* State, 54 Ala. 519, 527 ("demeanor when arrested", admitted); 1878, McAdory *v.* State, 62 Ala. 154, 159 (questions by the defendant to the witness, of the former's own motion, as to the latter being in search of the culprit, held admissible on the facts; see quotation *supra*); 1882, Beale *v.* Posey, 72 Ala. 323 (demeanor admissible); *Cal.* 1903, People *v.* Farrington, 140 Cal. 656, 74 Pac. 288 (demeanor when found with stolen property, admitted); *Colo.* 1896, Boykin *v.* People, 22 Colo. 496, 45 Pac. 419 (demeanor of the accused during the trial, admitted); *Ill.* 1914, People *v.* Duncan, 261 Ill. 339, 103 N. E. 1043 (attempted suicide while in jail, admitted); *Ind.* 1898, Miller *v.* Dill, 149 Ind. 326, 49 N. E. 272 (forgery set up as a defence to a note; the payee's conduct in attempting to dispose of the note, admitted); *Ia.* 1903, State *v.* Dennis, 119 Ia. 688, 94 N. W. 235 (demeanor when identified); *Kan.* 1886, State *v.* Baldwin, 36 Kan. 10, 11, 12 Pac. 318 (admitting the accused's apathy as to a sister's death, charged against him; also the fact that he "was nervous and showed a great deal of fear" when arrested); 1917, *Md.* Freud *v.* State, 129 Md. 636, 99 Atl. 934 (fraudulent arson; unspecified conduct); *Mich.* 1883, People *v.* Wolcott, 51 Mich. 615 (excitement while boot-tracks were examined; excluded as depending too much on personal peculiarities); *Mo.* 1902, State *v.* Brown, 168 Mo. 449, 68 S. W. 568 (accused's reluctance to have his shoe measured, held admissible); *N. Y.* 1875, Lindsay *v.* People, 63 N. Y. 143, 155 (turning pale when arrested, admitted); 1881, Greenfield *v.* People, 85 N. Y. 75, 85 (wife-murder; the defendant's failure to shed tears the next morning, admitted; demeanor "at the time of his arrest, or soon after the commission of the crime, or upon being charged", is admissible; see quotation *supra*); 1904, Austin *v.* Bartlett, 178 N. Y. 310, 70 N. E. 855 (defendant's failure to call upon plaintiff after her injury, not admitted); *N. Dak.* 1897, State *v.* Coudotte, 7 N. D. 109, 72 N. W. 913 (attempted suicide of an Indian under arrest, not evidential of

cial rulings, there has seldom resulted an exclusion, because usually none but conduct having at least plausibly a guilty significance is commonly offered. Among these inexhaustible varieties of conduct, there are a few sorts which recur often and possess some uniform feature that gives rise to doubt or controversy. These may now be taken up in detail.

§ 274. **Same: (2) Demeanor during Trial.** It has been judicially maintained that the demeanor of an accused person in court during the trial is too elusive to be justifiably considered as any indication whatever of his guilty consciousness:[1]

1892, BAKER, J., in *Purdy* v. *People*, 140 Ill. 50, 29 N. E. 700: "Evidence may be introduced which was not anticipated; a witness may greatly exaggerate a trifling circumstance, or may deliberately make a misstatement; a witness may fail to testify to a fact which the defendant fully believed was within the knowledge of such witness and would be stated by him; exaggerated denunciation may be indulged in by attorneys; the presiding judge may decide contrary to the expectations in regard to the admissibility of certain evidence, or may rule a point of law against him. Under these and other like circumstances, a prisoner (and especially in a trial where his life was at stake) might frequently (and especially so if he was not a hardened criminal) demean himself while under influence of his disappointment, fears, and feelings, in such a manner that an observer would regard his conduct and demeanor as indicative of guilt. It would be illogical and unjust, under circumstances, such as stated, to deduce a conclusion unfavorable to the defendant."

But none of the supposed dangers of mistake apply with any more force to this particular sort of conduct than to conduct in general. Moreover, it is as unwise to attempt the impossible as it is impolitic to conduct trials upon a fiction; and the attempt to force a jury to become mentally blind to the behavior of the accused sitting before them involves both an impossibility in practice and a fiction in theory. No other Court seems ever to have sanctioned such a proposal:[2]

1896, CAMPBELL, J., in *Boykin* v. *People*, 22 Colo. 496, 45 Pac. 419: "We know it to be a fact, grounded in human nature, that the conduct of a defendant or of a party to a suit during the trial is more or less potential, and has necessarily more or less influence with the

guilty consciousness); *Oh.* 1853, Moore *v.* State, 2 Oh. St. 500, 506 (murder; conduct when informed of the finding of the body of the deceased, admitted; see quotation *supra*); *Tex.* 1875, Smith *v.* State, 42 Tex. 444, 447 (readiness to deliver up on demand a hog alleged to have been stolen, admitted); 1898, Holt *v.* State, 39 Tex. Cr. 282, 45 S. W. 1016, 46 S. W. 829 (that he "tucked his head and looked like he had done something wrong", when charged, admitted); 1901, Weaver *v.* State, 43 Tex. Cr. 340, 65 S. W. 534 (defendant's refusal, after arrest, to look on the body of the deceased, excluded, on the special principle of § 1072, *post*); *Va.* 1879, Dean *v.* Com., 32 Gratt. 912, 924 (admitting a failure to exhibit natural interest in the crime).

Compare also the citations under §§ 394, 396, *post*.

§ 274. [1] 1884, Rider *v.* People, 110 Ill. 11, 13, *semble* (accused's demeanor admissible, when "on the witness-stand and during the trial"); 1892, Purdy *v.* People, 140 Ill. 46, 49, 29 N. E. 700 (forbidding to consider his demeanor during the trial when he has not taken the stand; see quotation *supra*); 1892, Siebert *v.* People, 143 Ill. 571, 593, 32 N. E. 431 (approving Purdy's case); 1908, People *v.* McGinnis, 234 Ill. 68, 84 N. E. 687 (following Purdy's Case).

[2] *Accord:* 1893, Brewer, J., in Graves *v.* U. S., 150 U. S. 118, 14 Sup. 40; 1910, Waller *v.* U. S., 8th C. C. A., 179 Fed. 810.

In the Guiteau trial, for the killing of President Garfield, the accused's singular demeanor during trial was a chief source of evidence.

Compare § 946, *post* (witness' demeanor).

Court and jury upon the question of his credibility. . . . If this be so, we fail to perceive the vice in an instruction telling the jury that they may do the very thing which common experience and common observation teach that the human mind inevitably will do."

§ 275. **Same: (3) Refusal to Undergo a Superstitious Test.** The popular trust in certain superstitious and irrational tests of guilt is much more widespread than is commonly supposed; and it is not rare for the police or interested persons to employ these superstitions as a means of obtaining a clue.

The test itself is no evidence (*ante*, § 9). But the refusal of a suspected person to undergo such a test would properly be evidential of his guilty consciousness,[1] although it would be also open to explanation as due to his repugnance to an unpleasant situation or to ignorance of the superstition:

1875, BRICKELL, C. J., in *Gassenheimer* v. *State*, 52 Ala. 316: "The conduct, demeanor, and words of one charged with crime, about the time of its commission or of its discovery, or on his arrest for or on accusation of it, are admissible in evidence against him. The mental emotion he exhibits is a criminative fact of more or less force as it is connected with other facts and circumstances. Alarm, confusion, anger, resentment, or despair may be evinced, and may spring from a consciousness of guilt. In the olden time it was a popular superstition that the corpse of the slain would bleed afresh if touched by the murderer; and it was deemed almost conclusive of guilt that he who was charged with the murder refused to lay his finger on the body or to take his hand; in recent years persons suspected of murder have been required to touch the dead body, not because the old superstition was indulged, but that its effect on them — the emotion produced and manifested — could be observed."

1894, GANTT, P. J., in *State* v. *Wisdom*, 119 Mo. 539, 24 S. W. 1051 (testimony was offered that at the morgue the defendant was requested with others to put his hand on the corpse of the murdered man, but he refused): "It was simply a test proposed by some bystander, and it was offered as showing the manner in which the three suspects conducted themselves when it was proposed. While defendant had a perfect right to decline, either because of his instinctive repugnance to the unpleasant task, or because no one had a right to subject him to the test, and his refusal might not prejudice him in the minds of a rational jury; on the other hand, a consciousness of guilt might have influenced him to refuse to undergo the proposed test, however unreasonable it was, and it is one of the circumstances of the case that the jury could weigh."

1894, Feb. 21, Boston *Transcript:* "B. G. was on trial for the larceny of $365 from Simon Melnikoff, his lodging-house keeper. It will be remembered that when the crime was discovered seven persons who could possibly have taken the money were requested to step into a dark room in Melnikoff's house and touch a live hen fastened on a table. They were told that when the guilty party touched her she would make an outcry. Unknown to the men who entered the room the hen had been saturated with blueing. An inspection of the hands of the men who entered the room showed that all but Goldstein had touched the hen. His hands bore no marks of blueing, and when he was informed of the trick that had been played on him he said he did not understand the condition of the test to be that he must place his hand on the hen. Judge SHERMAN admitted this testimony, and in commenting on the weight it should have with the jury said: 'This test was not applied to determine who was guilty from the result of the thing itself, but it was believed

§ 275. [1] To these instances add the following: 1828, State *v.* Guild, 10 N. J. L. 171 (refusal to touch a corpse; admitted below, not criticised on appeal). The *illegality* of compelling such a test would be immaterial: *post*, § 2183. But distinguish the case of a refusal to submit one's feet to measurement, or the like; if this be regarded as compulsory *self-crimination*, then the refusal could not be admissible: *post*, § 2265.

that the guilty one, in the uneasy state of his conscience, would be overcome with dreadful superstition and avoid carrying out the test.'"

§ 276. **Same: (4) Flight, Escape, Resistance, or Concealment.** Flight from justice, and its analogous conduct, have always been deemed indicative of a consciousness of guilt. The wicked flee, even when no man pursueth; but the righteous are bold as a lion. In our primitive system of law, the accused who fled, whether innocent or guilty, suffered forfeiture and escheat;[1] though this was rather a mode of deterring him from refusing to appear for judgment than an evidential rule. It is to-day universally conceded that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself:[2]

§ 276. [1] 1607 (?), *Coke*, 5 Rep. 109 b, Foxley's Case: "For although he be found Not Guilty, yet he shall forfeit his goods by the flying, 'quia fatetur facinus qui judicium fugit', and the law will not admit any proof against this presumption"; so also in 3 Inst. 232, 233; Pollock & Maitland, Hist. English Law, II, 588.

[2] In the following rulings the circumstance offered is flight, unless otherwise specified; and the evidence was admitted where not otherwise stated:

ENGLAND: 1826, R. *v.* Hazy, 2 C. & P. 458 (trespass; running away from the premises when detected, admitted as evidence of not being there by permission).

UNITED STATES: *Alabama:* 1853, Campbell *v.* State, 23 Ala. 44, 75 (plan to escape); 1856, Martin *v.* State, 28 Ala. 71, 81 (escape); 1871, Murrell *v.* State, 46 Ala. 89, 91 (same); 1875, Levison *v.* State, 54 Ala. 519, 527; 1877, Bowles *v.* State, 58 Ala. 335 (and that the flight was beyond the jurisdiction may be shown); 1881, Sylvester *v.* State, 71 Ala. 23, 26; 1883, Ross *v.* State, 74 Ala. 536; 1885, Clarke *v.* State, 78 Ala. 478; 1895, Whitaker *v.* State, 106 Ala. 30, 17 So. 456; 1895, Jackson *v.* State, 106 Ala. 12, 17 So. 333 (flight and assumption of *alias*); 1896, White *v.* State, 111 Ala. 92, 21 So. 330; 1905, Franklin *v.* State, 145 Ala. 669, 39 So. 979 (false statements as to identity); 1906, Allen *v.* State, 146 Ala. 61, 41 So. 624 ("all the facts connected with the flight" are admissible); 1906, Glass *v.* State, 147 Ala. 50, 41 So. 727 (resistance at the time of arrest, admitted);
Arizona: 1915, Leonard *v.* State, 17 Ariz. 293, 151 Pac. 947 (murder; robbery about the same time, admitted as a part of a scheme to escape; citing the above text with approval);
Arkansas: 1867, Flanigan *v.* State, 25 Ark. 92, 95 (concealment when inspected with others in order to be identified); 1881, Burris *v.* State, 38 Ark. 221, 225 (flight and escape);
California: 1873, People *v.* Strong, 46 Cal. 302 (escape, admissible, but, *semble*, not unless he knows the cause of the arrest); 1873, People *v.* Stanley, 47 Cal. 113, 118 (escape); 1880, People *v.* Wong Ah Ngow, 54 Cal. 151, 153 (same; but it does not raise a presumption); 1897, People *v.* Winthrop, 118 Cal. 85, 50 Pac. 390 (hiding, taking an assumed name, carrying around newspaper accounts of the crime); 1897, People *v.* Ashmead, 118 Cal. 508, 50 Pac. 681 (failure to return and claim the stolen goods taken from him, admitted); 1898, People *v.* Vidal, 121 Cal. 221, 53 Pac. 558 (flight from arrest for another crime, excluded); 1900, People *v.* Lee Dick Lung, 129 Cal. 491, 62 Pac. 71 (but not the mere receipt of letters from other persons advising flight); 1900, People *v.* Flannelly, 128 Cal. 83, 60 Pac. 670 (resistance to arrest); 1905, People *v.* Easton, 148 Cal. 50, 82 Pac. 840 (rule applies to a defendant pleading insanity); 1913, People *v.* Lee Nam Chin, 166 Cal. 570, 137 Pac. 917 (instructions discussed; knowledge of the corpus delicti is necessary, Sloss, J., diss. on this point); 1911, People *v.* Jones, 160 Cal. 358, 117 Pac. 176 (another instance of the futility of including in the instructions a disquisition of law on the inferences from flight; the opinion seems to approve the two erroneous notions mentioned in par. (*a*) and (*b*) *supra*);
District of Columbia: 1900, Funk *v.* U. S. 16 D. C. App. 478, 494 ("a confession of a contemplated assault for the purpose of escaping", admitted);
Florida: 1903, Carr *v.* State, 45 Fla. 11, 34 So. 892 (resistance); 1905, Wooldridge *v.* State, 49 Fla. 137, 38 So. 3 (and here the governor's proclamation of a reward, the sheriff's testimony of search, etc., were admitted to show the circumstances of the flight);
Georgia: 1852, Whaley *v.* State, 11 Ga. 123, 126 ("It is argued that this attempt to bribe the guard, in order to effect his escape, is consistent with innocence. But that is no test. Is it not an index of guilt?"); 1858, Revel *v.* State, 26 Ga. 275, 281 (escape); 1879, Smith *v.* State, 63 Ga. 168, 170; 1886, Sewell *v.* Vincent, 76 Ga. 836 (unless explained); 1897, Hudson *v.* State, 101 Ga. 520, 28 S. E. 1010; 1904, Johnson *v.* State, 120 Ga. 135, 47 S. E.

1796, L. C. J. EYRE, in *Crossfield's Trial*, 26 How. St. Tr. 216: "The prosecution say — and they say truly — if they make out that the conduct of the prisoner has been that he has either originally withdrawn himself from justice or that he has taken pains to secrete himself from justice after he was apprehended, that those are circumstances which do at least infer a consciousness of very great guilt, and, if there be no other reason assigned for the conduct of the party, very much corroborating and supporting the charges."

1850, PARSONS, J., in *Johnson* v. *State*, 17 Ala. 618, 624: "A flight is universally admitted as evidence of the guilt of the accused, though not conclusive. If we take flight as evidence of fear, and fear as evidence of a known cause of dread or apprehension, we arrive thus at the inference of crime. . . . In this instance, then, we take the flight, a thing of itself harmless and innocent, as evidence of conscious guilt, a necessary consequence of the crime itself; and the conscious guilt, of which the flight was evidence, is proof in its turn of the crime. In this instance, therefore, it is certain that the law ad-

510 ("the events and circumstances connected with the flight" are admissible; here, the denial of identity, etc.); 1905, Grant *v.* State, 122 Ga. 740, 50 S. E. 946 (flight on seeing the officer in another town, where he had no authority to arrest, admitted); 1921, Jones *v.* State, 26 Ga. App. 635, 107 S. E. 166 (defendant's failure to appear for trial and forfeiture of recognizance, admitted);

Idaho: 1870, People *v.* Ah Choy, 1 Ida. 317, 320 (admissible, but only to indicate the perpetrator; where the act is not denied, and the degree of homicide alone in question, excluded; this seems unsound, for there may be a guilty consciousness of the malice of the killing); 1901, State *v.* Lyons, 7 Ida. 530, 64 Pac. 236;

Illinois: 1874, Barron *v.* People, 73 Ill. 258, 260 (giving "straw bail" and forfeiting the recognizance; passing under an *alias*); 1893, Jamison *v.* People, 145 Ill. 357, 376 (murder; "the circumstances of the pursuit and capture of the defendant by the crowd of people", when he fled, admitted); 1904, McKevitt *v.* People, 208 Ill. 460, 70 N. E. 693 (resisting arrest, admitted);

Indiana: 1850, Porter *v.* State, 2 Ind. 435, 436; 1862, Hittner *v.* State, 19 Ind. 48, 50 (attempt to escape); 1877, Waybright *v.* State, 56 Ind. 122, 125 (flight does not create a real presumption of law); 1881, Batten *v.* State, 80 Ind. 394, 400; 1897, Anderson *v.* State, 147 Ind. 445, 46 N. E. 901 (resistance to arrest); 1900, Barton *v.* State, 154 Ind. 670, 57 N. E. 515 (failure to appear for trial when under recognizance);

Iowa: 1867, State *v.* Arthur, 23 Ia. 430, 432 (escape); 1877, State *v.* James, 45 Ia. 412 (same); 1879, State *v.* Fowler, 52 Ia. 103, 105, 2 N. W. 983 (resistance to a demand for the weapon, excluded); 1883, State *v.* Rodman, 62 Ia. 456, 458, 17 N. W. 663 (attempt to escape); 1890, State *v.* Van Winkle, 80 Ia. 15, 18, 45 N. W. 388 (departure sufficient, if occurring after knowledge that he was or would be charged); 1895, State *v.* Minard, 96 Ia. 267, 65 N. W. 147 (murder; the defendant's leaving the funeral procession on hearing that he was to be charged with the crime, admitted); 1895, State *v.* Seymore, 94 Ia. 699, 63 N. W. 663; 1900, Wise *v.* Schloesser, 111 Ia. 16, 82 N. W. 439 (breach of promise and seduction; doubted for civil cases; the doubt is unfounded); 1904, State *v.* Poe, 123 Ia. 118, 98 N. W. 587; 1905, State *v.* Richards, 126 Ia. 497, 102 N. W. 439; 1905, State *v.* Matheson, 130 Ia. 440, 103 N. W. 137; 1920, State *v.* O'Meara, 190 Ia. 613, 177 N. W. 563, 569 (knowledge of the charge is not necessary);

Kansas: 1897, State *v.* Thomas, 58 Kan. 805, 51 Pac. 228; 1902, State *v.* Stewart, 65 Kan. 371, 69 Pac. 335; 1905, State *v.* Kesner, 72 Kan. 87, 82 Pac. 720 (failure to appear for trial in pursuance to a recognizance bond);

Kentucky: 1866, Plummer *v.* Com., 1 Bush 76, 78; 1878, Kennedy *v.* Com., 14 Bush 345; 1888, Basham *v.* Com., 87 Ky. 440, 9 S. W. 284 (flight or concealment); 1891, Baker *v.* Com., — Ky. —, 17 S. W. 625; 1895, Clark *v.* Com., — Ky. —, 32 S. W. 131 (attempt to escape from jail); 1900, Saylor *v.* Com., — Ky. —, 57 S. W. 614 (failing to appear under a bail bond, admitted);

Louisiana: 1878, State *v.* Beatty, 30 La. An. 1267 (attempt to break jail); 1879, State *v.* Dufour, 31 La. An. 804 (escape); 1896, State *v.* Harris, 48 La. An. 1189, 20 So. 729; 1901, State *v.* Middleton, 104 La. 914, 28 So. 904; 1901, State *v.* Baptiste, 105 La. 661, 30 So. 146; 1905, State *v.* Nash, 115 La. 719, 39 So. 854 (flight is admissible, even when the killing was open and public; explaining State *v.* Melton, 37 La. An. 77 and later cases); 1906, State *v.* High, 116 La. 79, 40 So. 538 (two shots fired by defendant, in resisting arrest, admitted);

Maine: 1879, State *v.* Frederic, 69 Me. 400, 403 (allowable for flight when sought for arrest; whether he had been informed of the charge or not); 1908, State *v.* Lambert, 104 Me. 394, 71 Atl. 1092 (possession of a revolver at the time of arrest, admitted);

Massachusetts: 1876, Com. *v.* Tolliver, 119 Mass. 315 (flight or concealment); 1895, Com. *v.* Acton, 165 Mass. 11, 42 N. E. 329 (hiding beer from officers searching for liquor illegally kept; the intimation that this might be rejected if the search was illegal and the defend-

mits evidence of the party's conduct merely to prove his conscious guilt, which is proof of crime."

1896, PARKER, J., in the Federal District Court for Western Arkansas, charging the jury in *Starr* v. *U. S.*, 164 U. S. 627, 17 Sup. 224, and in *Alberty* v. *U. S.*, 162 U. S. 499, 16 Sup. 864: "The law says that a man is to be judged by his consciousness of the right or wrong of what he does, to some extent. If he flees from justice because of that act, if he goes to a distant country, and is living under an assumed name because of that fact, the law says that is not in harmony with what innocent men do, and jurors have a right to consider it as an evidence of guilt, because he is an eyewitness to the occurrence, he knows how it did transpire, he is presumed to have a consciousness of that act. . . . It is a principle of human nature — and every man is conscious of it, I apprehend — that, if he does an act which he is conscious is wrong, his conduct will be along a certain line. He will pursue a certain course not in harmony with the conduct of a man who is conscious that he has

ant knew this seems to be improper, because that would furnish merely a counter-explanation of the conduct);
Michigan: 1867, People *v.* Pitcher, 15 Mich. 397, 406 (concealment); 1878, Probasco *v.* Cook, 39 Mich. 717, 718 (resistance when arrested); 1895, People *v.* Caldwell, 107 Mich. 367, 374, 65 N. W. 216; 1900, People *v.* Keep, 123 Mich. 231, 81 N. W. 1097 (escape from jail of convict for another offence knowing of the present charge against him);
Mississippi: 1849, Cicely *v.* State, 13 Sm. & M. 202, 221 (hiding);
Missouri: 1851, Fanning *v.* State, 14 Mo. 386, 390 (attempt to escape); 1857, State *v.* Phillips, 24 Mo. 475, 484; 1873, State *v.* Williams, 54 Mo. 170 (attempt to escape after arrest); 1882, State *v.* Mallon, 75 Mo. 357 (breaking or attempting to break jail); State *v.* King, 78 Mo. 557; 1897, State *v.* Evans, 138 Mo. 116, 39 S. W. 462 (the mere fact of presence in another State when arrested is not enough); 1898, State *v.* Hopper, 142 Mo. 478, 44 S. W. 272 (mere return to home near by is not a flight); 1899, State *v.* Garrison, 147 Mo. 548, 49 S. W. 508 (escape from jail); 1906, State *v.* Spaugh, 200 Mo. 571, 98 S. W. 55 (resistance, and other circumstances, while in flight, admitted);
Montana: 1900, State *v.* Lucey, 24 Mont. 295, 61 Pac. 994 (inability of searchers to find the defendant); 1921, State *v.* Bonning, — Mont. —, 199 Pac. 274 (knowing receipt of stolen goods; flight when the charge was larceny, admitted);
Nebraska: 1898, McVey *v.* State, 55 Nebr. 777, 76 N. W. 438 (that the police had searched for the defendant unsuccessfully, admitted); 1901, George *v.* State, 61 Nebr. 669, 85 N. W. 840 (going to another part of the State); 1904, Kennedy *v.* State, 71 Nebr. 765, 99 N. W. 645 (attempt to escape); 1904, Woodruff *v.* State, 72 Nebr. 815, 101 N. W. 1114;
New Hampshire: 1856, State *v.* Rand, 33 N. H. 216, 225 ("the act of flying and escaping from the place, concealment and disguise of the person, and other acts and conduct of the like character");
New York: 1839, People *v.* Rathbun, 21 Wend. 509, 518 (advising an accomplice to break jail, admitted); 1880, Ryan *v.* People, 79 N. Y. 593, 601 (keeping out of the sheriff's way);
North Dakota: 1896, State *v.* Kent, 5 N. D. 516, 67 N. W. 1052;
Oklahoma: 1913, Robinson *v.* State, 8 Okl. Cr. 667, 130 Pac. 121;
Oregon: 1890, State *v.* Lee, 17 Or. 488, 21 Pac. 455; 1905, State *v.* Ryan, 47 Or. 338, 82 Pac. 703; 1909, State *v.* Osborne, 54 Or. 289, 103 Pac. 62 (flight);
Pennsylvania: 1877, Lanahan *v.* Com., 84 Pa. 80, 86; 1913, U. S. *v.* Alegado, 25 P. I. 510 (homicide);
Tennessee: 1844, Tyner *v.* State, 5 Humph. 386 ("We are told by an early and most venerable authority that the wicked fly when no one pursues; and we are told elsewhere that conscience makes men cowards");
Texas: 1899, Buchanan *v.* State, 41 Tex. Cr. 127, 52 S. W. 769 (flight after a preliminary charge of another tenor for the same crime, but before indictment, not excluded); 1904, Bennett *v.* State, 47 Tex. Cr. 52, 81 S. W. 30 (efforts of the sheriff to find the defendant, admitted);
Utah: 1900, State *v.* Morgan, 22 Utah 162, 61 Pac. 527; 1921, State *v.* Crawford, — Utah —, 201 Pac. 1031 (attempt to escape while under two charges, held to raise no "presumption of guilt" as to either; unsound, so far as it may signify that the fact was inadmissible);
Vermont: 1901, State *v.* Shaw, 73 Vt. 149, 50 Atl. 863;
Virginia: 1902, Anderson *v.* Com., 100 Va. 860, 42 S. E. 865 (escape);
Washington: 1904, State *v.* Deatherage, 35 Wash. 326, 77 Pac. 504;
Wyoming: 1916, Harris *v.* State, 23 Wyo. 487, 153 Pac. 881 (larceny; mere failure to surrender voluntarily, not admissible).

On the same principle an *attempt at suicide* is admissible: 1914, People *v.* Duncan, 261 Ill. 339, 103 N. E. 1043; 1904, State *v.* Jaggers, 71 N. J. L. 281, 58 Atl. 1014; 1918, State *v.* Blancet, 24 N. M. 433, 174 Pac. 207 (murder);
Contra: 1897, State *v.* Condotte, 7 N. D. 109, 72 N. W. 913.

done an act which is innocent, right, and proper. The truth is — and it is an old scriptural adage — 'that the wicked flee when no man pursueth, but the righteous are as bold as a lion.' Men who are conscious of right have nothing to fear. They do not hesitate to confront a jury of their country, because that jury will protect them. It will shield them and the more light there is let in upon their case the better it is for them. We are all conscious of that condition, and it is therefore a proposition of the law that, when a man flees, the fact that he does so may be taken against him, provided he does not explain it away upon some other theory than that of his flight because of his guilt."

This principle has been so many times sanctioned that its frequent modern repetition has become redundant, no further judicial attention should be paid to any bill of exceptions so presumptuous as to raise the question.[3] There remain only a few details that can be open to comment:

(*a*) It is occasionally required by a Court that the accused should have been *aware* that he was charged or suspected. This is unnecessary; it is the act of departure that is itself evidential; ignorance of the charge is merely a circumstance that tends to explain away the guilty significance of the conduct.

The limitation has also been advanced that flight is not admissible where the evidence of the offence is direct evidence; but this notion is groundless to the point of absurdity.[4]

(*b*) It has sometimes been said that an *unexplained* flight is the admissible evidence. But this is obviously unsound. The prosecution cannot be expected to negative beforehand all conceivable innocent explanations. The fact of flight is of itself significant; it becomes most significant when after all no explanation is forthcoming.

[3] The dissenting opinion of Deemer, C. J., in State *v.* Poe, Ia., *supra*, is the most sensible deliverance on this subject, and ought to put an end to judicial quibbling.

In the Federal Supreme Court, the evidential admissibility of the circumstance is conceded in a series of cases, in some of which however a charge of a trial judge (Parker, J., of Ark. W. D.) is disapproved for using the term "presumption": 1896, Hickory *v.* U. S., 160 U. S. 408, 16 Sup. 327; 1896, Alberty *v.* U. S., 162 U. S. 509, 16 Sup. 864; 1896, Allen *v.* U. S., 164 U. S. 492, 17 Sup. 154; 1897, Starr *v.* U. S., 164 U. S. 227, 17 Sup. 223. These cases, on the point of presumption, are ill advised in their attempts to assume the position of monitor over a great and experienced trial judge. In the Alberty case, the charge did not bear the construction put upon it above. In the Allen case, the opinion repudiates the notion that flight creates a "presumption", and then, in the very next paragraph, itself declares that fabrication of testimony creates a "presumption"; compare § 21, *ante*, note, §§ 2490, 2511, *post*.

The unfortunate influence of the above Federal cases may be seen in the following opinions: 1914, Stewart, U. S., 9th C. C. A., 211 Fed. 41 (an instruction held not to be within the rulings of the Hickory and Alberty cases); 1910, People *v.* Fiorentino, 197 N. Y. 560, 92 N. E. 195 (here the Court gives undue weight to Hickory *v.* U. S., and erroneously says that "flight of itself is no evidence of guilt" is "sound as an abstract proposition of law"; of course, the same would be true of any evidence whatever: "of itself" it is not proof; but it is absurd to single out flight as the subject for such a charge); 1911, Terr. *v.* Lucero, 16 N. M. 652, 120 Pac. 304 (following the Federal cases); 1911, State *v.* Papa, 32 R. I. 453, 80 Atl. 12. In the following case an instruction was held correct: 1915, Campbell *v.* U. S., 9th C. C. A., 221 Fed. 186.

Another form of quibble, using the present principle as a steeple-chase obstacle to win the game of a lawsuit, is to name all these possible aspects of the inference as *instructions to the jury;* of course the trial judge cannot be expected to divine just how the Supreme Court will agree on all details; hence frequent reversals; *e.g.* 1912, State *v.* Schmulback, 243 Mo. 533, 147 S. W. 966.

[4] 1922, Rowan *v.* U. S., 7th C. C. A., 277 Fed. 777 (decisive refutation of the notion; per Baker, J.).

(*c*) The flight of *another person* is relevant so far only as the accused has connived at it; [5] and it may then also become relevant as an act of suppression of testimony (*post*, § 278).

(*d*) Whether the fact of flight raises a *presumption of law* is a question of the rules of presumption (*post*, §§ 2490, 2511).

(*e*) On the logical principle of Explanation (*ante*, § 32), the accused may always endeavor to destroy the guilty significance of his conduct by facts which indicate it to be equally or more consistent with some other hypothesis than that of a consciousness of guilt: [6]

1878, COFER, J., in *Kennedy* v. *Com.*, 14 Bush 346 (the accused offered to show that he fled, while being conducted to jail, because "the jail to which he was being conducted was in a filthy condition"); "When flight had been proved as furnishing evidence of guilt, it is competent for the accused to prove other causes which may have influenced him to fly, and leave the jury to decide whether his flight was caused by a consciousness of guilt and apprehension of conviction, or by such other causes as he may prove to have existed. But it would be clear that a mere aversion to lawful imprisonments could not be allowed to be given in evidence for that purpose. . . . The appellant [by appealing to the judge] thus had in his power the means of relieving himself from the danger which he claims to have apprehended from the condition of the jail. . . . Evidence of apprehended danger, in order to be admissible to rebut the inference of guilt which may be drawn from an escape and flight, should show such danger as could not have been readily,

[5] 1909, Lowman *v.* State, 161 Ala. 47, 50 So. 43 (flight of an accomplice, excluded); 1873, People *v.* Stanley, 47 Cal. 113, 118 (escape of a co-indictee, excluded); 1867, People, *v.* Pitcher, 15 Mich. 397, 406 (flight of an accomplice; admitted, the defendant having instigated the flight); 1879, Cummins *v.* People, 42 Mich. 142, 3 N. W. 305 (flight of an accomplice, found with the defendant when arrested, admitted); 1839, People *v.* Rathbun, 21 Wend. N. Y. 509, 518 (cited in the preceding note).

The following is of course correct: 1906, Boykin *v.* State, 89 Miss. 19, 42 So. 601 (that the county had paid the reward for the arrest of defendant as a fleeing homicide, excluded).

[6] 1885, Chamblee *v.* State, 78 Ala. 466, 468 (certain explanatory evidence, held irrelevant); 1902, Sanders *v.* State, 131 Ala. 1, 31 So. 564 (acts of a lynching mob three weeks after the flight, excluded); 1913, Goforth *v.* State, 183 Ala. 66, 63 So. 8 (postcards mailed by the accused shortly after his departure, admitted to indicate non-concealment of his whereabouts, and thus to rebut the inference of guilt of a murder from his flight); 1892, U. S. *v.* Cross, 20 D. C. 378 (explanation admitted); 1858, Golden *v.* State, 25 Ga. 527, 531 (fear of an attack from one who had already assaulted him, admitted); 1881, Batten *v.* State, 80 Ind. 394, 400 (fear of violence from bystanders, admitted); 1885, Welch *v.* State, 104 Ind. 347, 352, 3 N. E. 850 (excluded, because no evidence of the flight had been offered); 1901, Bradburn *v.* U. S., 3 Ind. T. 604, 64 S. W. 550 (that he had been advised to leave, to avoid vengeance by the deceased's friends, allowed); 1899, State *v.* Desmond, 109 Ia. 72, 80 N. W. 214 (defendant's attempt to escape, held explainable as due to fear of mob violence); 1860, Plummer *v.* Com., 1 Bush Ky. 76, 78 (fear of violence from soldiers and from the mob, admitted); 1876, Com. *v.* Tolliver, 119 Mass. 314 (the defendant having denied that he concealed himself and affirmed that he went about openly, evidence that he was disguised when going about was admitted); 1895, People *v.* Caldwell, 107 Mich. 374, 65 N. W. 213 ("It is always open to the person to make explanation of the reason of his escape, to show that he was not prompted by a consciousness of guilt", but a voluntary return after escape did not furnish such explanation); 1856, State *v.* Hays, 23 Mo. 287, 316 (explanation allowed); 1857, State *v.* Phillips, 24 Mo. 484 (popular excitement as a reason for flight, not admitted here, because it did not yet exist at the time of flight, nor could it be apprehended); 1882, State *v.* Mallon, 75 Mo. 355 (maltreatment admitted, in explanation); 1883, State *v.* King, 78 Mo. 557 ("the presumption or inference from guilt arising from flight may be modified or overthrown by testimony showing that the flight of the defendant was occasioned by other causes than consciousness of guilt"); 1896, State *v.* Taylor, 134 Mo. 109, 35 S. W. 92 (that he was willing to return when arrested, not admitted); 1916, Jackson *v.* State, 12 Okl. Cr. 406, 157 Pac. 945 (rape); 1913, State *v.* Hogg, 64 Or. 57, 129 Pac. 115 (flight to escape a mob).

Compare the doctrine *post*, § 293, as to conduct indicating *consciousness of innocence*.

efficiently, and with entire safety provided against by the accused, either by his own act or through the instrumentality of the officers of the law."

Such attempts at explanation are sometimes declared improper; but the general and sounder tendency is to admit them freely, leaving to the jury to pass upon their plausibility.

§ 277. **Conduct, as evidence of Consciousness of a Weak Cause; (1) General Theory.** The second class of cases already noted (§ 267, par. *b*) includes those in which the inference is towards an act or event not necessarily a personal deed, and thus the circumstantial nature of the evidence is less marked (though not less real) in comparison with its testimonial nature. For example, when A, the defendant in an action by B for slander, bribes a witness to assist in proving a plea of truth as to B's misdoing, A's conduct is some evidence of a consciousness that his cause is a weak one; and yet A can ordinarily have no personal knowledge, one way or the other, of B's misdeed, so that his belief or consciousness is not a mark or a trace of his own past act, but is an impression founded on all that he has been able to learn by inquiry. Thus if A were a third person, the evidential use of his conduct amounts to little more than using his hearsay assertion, and the objection expounded in *Wright* v. *Tatham* (quoted *supra*, 267) applies in fullest force. Consequently, such evidence would have to be confined to the conduct of parties in the cause, since for them it would at any rate be receivable as an admission; for any assertion by an opponent in the cause may be offered against him as an admission (*post*, § 1048). It is true that, so far as the conduct is that of a criminal defendant, it may be referred to a consciousness of his personal deed, and thus would fall under the first class already noted (§ 267, par. *a*; § 273). But the sort of conduct in question — suppression of evidence, bribery of witnesses, non-production of evidence, and the like — is as a matter of law receivable equally against civil parties, and must therefore be treated in the light of this broader use.

It is enough, then, for practical purposes to note that this kind of conduct, though circumstantial in its nature, is guarded against evidential misuse as hearsay by using it, in *civil cases*, *only when predicated of the party opponent*, *i.e.* only when it could be treated as an admission; while in *criminal cases*, though not theoretically so restricted, practically it does not exceed the same limits except in the rare instances when it is offered to prove a third person the really guilty party (*ante*, § 142).

So far as regards the nature of the conduct which is open to this inference, all that can be said, in generalizing, is that there are broadly two sorts; first, conduct indicating a consciousness of the weakness of the cause in general, — bribery, destruction of evidence, and the like; and, secondly, conduct indicating a consciousness of the weakness of a specific element in the cause, — failure to produce a particular witness or a document, and the like. In the former, the inference is an indefinite one, that the whole cause must be an unfounded one since such means are employed to sustain it; in the

latter, the inference is a definite one, that the specific witness or document bears unfavorably on the cause.

§ 278 **Same: (2) Falsehood, Fraud, Fabrication and Suppression of Evidence, Bribery, Spoliation, and the like.** It has always been understood — the inference, indeed, is one of the simplest in human experience — that a party's falsehood or other fraud in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all similar conduct, is receivable against him as an indication of his consciousness that his case is a weak or unfounded one, and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit. The inference thus does not apply itself necessarily to any specific fact in the cause, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause. The nature of the inference, in general, may be gathered from the following passages, which deal with one or another variety of conduct of this character:

1743, *Craig dem. Annesley* v. *Earl of Anglesea*, 17 How. St. Tr. (Ire.) 1217. In this celebrated case [1] the plaintiff claimed to be the legitimate son of the defendant's brother, and the true heir to the estates and peerage; he showed that at the age of 14 he had been kidnapped by the defendant's procurement and transported to Pennsylvania, and after 15 years' slavery had escaped back to England and instituted a suit to obtain his rights; while on the way to begin proceedings, he joined the gamekeeper of a friend in catching some poachers, and one of them was killed by a shot from his gun, which he claimed went off accidentally; he had been tried for murder and acquitted; he now proposed to show "that the relations of the deceased, being convinced that the killing was only accidental, had intended a very slight prosecution, but that the defendant, who was in no way related to or acquainted with the person killed, employed a solicitor and carried on a severe prosecution against Mr. Annesley at a very great expense, and declared 'he would spend £10,000 to get him hanged';" the purpose of this evidence was to "strengthen that evidence of the defendant's spiriting away the lessor of the plaintiff, and show the defendant's continued design of removing this gentleman from any possibility of asserting his birthright." MOUNTENEY, B. (for admission): "The foundation of my opinion is this: Every act done by the defendant, which hath a tendency to show a consciousness in him of title in the lessor of the plaintiff, must I think be admitted, beyond all controversy, to be pertinent and legal evidence in the present cause. I think that the evidence now offered hath that tendency, and consequently is proper to be admitted. This evidence of the prosecution, in my apprehension, stands exactly on the same footing with the evidence of the kidnapping, . . . for I can by no means enter into the distinction of lawful and unlawful acts, which seems to have so much weight with my lord chief baron. That unlawful act was not therefore, in my apprehension, to be admitted in evidence because unlawful, but because it had a tendency to show such a consciousness as I have mentioned in the defendant; and if the carrying on the prosecution (which must be admitted to be a very extraordinary, though lawful, act of the

§ 278. [1] This great controversy led to three trials; the first, R. *v.* Annesley, 17 How. St. Tr. 1093 was for the murder; the second, Annesley *v.* Anglesea, was for the title to the estates; and the third, R. *v.* Heath, 18 How. St. Tr. 1, was for perjury committed by the chief witness for the defendant at the second trial. The remarkable feature is that, though the jury found for the claimant in the second trial, yet in the third, in which the whole cause was virtually re-tried, the jury acquitted of perjury the chief witness against the claimant at the second trial. The trials (omitting most of Heath's Trial) have been reprinted (1912) in the Notable English Trials Series (later termed Notable British Trials Series), under the distinguished editorship of Mr. Andrew Lang.

defendant) hath the same tendency, it ought upon the same principle to be admitted." DAWSON, B., was at first undecided, but later agreed with Mounteney, B. Chief Baron BOWES also, in charging the jury, finally showed his accord with the same general principle, in thus alluding to the kidnapping: "You will also consider whether these acts are not evidence to satisfy you that the defendant, in his own thoughts and way of reasoning, considered the staying of the boy here as what might some way prejudice his title. But whether, as insisted upon by the plaintiff's counsel, you ought to take this as an admission on the part of the defendant that the plaintiff was the lawful son of Lord Altham [earl of Anglesea], will deserve further consideration. Undoubtedly there is a violent presumption, because no man is supposed to be wicked without design, and the design in this act must be some way or other relative to the title; but whether or no it was the opinion of the trouble he might have from this lad that induced him to do the act, or a consciousness that the lad was the son of Lord Altham, must be left to your determination."

1870, COCKBURN, C. J., in *Moriarty* v. *R. Co.*, L. R. 5 Q. B. 319: "The conduct of a party to the cause may be of the highest importance in determining whether the cause of action in which he is plaintiff, or the ground of defence if he is defendant, is honest and just, — just as it is evidence against a prisoner that he has said one thing at one time and another at another, as showing that recourse to falsehoods leads fairly to an inference of guilt. Anything from which such an inference can be drawn is cogent and important evidence with a view to the issue. So, if you can show that a plaintiff has been suborning false testimony, and has endeavored to have recourse to perjury, it is strong evidence that he knew perfectly well his cause was an unrighteous one. I do not say that it is conclusive; I fully agree that it should be put to the jury with the intimation that it does not always follow, because a man, not sure he shall be able to succeed by righteous means, has recourse to means of a different character, that that which he desires, namely, the gaining of the victory, is not his due, or that he has not good ground for believing that justice entitles him to it; . . . but it is always evidence."

1873, COCKBURN, C. J., in *R.* v. *Castro* (Tichborne Case), Charge to the Jury, I, 813: "These falsehoods [of the defendant], however, must not operate unduly to the prejudice of the defendant beyond this, that falsehood is a badge of fraud; and a case which is sought to be supported by means of deception may 'prima facie', until the contrary be shown, be taken to be a bad and dishonest case; and, further, the recourse to fraud and falsehood necessarily engenders distrust."

1905, PHILLIMORE, J., in *R.* v. *Watt*, 20 Cox Cr. 852: "The principle is in fact well established. . . . It is this, that the conduct in the litigation of a party to it, if it is such as to lead to the reasonable inference that he disbelieves in his own case, may be proved and used as evidence against him."

1850, SHAW, C. J., in *Com.* v. *Webster*, 5 Cush. 295, 316: "To the same head may be referred all attempts on the part of the accused to suppress evidence, to suggest false and deceptive explanations, and to cast suspicion without just cause on other persons, — all or any of which tend somewhat to prove consciousness of guilt, and, when proved, to exert an influence against the accused. But this consideration is not to be pressed too urgently; because an innocent man, when placed by circumstances in a condition of suspicion and danger, may resort to deception in the hope of avoiding the force of such proofs."

1862, BIGELOW, C. J., in *Egan* v. *Bowker*, 5 All. 452 (admitting evidence of subornation of a witness): "The inference is a reasonable and proper one that a person having an honest and fair debt will not endeavor to support it by falsehood and fraud; and the fact that he resorts to such means of proof has a tendency to show that he knows he cannot maintain his suit by evidence derived from pure and incorrupt sources."

1874, *State* v. *Reed*, 62 Me. 145; the following charge was approved: "There is no reason, if he is innocent, for withholding a single truth; there is every reason for uttering it if innocent. If guilty, if he does not confess, the resort in all cases is or must ever

be to falsehood, evasion, or silence. . . . Each falsehood uttered by way of exculpation becomes an article of circumstantial evidence of greater or less inculpatory force."

1875, Ross, J., in *Green* v. *Woodbury*, 48 Vt. 6: "All authorized attempts of a party to suppress the testimony of the other party are clearly admissible, and are evidence that in such party's own conviction his case will not bear full examination. They show a consciousness in such party of the weakness of his own cause."

As the general principle applies in common to all these forms of conduct, it is not necessary, nor is it usually possible, to discriminate the precedents that apply it in one or another form. Roughly classifying them, they admit all forms of:

Personal falsification by the party in the course of the litigation; [2]

[2] *Federal:* 1869, U. S. v. Randall, Deady 524, 542, 543 (contradictions, misstatements, falsifications of entries); 1896, Wilson v. U. S., 162 U. S. 613, 16 Sup. 895 (false stories); 1893, Tucker v. U. S., 151 U. S. 164, 168, 14 Sup. 299 (affidavit of continuance); 1910, Waller v. U. S., 8th C. C. A., 179 Fed. 810 (feigning insanity); *Alabama:* 1873, Walker v. State, 49 Ala. 398, 401 (lying explanation of suspicious circumstances); 1875, Lavison v. State, 54 Ala. 519, 527 ("fabrication of evidence"); *Arkansas:* 1894, Jones v. State, 59 Ark. 417, 27 S. W. 601; s. c. 61 Ark. 88, 32 S. W. 81 ("false, improbable, and [or] contradictory statements" explaining suspicious circumstances against him); 1907, Weaver v. State, 83 Ark. 119, 102 S. W. 713 (affidavit for continuance; repudiating Burris v. State, 38 Ark. 221, *infra*, and Polk v. State, 45 Ark. 165, on the ground that they were decided when an accused was disqualified to testify); 1914, Billings v. U. S., 42 D. C. App. 413 (accused's false denial that he had before been arrested and photographed in the rogues' gallery, excluded); *Indiana:* 1897, Hinshaw v. State, 147 Ind. 334, 47 N. E. 158 (telling a false story); *Maine:* 1874, State v. Benner, 64 Me. 267, 289 (false stories); 1921, State v. Ward, 119 Me. 482, 111 Atl. 805 (murder); *Massachusetts:* 1902, Com. v. Devaney, 182 Mass. 33, 64 N. E. 402 (lying); 1906, Bennett v. Susser, 191 Mass. 329, 77 N. E. 884 (a "deliberate misstatement of fact" by a party on a material point may be considered by the jury "as an admission that his claim is wrongful"; but here the instruction was not held demandable; *Michigan:* 1880, People v. Arnold, 43 Mich. 303, 306, 5 N. W. 385 (defendant's statement at the prior trial, admitted and allowed to be shown false; Curley, J.: "It betrays a consciousness that, unless the jury are made to believe a falsehood, the case against the party is sufficient to convict him"; Christiancy, J., diss., but his opinion seems to rest on the rule that a witness is not to be contradicted on a collateral point, — a rule not here applicable, because it is the party's fabrication as defendant, not as witness, that is offered); 1905, People v. Hoffmann, 142 Mich. 531, 105 N. W. 838 (false affidavit of continuance); *Missouri:* 1901, State v. Furgerson, 162 Mo. 668, 63 S. W. 101 (false stories, etc.); *Nevada:* 1874, State v. En, 10 Nev. 277, 281 (larceny; different statements as to show possession was obtained, admitted); *New York:* 1874, Coleman v. People, 58 N. Y. 556, 560 (false statements received "as showing a consciousness of wrong"); *Oregon:* 1906, State v. Jennings, 48 Or. 483, 87 Pac. 524 (false statements); *Wisconsin:* 1879, Dickerson v. State, 48 Wis. 288, 293, 4 W. W. 321 (false stories).

Contra, but unsound: 1881, Burris v. State, 38 Ark. 221, 225 (an affidavit for continuance to secure absent witnesses had stated that they would prove threats of the deceased; on the trial these witnesses were offered by the State to testify that they had never heard such threats nor told the defendant about them; excluded, on the theory that the defendant's character was attacked; the present use of such evidence was ignored; it showed a corrupt falsification by the defendant).

1905, Darrell v. Com., — Ky. —, 88 S. W. 1060 (this astonishing ruling holds that where the State has avoided a demand for continuance by admitting an affidavit of testimony of absent witness, the State cannot show that the witness is dead and that the sworn statement as to his absence was false; compare § 2595, n. 2, *post*).

The apparent ruling in Brown v. State, 142 Ala. 287, 38 So. 268 (1904), that the fabrication of a *statement of testimony of an absent witness* ("showing") cannot be proved, where the party has neither formally introduced the showing nor called the witness, seems erroneous.

Distinguish the improper attempt to argue from the *falsity of the defendant's case as a whole;* this would be a begging of the question; 1892, Com. v. Trefethen, 157 Mass. 180, 199, 31 N. E. 961 ("To argue that, by the other evidence, the defendant is shown to be guilty and that therefore his denial of guilt is false and is additional evidence against him, ought not to be permitted").

Compare the principle of 'falsus in uno' as applied to witnesses (*post*, § 1008).

Fabrication or *manufacture of evidence*, by *forgery, bribery, subornation,* and the like; [3]

Suppression of evidence, by *intimidation, eloignment*, or *concealment* of witnesses or material objects,[4] or

[3] ENGLAND: 1743, Craig dem. Annesley *v.* Anglesea, 17 How. St. Tr. 1217 (see quotation *supra*); 1806, Vowles *v.* Young, 13 Ves. Jr. 140 (forgery of a register; Erskine, L. C.: "Every case must depend upon its own circumstances"); 1870, Moriarty *v.* R. Co., L. R. 5 Q. B. 314 (attempts to suborn witnesses, by the plaintiff and by C. acting under his authority; Blackburn, J.: "I think there is no case or authority in which the present point was actually ruled, except the celebrated case of Annesley *v.* Earl of Anglesea"; the proper inference is that "he was very doubtful about his case, — not necessarily that he thought his case untrue, but that it was not a good one"; see quotation *supra*); 1876, Lacey *v.* Hill, L. R. 4 Ch. D. 537, 543 (Jessel, M. R.: "No man makes fictitious entries and commits forgeries except to conceal that which he knows ought to be concealed for his own credit; and therefore no one can doubt for a moment that Sir R. Harvey was perfectly well aware that he was committing these frauds"); 1680, Earl of Stafford's Trial, 7 How. St. Tr. 1461, 1479 (that the defendant had tried unsuccessfully to bribe a person to come as witness, admitted); 1905, R. *v.* Watt, 20 Cox Cr. 852 (that the defendant had induced a witness to testify falsely on a prior day in the same cause, admitted; good opinion by Phillimore, J.).

UNITED STATES: *Federal:* 1896, Allen *v.* U. S., 164 U. S. 492, 17 Sup. 154 (using false testimony); *Illinois:* 1882, Chicago C. R. Co. *v.* McMahon, 103 Ill. 485, 487 (attempt to bribe a witness; "it is in the nature of and implies an admission that he has no right to recover if the case was tried on the evidence as it exists, — that it is not sufficient to recover unless aided by suppressing evidence or the fabrication of more evidence"); 1903, U. S. Brewing Co. *v.* Ruddy, 203 Ill. 306, 67 N. E. 799 (subornation of witnesses); *Iowa:* 1905, State *v.* Koller, 129 Ia. 111, 105 N. W. 391 (adultery; the wife's attempt to dissuade the husband's witnesses, admitted); 1911, State *v.* Kimes, 152 Ia. 240, 132 N. W. 180 (subornation of a witness to perjury); *Kentucky:* 1920, Hall *v.* Com., 189 Ky. 72, 224 S. W. 492 (procuring a witness to testify falsely, admitted); *Louisiana:* 1904, State *v.* Gianfala, 113 La. 463, 37 So. 30 (offer of bribe to the deputy to release him); *Massachusetts:* 1862, Egan *v.* Bowker, 5 All. 449, 451 (suborning a witness, admitted, though the deposition had not been used); 1877, Com. *v.* Wallace, 123 Mass. 400 (attempt to bribe an arresting officer); 1881, Lynch *v.* Coffin, 131 Mass. 311, *semble* (attempt to suborn a witness); *Michigan:* 1874, People *v.* Mason, 29 Mich. 31, 39 (attempt to influence a witness and to bribe jurymen); *Mississippi:* 1903, Baker *v.* State, 82 Miss. 84, 33 So. 716 (defendant's request to B. to testify falsely if called, B. not being called, excluded; unsound); 1905, Dickey *v.* State, 86 Miss. 525, 28 So. 776 (attempt to suborn perjury); *Nebraska:* 1904, Blair *v.* State, 72 Nebr. 501, 101 N. W. 17 (removal of the prosecutrix); *New Mexico:* 1915, State *v.* Ancheta, 20 N. M. 19, 145 Pac. 1086 (attempt to bribe a witness); *North Carolina:* 1877, State *v.* Brown, 76 N. C. 222, 224 (using false testimony; but the falsities of a witness of the defendant must of course have been known to him beforehand); *Oklahoma:* 1921, Rogers *v.* State, — Okl. Cr. —, 197 Pac. 525 (unlawful possession of liquor; offer of money to arresting officers, admitted); *Oregon:* 1895, State *v.* Reinhart, 26 Or. 466, 38 Pac. 825 (false entries of account); *Pennsylvania:* 1898, McHugh *v.* McHugh, 186 Pa. 197, 40 Atl. 410 (attempt to suborn witnesses and to corrupt jurors, admitted; that defendant was acting as executrix only, immaterial); *Vermont:* 1855, State *v.* Williams, 27 Vt. 724, 726 (deposition); *West Virginia:* 1920, Maynard *v.* Bailey, 85 W. Va. 679, 102 S. E. 480 (letter offering a bribe, etc., admitted); 1921, State *v.* Weissenhoff, 89 W. Va. 279, 109 S. E. 707 ("money is no object to me; I want to get out of it", said to the sheriff, admitted).

[4] CANADA: 1888, Vye *v.* Alexander, 28 N. Br. 89, 93, 94, *semble* (libel; defendant's change of signature since litigation began, admissible to prove consciousness of guilt); 1889, Alexander *v.* Vye, 16 Can. Sup. 501 (foregoing case affirmed);

UNITED STATES: To the following, add the general Code provisions, cited *post*, § 285: *Alabama:* 1857, Liles *v.* State, 30 Ala. 24 (ordering his wife to hold her tongue about the matter, admitted); 1875, Levison *v.* State, 54 Ala. 519, 528 (a conversation with his associate, "Lie still, and keep your damned mouth shut", admitted); *California:* Cal. C. C. P. 1872, § 1963, Pac. 5 (it is presumed that "evidence wilfully suppressed would be adverse if produced"); 1895, People *v.* Chin Hane, 108 Cal. 597, 41 Pac. 697 (intimidation of witness); 1898, People *v.* Clausen, 120 Cal. 381, 52 Pac. 658 (failure of pawnbroker to enter goods in book required by law, evidence of guilty knowledge that they were stolen); *Connecticut:* 1896, State *v.* Hogan, 67 Conn. 581, 35 Atl. 508 (keeping away a witness); 1907, *In re* Durant, 80 Conn. 140, 67 Atl. 497 (intimidating a witness; the witness' deposition admitted, to show what had led to the intimidation); *Indiana:* 1900, Keesier *v.* State, 154 Ind. 242, 56 N. E. 232 (intimidation of witnesses;

Destruction or *spoliation* of material objects in general [5] or of *documents* in particular (*post*, § 291).

§ 279. **Same: Other rules discriminated; Confessions, Impeachment of Witnesses, Failure to prove Alibi, etc.** In applying the principle to the foregoing instances, no difficulty arises except so far as it becomes necessary to discriminate certain other principles.

(1) The rules of limitation for an accused's *confession of guilt* do not apply to conduct of the foregoing sorts, because a confession, properly so called, is a direct assertion of the incriminating fact and does not include within its definition mere conduct used circumstantially (*post*, § 821).

(2) A witness may be impeached by his *corrupt conduct* consisting in bribery or subornation of other witnesses or of court-officers; this is dealt with elsewhere (*post*, §§ 957 ff.).

(3) The mere *failure to produce* witnesses, documents, or chattels must be distinguished from the suppression or concealment of them; the inference

"such conduct is regarded as in the nature of an admission that the party has a bad case, which cannot be supported by honest proof"); *Iowa:* 1878, State *v.* Hudson, 50 Ia. 157 (furnishing money for an accomplice's escape); *Maine:* 1844, State *v.* Bruce, 24 Me. 72 (property obtained by threats; its subsequent concealment admitted); *Massachusetts:* 1877, Com. *v.* Wallace, 123 Mass. 400 (illegal liquor-selling; concealment of bottles); 1895, Com. *v.* Welch, 163 Mass. 372, 40 N. E. 103 (liquor-selling; refusal to let an officer see something hidden under the clothing and shaped like a bottle); 1899, Adams *v.* Swift, 172 Mass. 521, 52 N. E. 1068 (concealing identity after a collision); 1900, Jones *v.* Shattuck, 175 Mass. 415, 56 N. E. 736 (refusal to disclose one's name, on request, after a collision, admitted); 1910, Minihan *v.* Boston Elev. R. Co., 205 Mass. 402, 91 N. E. 414 (intimidation of witnesses); *Missouri:* 1907, State *v.* Mathews, 202 Mo. 143, 100 S. W. 420 (threats to dissuade the prosecuting witness from appearing, admitted); 1919, Rice *v.* Jefferson C. B. & T. Co., — Mo. —, 216 S. W. 746 (death by electric railway; defendant's concealment of death from relatives, and misrepresentation of its cause, held open to inference); 1921, State *v.* Howe, 287 Mo. 1, 228 S. W. 477 (attempting to "spirit away" a witness); *New Mexico:* 1918, State *v.* Riddle, 23 N. M. 613, 170 Pac. 61 (larceny of cattle; branding another's maverick in an unrecorded brand and later altering it to the party's own brand, admitted as "a form of deception . . . of highly probative value"); *New York:* 1915, People *v.* Willett, 213 N. Y. 368, 107 N. E. 707 (corrupt procurement of nomination; certain editorials by other persons, admitted as interpreting defendant's conduct in suppressing facts, etc.); 1916, People *v.* Galbo, 218 N. Y. 283, 112 N. E. 1041 (concealment of a body, as evidence of share in murder); *North Dakota:* 1899, State *v.* Rozum, 8 N. D. 548, 80 N. W. 480 (intimidation of witness); *Porto Rico:* Rev. St. C. 1911, § 1470 (like Cal. C. C. P. § 1963); *Vermont:* 1864, State *v.* Barron, 37 Vt. 57, 61 (getting witnesses out of the way); 1898, State *v.* Taylor, 70 Vt. 1, 39 Atl. 447 (refusal to give name, age, and residence, to attending physician after arrest, held admissible, by a majority of the Court); *Wisconsin:* 1882, Snell *v.* Bray, 56 Wis. 156, 162, 14 N. W. 14 (letters to a witness urging non-appearance; also letters urging a particular tenor of testimony).

[5] 1898, Roberson *v.* State, 40 Fla. 509, 24 So. 474 (burning a house to destroy evidence of burglary, admitted); 1903, Weightnovel *v.* State, 46 Fla. 1, 35 So. 856 (abortion); 1881, Betts *v.* State, 66 Ga. 508, 512 (murder; throwing away money taken from the deceased); 1862, Com. *v.* Hall, 4 All. Mass. 306 (swallowing a counterfeit bill when arrested on the charge of uttering counterfeit bills); 1877, Com. *v.* Wallace, 123 Mass. 400 (illegally keeping liquor with intent to sell; destruction of the liquors); 1882, Com. *v.* Daily, 133 Mass. 577 (same; intentional breaking of a bottle); 1892, Com. *v.* Sullivan, 156 Mass. 487, 31 N. E. 647 (same; destruction of liquor); 1904, Harper *v.* State, 83 Miss. 402, 35 So. 572 (hypodermic injections, to prevent the victim from telling, excluded; absurd); 1883, State *v.* Dickson, 78 Mo. 438, 448 (murder; burying the dead body in a hole, and false statements as to the cause of the deceased's disappearance, admitted); 1920, State *v.* Moss, 95 Or. 616, 188 Pac. 702 (larceny of cattle; "the mere fact that one man's brand is found upon another man's animal" is not sufficient evidence, without connecting the defendant in some way with the branding).

from the former conduct is a more restricted one (examined elsewhere, *post*, §§ 285–291). In particular, the *failure to establish an alleged alibi* is to be distinguished from the use of perjury or subornation in an unsuccessful attempt to prove the 'alibi'; the latter admits of the usual broad inference from fraud, but the former amounts to nothing more than an inability to prove the specific fact of 'alibi':[1]

1866, WELCH, J., in *Toler* v. *State*, 16 Oh. St. 585: "The defendant's case is often much weakened by an unsuccessful attempt to prove an 'alibi.' But this result happens, not because of any implied or technical admission involved in the attempt, but because of fraud and subornation of perjury manifested in the attempt. . . . In no case can the attempt be held to involve an admission of crime, nor the simple failure to establish it afford any presumption of the defendant's presence at the time and place when and where the crime was committed. . . . It can have no effect upon the question of his presence at the place charged, otherwise than by disclosing falsehood and prevarication and thus affording general evidence of guilt."

(4) An *offer of compromise* is in general inadmissible (*post*, § 1062); hence, in a criminal prosecution, an offer of money to the injured party, which might otherwise be admissible as an attempt to bribe a witness, may be inadmissible if construable merely as an offer to redress the wrong.[2]

§ 280. **Same: Fraud in Separate Litigation; Fraud by Agents.** (1) The use of fraudulent practice in a *separate litigation* has of itself no other significance than a reflection on the opponent's general character as an unscrupulous man, and is of course from that point of view inadmissible (*ante*, §§ 55, 64). But, so far as the other litigation involves substantially *the same issue or object* as the present one, a party's fraudulent conduct in the former, indicating a consciousness of the weakness of his cause, carries the same indication for the present cause, since by hypothesis the two causes are substantially the same with reference to the party's motives. On principle, then, the misconduct of the party in other litigation should be received, provided the issue involved was in effect the same, or provided the interests at stake in that and the present litigation are so united that the motive to suc-

§ 279. [1] *Accord:* 1876, Porter *v.* State, 55 Ala. 107; 1902, Tatum *v.* State, 131 Ala. 32, 31 So. 369; 1883, Kilgore *v.* State, 74 Ala. 8; 1881, People *v.* Malaspina, 57 Cal. 628; 1869, White *v.* State, 31 Ind. 262, 264 ("The fabrication of an 'alibi', like the wilful introduction of false and fabricated evidence in support of any other ground of defence, is a circumstance against the accused"; but not the mere failure to succeed in showing an 'alibi'); 1904, State *v.* Aspara, 113 La. 940, 37 So. 883 (false statements as to alibi); 1878, Turner *v.* Com., 86 Pa. 54, 73; 1898, Ford *v.* State, 101 Tenn. 454, 47 S. W. 703.

Contra: 1922, Threet *v.* State, — Ala. App. —, 91 So. 890 ("an attempt to prove any material fact in defense, followed by a failure, is a circumstance to be weighed against the party making it", whether the fact be an alibi or any other fact; unsound); 1870, State *v.* Josey, 64 N. C. 56, 59, *semble* (mere failure to prove an 'alibi' suffices).

But any inference which merely accepts the failure of evidence to deny the fact, as indicating the truth of the fact, is permissible on the principle of § 285, *post:* 1865, Gordon *v.* People, 33 N. Y. 501, 508 (inference allowable for failure to account for whereabouts); 1879, Dean's Case, 32 Gratt. Va. 912, 925 ("the failure unexplained to assert the defence of an 'alibi' when it could first be made [here, at the preliminary examination], and if true would be conclusive, is always regarded . . . as a most suspicious circumstance", indicating that the 'alibi' was false).

[2] 1906, Sanders *v.* State, 148 Ala. 603, 41 So. 466 (rape; offer of money to the woman's father).

ceed unlawfully in the present case might be supposed to be furthered by fraud in the former one.[1]

(2) Where the fraudulent act — bribery, intimidation, spoliation, or the like — has personally been committed by *an agent* or other third person, and not by the party-opponent himself, it is obvious that the act must be brought home to the party's connivance or sanction, express or implied, in order to use it as indicating any consciousness on his part of a weak cause. In thus connecting it with the party, it is to be noted, on the one hand, that no mere technical theory of agency will suffice to charge him; for it is not a question of legal liability, but of actual moral connivance. On the other hand, no less should mere technical deficiencies of proof be allowed to exonerate him; due regard to the common probabilities of experience should be paid. For example, if a witness has been suborned by B, a clerk in the defendant's bank, it is idle to argue that such a clerk has no implied authority to tamper with witnesses, and therefore that some conversation or letter of the defendant, expressly authorizing B's errand, must be proved. Why should B meddle in such fashion, except upon some hint or order from the defendant? The relation between the two, together with common experience, should suffice to admit the fact, leaving to the defendant the opportunity to exculpate himself, as he easily could if innocent of any share. The common probabilities of such cases cannot be ignored; and it is better to admit such facts in the fair certainty that an innocent party can protect himself, than to exclude them by requiring such a degree of connecting proof as practically gives a general immunity to fraud and chicanery. Most Courts exhibit an undue tenderness for technicality in dealing with such evidence, and shut their eyes, with solemn pretence, to that which every one must believe to be deserving of strong suspicion. No general rule seems to have found acceptance;[2] but the wide variety of judicial attitude may be seen in the following passages:

§ 280. [1] The precedents do not show the sanction of any general rule; the phrasing above, in its second proviso, is illustrated by the first of the ensuing cases; 1743, Craig dem. Annesley *v.* Anglesea, 17 How. St. Tr. 1217 (see quotation *ante*, § 278; Bowes, C. B., seems to have dissented); 1896, Georgia R. & B. Co. *v.* Lybend, 99 Ga. 421, 27 S. E. 794 (a false affidavit in connection with a former trial of the same cause; Atkinson, J., diss., because of the incidental admission of facts affecting character); 1899, Fuller *v.* Fuller, 108 Ga. 256, 33 S. E. 865 (attempted subornation in another case, excluded); 1899, State *v.* Seevers, 108 Ia. 738, 78 N. W. 705 (institution of a collateral prosecution against complainant to hinder present trial, admitted); 1839, Com. *v.* Sacket, 22 Pick. Mass. 394 (offer of reward, on behalf of the opponent, for his testimony in a class of cases including the present, admitted; but here the impeachment of the witness seems alone to have been in mind); 1881, Hastings *v.* Stetson, 130 Mass. 76 (attempt to bribe a juror at a former trial of the same case, admitted); 1866, State *v.* Staples, 47 N. H. 113 (an offer of a bribe to a witness for help in a series of charges including the present, admitted).

For the use of similar evidence to *impeach a witness as corrupt*, see *post*, §§ 957–963, 1040; some of these cases involved witnesses who were also parties, and they might serve as precedents under the present head.

Compare also the use of *other frauds* as evidence of *intent or plan* (*post*, §§ 333, 340, 352).

[2] The precedents seem to furnish no accepted rule or test:

ENGLAND: 1743, Craig dem. Annesley *v.* Anglesea, 17 How. St. Tr. 1217 (see quotation *supra*, § 278); 1820, The Queen's Case, 2 B. & B. 302; s. c. Queen Caroline's Trial, Linn's

1820, ABBOTT, C. J., in *The Queen's Case*, 2 B. & B. 302 (answering the question, Whether the offer of a bribe, to a person not called as a witness, by one employed as an agent to procure evidence, is admissible): "This is a lawful employment necessary in many cases, . . . and, being a lawful employment, it is to be presumed, until the contrary be shown, that the employer means and intends that his agent shall execute it by lawful means. . . . The prosecutor may, up to the very moment when the proof is offered, be wholly ignorant of the wicked act of his agent; it is no less consistent that, having been informed of it, he may have rejected it with indignation and have repudiated the proffered testimony and withholden the witness from the Court; and if he be absent from the trial, which frequently happens, it may be impossible to prove his ignorance in the one case or the propriety of his conduct in the other. . . . [Nevertheless] I am by no means prepared to say that in no case and under no circumstances appearing at a trial it might not be fit and proper for a judge to allow proof of this nature to be submitted."

1901, VANN, J., in *Nowack* v. *R. Co.*, 166 N. Y. 433, 60 N. E. 32: "If an honest man by mistake employs a dishonest one to look up witnesses for him, and the latter, through excess of zeal, resorts to bribery, although it was never thought of by his employer, it is better, for cleanliness and purity in the administration of justice, that the facts should be

ed., iii, 168, 177, 184 (offer of bribe, made by A, not a witness, to B, not a witness, A being the party's agent to procure witnesses, but no authority to offer bribes being expressly shown; excluded, because the party *may* have been wholly ignorant of it; unsound, for (1) it is possible that the party was ignorant, but it is entirely unlikely; common probability suggests connivance as the most likely explanation, and a party's bribes can otherwise be hardly ever proved; (2) repeated instances of the sort indicate a general plan to bribe, on the principle of § 343, *post*, and from that may be inferred the probable bribery of other persons actually examined as witnesses, and this circumstance, no matter who gave the bribe, would be admissible under § 962, *post;* see the argument of Mr. Wilde and Lord Erskine, at pp. 172, 178, *ubi supra*).

UNITED STATES: *Federal:* Baltimore & O. R. Co. *v.* Rambo, 8 C. C. A. 6, 59 Fed. 75, 82 (attempt at bribery by the "special agent" of the defendant, admissible);
Alabama: 1856, Martin *v.* State, 28 Ala. 71, 81 (suppression of evidence; third person's conduct, inadmissible unless a connection with the party is shown);
Arkansas: 1908, Strong *v.* State, 85 Ark. 536, 109 S. W. 536 (threats against witness for prosecution, by unknown person, admitted merely to rebut the defendant's allegation that the witness was testifying under a bias for the State, on the principle);
Illinois: 1870, Winchell *v.* Edwards, 57 Ill. 41, 48 (fabrication by a former party in interest, admitted); 1882, Chicago C. R. Co. *v.* McMahon, 103 Ill. 485, 488 (a clerk of the company offered the bribe; the solution is worked out by the doctrine of scope of employment, as making the principal responsible for malicious acts);
Indiana: 1907, Eacock *v.* State, 169 Ind. 488, 82 N. E. 1039 (procuring a witness to leave the State, by third persons with the defendant's privity, admitted);
Kentucky: 1902, Ashcraft *v.* Com., — Ky. —, 68 S. W. 847 ("that the prisoner's father, or any other person than the prisoner, had bribed or offered to bribe a witness in the case, could not be a relevant fact against the prisoner");
Louisiana: 1899, State *v.* Harris, 51 La. An. 1105, 26 So. 64 (admissions of subornation by a relative, not shown to be an agent, excluded);
Massachusetts: 1825, Com. *v.* Robbins, 3 Pick. 63 (husband's attempt to suborn the prosecutor not to testify, excluded as not made with the defendant-wife's privity); 1883, Com. *v.* Ryan, 134 Mass. 223, 225 (suppression of evidence by a prosecuting officer in a criminal case; undecided); 1888, Com. *v.* Locke, 145 Mass. 401, 14 N. E. 621 (same; destruction of liquors by the defendant's barkeeper, admitted); 1888, Com. *v.* McHugh, 147 Mass. 401, 18 N. E. 74 (same; destruction by a person present, without the defendant's objection, admitted); Com. *v.* Downey, 148 Mass. 14, 18 N. E. 584 (same; destruction of liquor by the defendant's wife, admitted); 1888, Com. *v.* Gillon, 148 Mass. 15, 18 N. E. 584 (same as Com. *v.* Downey); 1909, Com. *v.* Min Sing, 202 Mass. 121, 88 N. E. 918 (bribery of four persons, who did not in fact testify, by a police officer assisting in getting evidence, and by an interpreter used by him, excluded on the facts, no connivance of the prosecuting attorney being "suggested or suspected by the counsel for the defendant");
Michigan: 1860, Dillin *v.* People, 8 Mich. 357, 370 (attempts by accused's counsel and friends, to induce a witness' absence; "such testimony should only be allowed to go to the jury when some evidence accompanies it upon which the jury may inquire as to the prisoner's knowledge of and complicity in it"); 1903, People *v.* Salsbury, 134 Mich. 537, 96 N. W. 936 (it

shown, with the fullest opportunity for explanation, than to exclude all evidence of the evil acts upon the ground that they were not authorized; because authority may properly be inferred from the nature of the employment. In such a case all doubt should be resolved, if possible, in the interest of clean evidence and the exposure of foul practices."

§ 281. **Same: Explaining away the Suspicious Conduct.** On the general logical principle of Explanation (*ante*, § 32) the opponent may always introduce such facts as serve to explain away, on some other hypothesis, the apparent significance of the fraudulent conduct. A consciousness of the weakness of the cause is the natural inference, but not the only possible one, from such conduct; and there is nothing to prevent the admission of facts which make some other inference more plausible.[1]

must appear that the attempt to bribe was with the "consent or approval" of the party, "or at least knowledge or expectation that it had been or would be made");
Minnesota: 1896, Matthews *v.* Lumber Co., 65 Minn. 372, 67 N. W. 1008 (admissible if the agency is shown; here the person was only an officer of the law);
Mississippi: 1907, Jeffries *v.* State, 89 Miss. 643, 42 So. 801 (cloignment of the prosecutrix by the defendant's brother, excluded);
Missouri: 1878, State *v.* Rothschild, 68 Mo. 52, 54 (inducements to leave the State, made by persons not shown to be connected with defendant, excluded); 1901, State *v.* Huff, 161 Mo. 459, 61 S. W. 900 (improper attempts by a person claiming to represent the party, but not shown to be authorized, excluded); 1920, Gebhardt *v.* United R. Co., — Mo. —, 220 S. W. 677 (personal injury; attempt by plaintiff's father to suborn witnesses, admitted after evidence of conspiracy);
New York: 1901, Nowack *v.* R. Co., 166 N. Y. 433, 60 N. E. 32 (a corrupt offer by one concededly an agent to interview witnesses, admitted, the party being a corporation; Landon, Haight, and O'Brien, JJ., diss.; see quotation *supra*);
Ohio: 1883, Tullis *v.* State, 39 Oh. 200 (that money had been offered, though not by the opponent's agent, admitted);
Oklahoma: 1922, Freeman *v.* State, — Okl. Cr. —, 203 Pac. 1052 (attempt of defendant's attorney to suppress testimony, admitted);
Pennsylvania: 1876, Heslop *v.* Heslop, 82 Pa. 537 (efforts to tamper with a witness, by the defendant and her son jointly, admitted);
Texas: 1899, Luttrell *v.* State, 40 Tex. Cr. 651, 51 S. W. 930 (subornation by defendant's attorney; excluded for lack of proof of authority); 1913, Burnaman *v.* State, 70 Tex. Cr. 361, 159 S. W. 244 (corrupt offer by the accused's brother, who was also a witness, held admissible, Davidson, P. J., diss.; prior cases collected); 1915, Latham *v.* State, 75 Tex. Cr. 575, 172 S. W. 797 (erasure of the defendant's name as signed in a hotel register; the entry of it was an incriminating circumstance, and the erasure had been made since the arrest of accused, but there was no evidence to show who had erased it; admitted, one judge diss.); 1919, Porter *v.* State, 86 Tex. Cr. 23, 215 S. W. 201 (conduct of defendant's brother, showing consciousness of guilt, on arrival of the sheriff, admitted to show bias of brother as a witness; this solution is not sound; Davidson, P. J., diss.); 1920, Nader *v.* State, 86 Tex. Cr. 424, 219 S. W. 474 (murder; offer of money to the widow of the deceased, to refrain from testifying, held admissible so far as said to have been made by any person testifying for the defendant, but not by "any friends or relatives, attempted in behalf of an accused whose own connection therewith does not appear");
Vermont: 1875, Green *v.* Woodbury, 48 Vt. 5 (attempt to keep a witness away; "such acts must be the acts of the party, either directly or by authorization").

Distinguish the use of evidence of bribery or the like for the purpose of *impeaching a particular witness*, *post*, §§ 957–963; in that aspect, the witness' conduct, *e.g.* offering a bribe to another desired witness, is relevant to show his own corrupt interest or bias, and not the party's corrupt intent; hence the party's authority or connivance is immaterial, and need not be evidenced.

Compare the rulings in regard to using a *compromise by an authorized person*, *post*, § 1062.

§ **281.** [1] 1903, Sherrill *v.* State, — Ala. —, 35 So. 129 (an explanation made some time after the flight, excluded); 1859, Com. *v.* Goodwin, 14 Gray Mass. 55 (as tending to explain away his falsehoods, the defendant was not allowed to show that he had formerly acknowledged the truth in the matter; apparently too strict a ruling); 1881, Lynch *v.* Coffin, 131 Mass. 311 (fabrication of evidence; explanation allowed); 1883, Homer *v.* Everett, 91 N. Y. 641, 646 (permitting an explanation of an alleged attempt to suborn); 1903, Evans *v.* State, — Tex. Cr. —, 76 S. W. 467 (flight).

Compare the principal allowing explanation of an *admission* (*post*, § 1058) and of a *witness' prior self-contradiction* (*post*, § 1044).

§ 282. **Same: (3) Taking Precautions to remedy or prevent Injury; Conveying Property; Insuring against Risks; Offer of Compromise.** The opponent's conduct in taking precautions to prevent an apprehended injury, or to remedy one already inflicted, may sometimes indicate a consciousness of wrong, in respect either to the party's identity as the wrongdoer or to his culpability in doing the act. For example, the precautions taken by the *owner of an animal* alleged to be vicious would be some evidence of his knowledge of that viciousness;[1] the *regulations* adopted by an *employer* for the conduct of a factory or a transportation system, may be some evidence of his belief as to the standard of care required, and thus of the negligent nature of an act violating those rules;[2] the *conveyance of property*, during litigation or just prior to it, may be evidence of the transferor's consciousness that he ought to lose;[3] the procurement of an *abortion* may indicate consciousness of the procurer's paternity;[4] and other instances may well occur.[5]

§ 282. [1] 1796, Jones *v.* Perry, 2 Esp. 483 (the precaution used in tying up a dog, admitted to show defendant's knowledge that it was fierce and dangerous); 1900, Sanders *v.* O'Callaghan, 110 Ia. 574, 82 N. W. 969 (keeping a dog chained so that it would not bite is an admission of his vicious character); 1883, Montgomery *v.* Koester, 35 La. An. 1091, 1093 (similar); 1888, Brice *v.* Bauer, 108 N. Y. 428, 431, 15 N. E. 695 (similar); 1914, U. S. Briones, 28 P. I. 367, 379.

[2] 1902, Chicago & A. R. Co. *v.* Eaton, 194 Ill. 441, 62 N. E. 784 (adoption of a rule requiring flags and torpedoes in a certain exigency, held an admission "that ordinary care required the course of conduct prescribed"); 1904, Stevens *v.* Boston Elev. R. Co., 184 Mass. 476, 69 N. E. 338 ("A rule made by a corporation for the guidance of its servants in matters affecting the safety of others", and its violation, raises an implication that there was a breach of duty towards the third person "as well as towards the master who prescribed the conduct that he thought necessary or desirable for protection in such matters. Against the proprietor of a business the methods which he adopts for the protection of others are some evidence of what he thinks necessary or proper to insure their safety"; good opinion by Knowlton, C. J., citing authorities); 1920, Bilodeau *v.* Fitchburg & L. St. R. Co., 236 Mass. 526, 128 N. E. 872 (injury by street-car to person on track; Public Service Commission's rules for headlights, etc., excluded; but defendant's book of rules for operation of cars, admitted); 1921, Parks *v.* United R. Co., — Mo. —, 235 S. W. 1067 (injury by a street-car; defendant's rule requiring motormen to stop before passing another car standing, admissible); 1913, Canham *v.* Rhode Island Co., — Vt. —, 85 Atl. 1050 (collecting the cases).

Contra: 1920, Louisville & N. R. Co. *v.* Stidham's Adm'x, 187 Ky. 139, 218 S. W. 460 (death at a railroad track; defendant's rules as to keeping a lookout on locomotives, excluded).

For the use of *other persons' regulations*, or municipal *ordinances*, to evidence negligence, see *post*, § 461.

[3] *Accord:* 1904, Camsusa *v.* Coigdarripe, 11 Br. C. 177, 192 (action for breach of trust; the trustee's conveyance of his property pending suit, held a proper subject for cross-examination); 1907, Pelkey *v.* Hodgdon, 102 Me. 426, 67 Atl. 218 (mortgage of property, admitted); 1906, State *v.* Kincaid, 142 N. C. 657, 55 S. E. 647 (seduction; transfer of property to evade the result of conviction, admitted); 1882, Heneky *v.* Smith, 10 Or. 349 (transfer of land, after a shooting, admitted); 1918, Chaufty *v.* DeVries, 41 R. I. 1, 102 Atl. 612 (personal injury; defendant's transfer of property immediately afterwards, admitted; authorities collected);

Contra: 1898, Miller *v.* Dill, 149 Ind. 326, 49 N. E. 272 (mere fact of conveyance of property, not received as an admission of a debt); 1892, Jackson F. C. S. P. & Tile Co. *v.* Snyder, 93 Mich. 325, 53 N. W. 359, *semble* (that the defendant had disposed of his property pending suit, excluded); 1901, Hocks *v.* Sprangers, 113 Wis. 123, 87 N. W. 1101 (defendant's attempts to dispose of his property, excluded).

[4] 1920, Thomas *v.* Jones [1920] 2 K. B. 399 [1921] 1 K. B. 22 (bastardy; *semble*, sending for a doctor is not an admission of paternity, the woman living in the same house as defendant); 1881, McIlvain *v.* State, 80 Ind. 71 (bastardy; the fact that the defendant had, after the complainant's pregnancy, procured abortion-medicine for her, admitted); 1894, Badder *v.* Keefer, 100 Mich. 272, 273, 58 N. W. 1007 (bastardy; defendant's inquiries of a physician for what was "good to get a young lady out of a fix", admitted); 1868, Fox *v.* Stevens, 13 Minn. 252; 1903, Gatzemeyer *v.* Peterson, 68 Nebr. 832, 94 N. W. 974 (bas-

But it is plain that the prior provision of *insurance against* a certain class of *risks* can permit no such inference; first, because insurance is mainly intended to guard against inevitable injuries for which no one may be to blame; and, secondly, even so far as it is intended to cover injuries caused by the insured's culpability (*e.g.* employer's liability insurance), this affords no indication of the insured's belief as to the specific injury at issue, for to assume that it was one of the class of injuries insured against is to beg the question.[6]

An *offer to compromise* presents special distinctions, examined fully *post*, §§ 1061, 1062 (Admissions). It suffices to note here that in general an offer

tardy; defendant's offer to obtain medical aid to get rid of the child, admitted).

Contra: 1913, Bray *v.* U. S., 39 D. C. App. 600 (seduction; no authority cited); 1904, Darrell *v.* Com., — Ky. —, 82 S. W. 289 (but here because the charge was rape, and the defendant admitted the intercourse and alleged consent; no authority cited).

[5] 1911, Engel *v.* United Traction Co., 203 N. Y. 321, 96 N. E. 731 (discharge of motorman since the injury, excluded).

[6] CANADA: 1909, Hyndman *v.* Stephens, 19 Man. 187 (excluded); 1908, Longhead *v.* Collingwood Shipbuilding Co., 16 Ont. L. R. 64 ("This had been so ruled by myself and probably other judges, over and over again at nisi-prius").

UNITED STATES: *Federal:* 1920, James Stewart & Co. *v.* Newby, 4th C. C. A., 266 Fed. 287, 295 (employer's liability); *California:* 1903, Roche *v.* Llewellyn I. Co., 140 Cal. 563, 74 Pac. 147 (defendant's insurance against accidents held inadmissible to evidence negligence, and also to evidence the fact that the plaintiff was an employee of defendant and not of a third person); *Columbia* (Dist.): 1906, Capital C. Co. *v.* Holtzman, 27 D. C. App. 125, 138 (the fact of defendant's insurance against accident, excluded, except as affecting a witness' bias); *Illinois:* 1913, Mithen *v.* Jeffery, 259 Ill. 372, 102 N. E. 778 (defendant's protection by liability insurance not being admissible, questions to jurors on voir dire, intended to introduce the fact indirectly, as improper; prior Illinois cases cited); *Maine:* 1897, Sawyer *v.* Shoe Co., 90 Me. 369, 38 Atl. 311 (similar); *Massachusetts:* 1894, Anderson *v.* Duckworth, 162 Mass. 251, 38 N. E. 510 (admitting a conversation for other reasons, but cautioning against the use of this fact referred to in it); 1919, Dempsey *v.* Goldstein B. A. Co., 231 Mass. 461, 121 N. E. 429; *Minnesota:* 1899, Manley *v.* Minneap. Paint Co., 76 Minn. 169, 78 N. W. 1050 (employer's indemnity policy, not admissible as an admission of negligence); 1896, Barg *v.* Bousefield, 65 Minn. 355, 68 N. W. 45 (that defendant was insured against accidents in a particular mill, admitted solely as an admission that the employees there working, including the plaintiff, were employees of the defendant and not of a third person); 1908, Gracy *v.* Anderson, 104 Minn. 476, 116 N. W. 1116 (allowing a questioning of jurors as to insurance-interests, but not allowing the cross-examination of the defendant on this subject to affect his credibility, subject to the trial Court's discretion); *New York:* 1902, Cosselmon *v.* Dunfee, 172 N. Y. 507, 65 N. E. 494 (similar); *Oregon:* 1913, Zimmerle *v.* Childers, 67 Or. 465, 136 Pac. 319 (indemnity bond); *Texas:* 1922, Beazley *v.* Meyers, Tex. Civ. App., 238 S. W. 979 (exchange of automobiles; that defendant had received an indemnity bond from M. to cover the claim here involved, held inadmissible); *Washington:* 1913, Armstrong *v.* Yakima Hotel Co., 75 Wash. 477, 135 Pac. 232 (questions to jurors as to connection with indemnity companies, allowed; distinguishing this from questions directly intended to advise jurors that the suit was defended by an insurer; following Hoyt *v.* Independent Paving Co., 52 Wash. 672, 101 Pac. 367, and distinguishing Stratton *v.* Nichols L. Co., 39 Wash. 323, 81 Pac. 831; the distinction is futile; either the ascertainment of jurors' interest or the suppression of the fact of insurance must frankly be allowed to prevail; no compromise is worth while); *Wisconsin:* 1906, Chybowski *v.* Bucyrus Co., 127 Wis. 332, 106 N. W. 833 (offer to prove insurance, excluded); 1908, Wankowski *v.* Crivitz P. & P. Co., 137 Wis. 123, 118 N. W. 643 (counsel's remark as to insurance, held not prejudicial on the facts); 1919, Kellner *v.* Christiansen, 169 Wis. 390, 172 N. W. 796; 1920, Smith *v.* Yellow Cab. Co., 173 Wis. 33, 180 N. W. 125 (fact of defendant's insurance, excluded);

But the taking out of a policy may be an admission of *ownership*, where that is disputed (on the principle of § 283, note 5, *post*); 1904, Perkins *v.* Rice, 187 Mass. 28, 72 N. E. 323 (ownership of an elevator); 1920, Davis *v.* North Carolina S. Co., 180 N. C. 74, 104 S. E. 82.

Distinguish the use of such evidence to show a *motive* in the employer *to be negligent* or indifferent in care (*post*, § 393), or to show a *bias* in his *testimony* (*post*, § 949), or *interest* (*post*, § 969); and cases cited in § 393 (pecuniary circumstances as a motive).

to compromise, not involving an express admission of a claim or charge, is not receivable, and that the principle is equally applicable in criminal as in civil cases.

§ 283. **Same: Repairs of a Machine, Highway, or the like, after an Injury; Offers to Remedy Harm.** If machines, bridges, sidewalks, and other objects, never caused corporal injury except through the negligence of their owner, then his act of improving their condition, after the happening of an injury thereat, would indicate a belief on his part that the injury was caused by his negligence. But the assumption is plainly false; injuries may be and are constantly caused by reason of inevitable accident, and also by reason of contributory negligence of the injured person. To improve the condition of the injury-causing object is therefore to indicate a belief merely that it has been *capable of causing such an injury*, but indicates nothing more, and is equally consistent with a belief in injury by mere accident, or by contributory negligence, as well as by the owner's negligence. Mere capacity of a place or thing to cause injury is not the fact that constitutes a liability for the owner; it must be a capacity which could have been known to an owner using reasonable diligence and foresight, and a capacity to injure persons taking reasonable care in its use.

On this ground, then, namely, that the supposed inference from the act of improvement is not the plain and most probable one, such acts may be excluded.

To be sure, it may be argued that, on the general theory of Relevancy (*ante*, §§ 31, 38), it would suffice for admissibility if merely the inference was a fairly possible one,—leaving it to the opponent to argue that it was the less probable one. Theoretically, it would be perhaps difficult to deny this. But in the present instance an argument of policy has always been invoked to strengthen the case for exclusion. That argument is that the admission of such acts, even though theoretically not plainly improper, would be liable to the jury's over-emphasis, and would discourage all owners, even those who had genuinely been careful, from improving the place or thing that had caused the injury, because they would fear the evidential use of such acts to their disadvantage; and thus not only would careful owners refrain from improvements, but even careless ones, who might have deserved to have the evidence adduced against them, would by refraining from improvements subject innocent persons to the risk of the recurrence of the injury. Whatever then might be the strength of the objection to such evidence from the point of view of relevancy alone, the added considerations of policy suffice to make clear the impropriety of resorting to it. On one or another or both of these grounds have most Courts rested their reasoning: [1]

§ 283. [1] In three or four jurisdictions only is there any inclination to qualify or to repudiate this doctrine; the early contrary cases in Pennsylvania raised the question generally, and were followed in Georgia, Iowa, Kansas, and Minnesota; but since Morse *v.* R. Co., in Minnesota, and Columbia R. Co. *v.* Hawthorne, in the Federal Court, there has been little disposition to concede any force to the Pennsylvania view, and it has apparently been

1869, BRAMWELL, B., in *Hart* v. *R. Co.*, 21 L. T. R. N. S. 263: "People do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident. I think that a proposition to the contrary would be barbarous. It would be (as I have often had occasion to tell juries) to hold that, because the world gets wiser as it gets older, therefore it was foolish before."

1892, COLERIDGE, L. C. J., in *Beever* v. *Hanson*, 25 L. J. Notes of Cases 132: "Now a perfectly humane man naturally makes it physically impossible that a particular accident which has once happened can happen again, by fencing or covering, or at any rate making safe the particular thing from which it arose. That, however, is no evidence of, and

discarded in most courts where it was originally accepted:

ENGLAND: 1869, Hart *v.* R. Co., 21 L. T. R. N. S. 261 (injury by a railroad collision; subsequent improvement of tracks, excluded); 1892, Beever *v.* Hanson, 25 L. J. Notes of Cases 132 (injury on cogs of a machine; subsequent boarding of the cogs, excluded);

CANADA: 1900, Cole *v.* R. Co., 19 Ont. Pr. 104 (subsequent safeguards, excluded);

UNITED STATES: *Federal:* 1886, Osborne *v.* Detroit, 36 Fed. 36, 38 (injury at a defective sidewalk; subsequent repairs, admitted; no authority cited); 1892, Columbia R. Co. *v.* Hawthorne, 144 U. S. 202, 12 Sup. 591 (injury at a machine; subsequent placing of safeguards, excluded); 1900, Southern Pacific Co. *v.* Hall, 41 C. C. A. 50, 100 Fed. 760 (subsequent change of railroad hydrant, excluded); 1902, Choctaw O. & G. R. Co. *v.* McDade, 50 C. C. A. 591, 112 Fed. 889; s. c. on appeal, 191 U. S. 64, 24 Sup. 24 (changes of construction in a waterspout, admitted solely as affecting the measurement of its dimensions); 1904, Choctaw, O. & G. R. Co. *v.* McDade, 191 U. S. 64, 24 Sup. 24 (subsequent changes, admitted to explain away the evidence of subsequent measurements introduced by the defendant); 1904, Southern R. Co. *v.* Simpson, 131 Fed. 705, 711, 65 C. C. A. 544 (custom of whistling at a crossing since the accident, excluded); 1905, Davidson S. S. Co. *v.* U. S., 142 Fed. 315, 318, C. C. A. (subsequent precautions as to a breakwater, excluded); 1907, Armour *v.* Skene, 1st C. C. A., 153 Fed. 241 (injury by a runaway horse; defendant's discharge of the driver, a year later, not admissible); 1917, Bingham Mines Co. *v.* Bianco, 8th C. C. A., 246 Fed. 936 (death in a mine; subsequent repairs, excluded); 1918, Du Pont de Nemours & Co. *v.* Smith, 4th C. C. A., 252 Fed. 491 (personal injury; subsequent placing of protective apparatus for another purpose, held inadmissible);

Alabama: 1896, Louisville & N. R. Co. *v.* Malone, 109 Ala. 509, 20 So. 33 (the mere fact of repairs, held inadmissible; but in determining the condition at the time of the accident, the repairs may be considered); 1904, Jackson L. Co. *v.* Cunningham, 141 Ala. 206, 37 So. 445 (defective roadbed; changes of track-timbers, etc., admitted, to identify other timbers); 1904, Frierson *v.* Frazier, 142 Ala. 232, 37 So. 825 (ferry accident, subsequent placing of a rail, admitted only on cross-examination of a defendant who had testified to that subject); 1904, Davis *v.* Kornman, 141 Ala. 479, 37 So. 789 (injury at a machine; protective construction since the injury, excluded);

Arkansas: 1906, St. Louis S. W. R. Co. *v.* Plumlee, 78 Ark. 147, 95 S. W. 442 (subsequent removal of hand-car wheels for safety, excluded); 1907, Bodcaw L. Co. *v.* Ford, 82 Ark. 555, 102 S. W. 896 (subsequent repairs to a machine, excluded); 1912, St. Louis S. M. & S. R. Co. *v.* Steed, 105 Ark. 205, 151 S. W. 257 (repairs of a car, excluded);

California: 1891, Sappenfield *v.* R. Co., 91 Cal. 48, 61, 27 Pac. 590 (injury by failure of the pin in the drawhead of a car; subsequent adoption of an improved pin, excluded); 1896, Turner *v.* Hearst, 115 Cal. 394, 47 Pac. 129 (the discharge of the reporter, after the libellous publication, excluded); 1900, Limburg *v.* Glenwood L. Co., 127 Cal. 598, 60 Pac. 176 (wagon accident; subsequent remedy of defect, excluded); 1903, Kahn *v.* Triest-Rosenberg Co., 139 Cal. 340, 73 Pac. 164 (boiler-explosion; subsequent precaution, held inadmissible); 1903, Dyas *v.* Southern P. Co., 140 Cal. 296, 73 Pac. 972 (subsequent condition of a derrick structure, admitted to show its condition at the time in question, though incidentally involving a mention of the fact of repairs); 1904, Helling *v.* Schindler, 145 Cal. 303, 78 Pac. 710 (subsequent sharpening of planer's knives, excluded);

Colorado: 1874, Kansas P. R. Co. *v.* Miller, 2 Colo. 442, 468 (washing away of a bridge; subsequent different construction, admissible to show "that the first one was inadequate", but not to show negligence); 1888, Colorado Electric Co. *v.* Lubbers, 11 Colo. 505, 508, 19 Pac. 479 (injury to employee by electric shock; defendant's subsequent warning to employees as to mode of doing work, excluded); 1893, Anson *v.* Evans, 19 Colo. 274, 277, 35 Pac. 47 (subsequent renewal of ropes, excluded); Comp. St. 1921, § 2891 (railroad's appointment of appraiser for damage done by fire set, not to be evidence that fire "was set out or caused by the operating of such railroad"); 1907, Diamond Rubber Co. *v.* Harryman, 41 Colo 415, 92 Pac. 922 (subsequent removal of a pipe-arm causing the injury, excluded);

Connecticut: 1884, Nailey *v.* Carpet Co. 51 Conn. 524, 526 (injury at a door; subsequent closing-up of the door, excluded)

I protest against its being put forward as evidence of negligence. A place may be left for a hundred years unfenced, when at last some one falls down it; the owner, like a sensible and humane man, then puts up a fence; and upon this the argument is that he has been guilty of negligence, and shows that he thought the fence was necessary because he put it up. This is both unfair and unjust. It is making the good feeling and right principle of a man evidence against him."

1883, MITCHELL, J., in *Morse* v. *R. Co.*, 30 Minn. 468, 16 N. W. 358: "Such acts afford no legitimate basis for construing such an act as an admission of previous neglect of duty. A person may have exercised all the care which the law required, and yet, in the light of

1901, Waterbury *v.* Waterbury T. Co., 74 Conn. 152, 50 Atl. 3 (subsequent restoration of a railing, not received as evidence that it was the defendant's workmen who had taken it down);

Georgia: 1898, Atlanta C. S. R. Co. *v.* Bates, 103 Ga. 333, 30 S. E. 41 (street-railroad company's rule for motormen at a certain place, received as an admission of its danger); 1902, Georgia S. & F. R. Co. *v.* Cartledge, 116 Ga. 164, 42 S. E. 405 (subsequent removal of a post near a railroad track, excluded; "our faith in the correctness [of prior decisions admitting such evidence], which in the past had already been much shaken, has succumbed . . .; we do, however, distinctly announce that those decisions are now overruled");

Idaho: 1898, Giffen *v.* Lewiston, 6 Ida. 231, 55 Pac. 545 (injury at a sidewalk; subsequent repairs excluded);

Illinois: 1882, Warren *v.* Wright, 103 Ill. 298, 302 (falling of a sidewalk; the fact and mode of rebuilding afterwards, excluded); 1890, Hodges *v.* Percival, 132 Ill. 53, 56, 23 N. E. 423 (falling of an elevator; subsequent construction of an air-cushion beneath it, excluded); 1891, Marder *v.* Leary, 137 Ill. 319, 323, 26 N. E. 1093 (elevator accident; improvements after the accident, inadmissible); 1892, Weber Wagon Co. *v.* Keil, 139 Ill. 644, 650, 29 N. E. 714 (injury from a slippery floor; subsequent change of the floor, held inadmissible); 1894, Bloomington *v.* Legg, 151 Ill. 9, 15, 37 N. E. 696 (removal of the injuring article, inadmissible); 1899, Howe *v.* Medaris, 183 Ill. 288, 55 N. E. 724 (machine; subsequent repairs, excluded); 1902, Taylorville *v.* Stafford, 196 Ill. 288, 63 N. E. 624 (subsequent repairs of a sidewalk, held not receivable as an admission, but only to explain a difference of measurement;

Indiana: 1883, Lafayette *v.* Weaver, 92 Ind. 477, 479 (injury at a sidewalk; subsequent repairs excluded); 1889, Terre Haute & I. R. Co. *v.* Clem, 123 Ind. 15, 23 N. E. 965 (injury at a railroad crossing; subsequent repairs excluded; repudiating the 'obiter dictum' in Goshen *v.* England, 119 Ind. 368, 373, 21 N. E. 977); 1891, Board *v.* Pearson, 129 Ind. 456, 28 N. E. 1120 (falling of a bridge; defendant commissioners' resolution to renew the bridge, excluded); 1898, Sievers *v.* P. B. & L. Co., 151 Ind. 642, 50 N. E. 877 (subsequent change of operation of an elevator, excluded);

Iowa: 1877, Cramer *v.* Burlington, 45 Ia. 627, 629 (injury at a sidewalk; subsequent repairs excluded, but on the theory that the acts of an agent, to operate as admissions, must be contemporaneous); 1882, Hudson *v.* R. Co., 59 Ia. 581, 584, 13 N. W. 735 (same); 1883, Coates *v.* P. Co., 62 Ia. 491, 17 N. W. 760 ("The existence of a general order [to block all frogs on the line] was important only as a circumstance in the nature of an admission that without some protection frogs are dangerous to employees"); 1888, Kuhns *v.* Wisconsin I. & N. R. Co., 76 Ia. 68, 72, 40 N. W. 92 (subsequent repairs of a track, not receivable as "an admission that the track was out of repair"); 1897, Hemmi *v.* R. Co., 102 Ia. 25, 70 N. W. 746 (fire from a locomotive; subsequent repairs considered); 1900, Sylvester *v.* Casey, 110 Ia. 256, 81 N. W. 455 (sidewalk-injury; subsequent repairs, held inadmissible); 1901, Wimber *v.* R. Co., 114 Ia. 551, 87 N. W. 505 (photograph of a track, showing the subsequent removal of the guard-rail in which plaintiff's foot had been caught, held properly admitted on the facts); 1899, Beard *v.* Guild, 107 Ia. 476, 479, 78 N. W. 201 (subsequent repairs to a hack, excluded; no Iowa cases cited, but three cases from other States); 1899, Frohs *v.* Dubuque, 109 Ia. 219, 221, 86 N. W. 342 (subsequent repairs to a sidewalk; the incidental mention of it, under proper instructions, held not error); 1904, Cronk *v.* Wabash R. Co., 123 Ia. 349, 98 N. W. 884 (subsequent condition of a track, excluded); 1904, See *v.* Wabash R. Co., 123 Ia. 443, 99 N. W. 106 (repairs at a crossing, excluded); 1906, Fitter *v.* Iowa Tel. Co., 129 Ia. 610, 106 N. W. 7 (injury by telephone poles; defendant's subsequent change in method of work, excluded, in an opinion which at last seems squarely to lay down a general rule against this evidence; of the above cases, however, only Hudson *v.* R. Co. is cited); 1907, Patton *v.* Sanborn, 133 Ia. 650, 110 N. W. 1032 (sidewalk; subsequent replacement, here admitted for other purposes);

Kansas: 1873, St. Joseph & D. C. R. Co. *v.* Chase, 11 Kan. 47, 56 (fire from engine-sparks; subsequent change of the smoke-stack, admitted); 1877, Atchison T. & S. F. R. Co. *v.* Retford, 18 Kan. 245, 249 (injury at a track near a coal-chute; subsequent removal of the track, admitted); 1885, Emporia *v.* Schmidling, 33 Kan. 485, 488, 6 Pac. 893 (injury at a sidewalk; subsequent removal of the walk ad-

his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards. The more careful a person is, the more regard he has for the lives of others, the more likely he would be to do so, and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement for continued negligence."

1889, ELLIOTT, J., in *Terre Haute & I. R. Co.* v. *Clem*, 123 Ind. 18, 23 N. E. 965: "The effect of declaring such evidence competent is to inform a defendant that if he makes changes or repairs, he does it under penalty. . . . True policy and sound reason require

mitted to show it defective, but not to show notice); 1886, St. Louis & S. F. R. Co. *v.* Weaver, 35 Kan. 412, 432, 11 Pac. 408 (derailment at a washed-out culvert; subsequent erection of a larger culvert, admitted); 1920, White *v.* Berkson B. C. & S. Co., 106 Kan. 239, 187 Pac. 670 (injury at a doorway; subsequent raising of the floor-level, excluded; noting prior rulings to the contrary); 1921, Juznik *v.* Kansas C. So. R. Co., — Kan. —, 199 Pac. 90 (collision at a railroad crossing; subsequent repairs, admitted);

Kentucky: 1891, Standard Oil Co. *v.* Tierney, 92 Ky. 367, 17 S. W. 1025 (fire of oil during transit; subsequent change of mode of shipping, etc., excluded); 1897, Louisville & N. R. Co. *v.* Bowen, — Ky. —, 39 S. W. 31 (precautions at a crossing; preceding case followed); 1897, Taylor *v.* R. Co., — Ky. —, 41 S. W. 551, *semble* (repairs to an engine said to have emitted sparks, excluded); 1905, Louisville & N. R. Co. *v.* Morton, 121 Ky. 398, 89 S. W. 243 (defective method of loading logs; subsequent safe use of another method, excluded, on the present principle; erroneous on the facts, because the principal object was merely to show by experiment that there was another method which was safe); 1920, Louisville & N. R. Co. *v.* Scott's Adm'r, 188 Ky. 99, 220 S. W. 1066 (collision at a railway crossing; subsequent cutting away of bushes and earth, admitted, to identify the condition of the place);

Maryland: 1894, Washington C. & A. T. *v.* Case, 80 Md. 36, 30 Atl. 571 (defective bridge; repairs fourteen months later, excluded); 1906, Ziehm *v.* United El. L. & P. Co., 104 Md. 48, 64 Atl. 61 (subsequent change in location of wires, excluded);

Massachusetts: 1890, Menard *v.* R. Co., 150 Mass. 386, 388, 23 N. E. 214 (injury at a railroad crossing; subsequent placing of a flagman there, excluded); 1891, Shinners *v.* Merrimack Locks, 154 Mass. 168, 28 N. E. 10 (fall of a bank of earth; subsequent treatment of the bank, excluded); 1892, Downey *v.* Sawyer, 157 Mass. 418, 32 N. E. 654 (injury at a wool-feeding machine; change of apparatus not admissible to show former defect or former negligent use); 1894, McGuerty *v.* Hale, 161 Mass. 51, 53, 36 N. E. 682 (subsequent covering of gearing, excluded); 1895, Chalmers *v.* Mfg. Co., 164 Mass. 532, 42 N. E. 98 (machine; substitution of another machine, excluded); 1897, Dacey *v.* R. Co., 168 Mass. 479, 47 N. E. 418 (injury at a switch; subsequent construction of a different kind of switch, excluded); 1904, Stevens *v.* Boston Elev. R. Co., 184 Mass. 476, 69 N. E. 338 (rule as to sounding a gong);

Michigan: 1883, Fulton Works *v.* Kimball, 52 Mich. 146, 149, 17 N. W. 733 (injury at a bridge; subsequent repairs, excluded); 1891, Lombar *v.* East Tawas, 86 Mich. 14, 18, 48 N. W. 947 (injury at a sidewalk; subsequent repairs, excluded); 1892, Thompson *v.* R. Co., 91 Mich. 255, 260, 51 N. W. 995 (injury at a crossing; subsequent removal of a building, excluded); 1893, Noble *v.* R. Co., 98 Mich. 249, 57 N. W. 126 (injury by a car-horse shying; subsequent separation of horses, excluded); 1906, Moon *v.* Pere Marquette R. Co., 143 Mich. 125, 106 N. W. 715 (collision; defendant's change of rules to prevent collisions, excluded); 1916, Sykes *v.* Portland, 193 Mich. 365, 159 N. W. 325 (injury by an electric shock; subsequent change of wires, admitted on the facts);

Minnesota: the evidence was here at first thought admissible, following the Pennsylvania rulings; 1874, O'Leary *v.* Mankato, 21 Minn. 65, 68 (injury at a ditch near a bridge; subsequent covering of the ditch, admitted); 1877, Phelps *v.* Mankato, 23 Minn. 276, 279 (injury at a post in a street, subsequent removal of the post, admitted); 1881, Kelly *v.* R. Co., 28 Minn. 98, 108, 9 N. W. 588 (injury at a railroad crossing; subsequent repairs, admitted); but this view was afterwards repudiated; 1883, Morse *v.* R. Co., 30 Minn. 465, 468, 16 N. W. 358 (derailment at a switch; subsequent repairs, excluded); 1893, Day *v.* Lumber Co., 54 Minn. 523, 525, 528, 56 N. W. 243 (injury by emission of furnace-sparks; subsequent improvement in the smoke-stack, excluded); 1897, Hammargren *v.* St. Paul, 67 Minn. 6, 69 N. W. 470 (sidewalk; subsequent repairs, excluded);

Missouri: 1882, Ely *v.* R. C., 77 Mo. 34, 46 (derailment at an embankment; subsequent alterations, excluded); 1885, Hipsley *v.* R. Co., 88 Mo. 348, 354 (railroad accident; subsequent repairs of the track, excluded); 1887, Brennan *v.* St. Louis, 92 Mo. 488, 2 S. W. 481; 1891, Alcorn *v.* R. Co., 108 Mo. 90, 18 S. W. 188 (repairs to a switch-block, excluded); 1905, Bailey *v.* Kansas City, 189 Mo. 503, 87 S. W. 1182 (subsequent repairs to a sidewalk, excluded); 1904, Schermer *v.* McMahon, 108 Mo. App. 36, 82 S. W. 535 (excluded);

that men should be encouraged to improve or repair, and not be deterred from it by the fear that if they do so their acts will be construed into an admission that they had been wrongdoers. A rule which so operates as to deter men from profiting by experience and availing themselves of new information has nothing to commend it; for it is neither expedient nor just."

Nebraska: 1908, Pribbeno *v.* Chicago B. & Q. R. Co., 81 Nebr. 494, 116 N. W. 494 (subsequent change of a bridge to prevent a flood, excluded); 1917, Tankersley *v.* Lincoln Traction Co., 101 Nebr. 578, 163 N. W. 850 (subsequent boxing of electric wires, excluded); 1919, Anderson *v.* Union Pacific R. Co., 103 Nebr. 770, 174 N. W. 327 (overflow of surface water; subsequent placing of a culvert, excluded);
New Hampshire: 1892, Aldrich *v.* R. Co., 67 N. H. 250, 29 Atl. 408 (subsequent replacement of a switch by a new kind, excluded; Martin *v.* Towle, 59 N. H. 31, so far as inconsistent, overruled); 1908, Cummings *v.* Farnham, 75 N. H. 135, 71 Atl. 632 (change in method of work, not to be a basis of argument);
New Jersey: 1899, Flanigan *v.* Guggenheim S. Co., 63 N. J. L. 647, 44 Atl. 762 (injury from alleged defective ladder; ladder's destruction by defendant's employee after the injury, admissible as accounting for plaintiff's nonproduction of it and as discrediting employee's exculpatory testimony);
New York: 1871, Reed *v.* R. Co., 45 N. Y. 575 (derailment of a car; subsequent placing of new ties in the vicinity, excluded); 1874, Dougan *v.* Champlain Co., 56 N. Y. 1, 8 (falling off a steamdeck; subsequent boarding-up of the rail, excluded); 1877, Baird *v.* Daly, 68 N. Y. 547, 551 (swamping of a scow; subsequent towing of the scow at reduced speed, excluded); 1878, Dale *v.* R. Co., 73 N. Y. 468 (injury on a narrow bridge; subsequent erection of a wider one, excluded on the facts; but evidence of subsequent repairs said *obiter* to be admissible); 1878, Sewell *v.* Cohoes, 75 N. Y. 45, 54 (injury at a low bridge; subsequent removal of the bridge, held inadmissible to show negligence); 1888, Corcoran *v.* Peekskill, 108 N. Y. 151, 154, 15 N. E. 309 (injury at an area; subsequent fencing of the area, excluded); 1891, Getty *v.* Hamlin, 127 N. Y. 636, 27 N. E. 399 (bridge accident; subsequent repairs, excluded); 1907, Loughlin *v.* Brassil, 187 N. Y. 128, 79 N. E. 854 (subsequent repair of a machine, excluded);
North Carolina: 1916, McMillan *v.* Atlanta & C. Air Line R. Co., 172 N. C. 853, 90 S. E. 683 (subsequent changes in signals, excluded); 1920, Farrell *v.* Universal Garage Co., 179 N. C. 389, 102 S. E. 617 (loss of an automobile while at defendant's garage; subsequent installation of gates, excluded);
Oklahoma: 1913, Sloan *v.* Warrenburg, 36 Okl. 523, 129 Pac. 720 (fall of a telephone pole; improved method of replacing it, excluded); 1913, Shawnee G. & E. Co. *v.* Motesenbocker, — Okl. —, 135 Pac. 357 (electric wires; subsequent improvements of system, excluded); 1917, Chicago R. I. & P. R. Co. *v.* Jackson, 63 Okl. 32, 162 Pac. 823 (subsequent change of method in lifting handcars, excluded); 1920, Ferris *v.* Jones, 78 Okl. 154, 189 Pac. 527 (revised rule of behavior, posted by defendant after a boiler explosion, excluded);
Pennsylvania: 1865, Pa. R. Co. *v.* Henderson, 51 Pa. 315, 320 (injury on a railroad platform; subsequent removal of the platform, admitted); 1871, West Chester & P. R. Co. *v.* McElwee, 67 Pa. 311, 314 (injury on a railroad track; subsequent change in the track, admitted); 1873, McKee *v.* Bidwell, 74 Pa. 218 (injury at an elevator-opening; subsequent placing of a gas-light there, admitted); 1895, Lederman *v.* R. Co., 165 Pa. 118, 30 Atl. 725 (injury at railroad crossing; subsequent erection of gates there, admitted, "to rebut an inference that the gates were there at the time of the accident"); 1902, Smith *v.* Philadelphia Traction Co., 202 Pa. 54, 51 Atl. 345 (substitution of a new system of sanding tracks, held not evidence of negligence); 1902, Baron *v.* Reading Iron Co., 202 Pa. 274, 51 Atl. 979 (prior cases overruled; "in the later cases the rule has been recognized with reluctance, and doubt suggested as to its validity; the time has come when we should distinctly say that we do not approve the rule"; subsequent alteration of a railroad platform, here excluded); 1902, Elias *v.* Lancaster, 203 Pa. 638, 53 Atl. 507 (preceding case followed);
Rhode Island: 1902, McGarr *v.* National & P. W. Mills, 24 R. I. 447, 53 Atl. 320 (subsequent repairs to belting, excluded);
South Carolina: 1897, Farley *v.* C. B. & S. Co., 51 S. C. 222, 28 S. E. 193 (subsequent precautions at a machine; question undecided; McIver, C. J., for rejection); 1907, Worthy *v.* Jonesville Oil Mill, 77 S. C. 73, 57 S. E. 634; 1908, Plunkett *v.* Clearwater B. & M. Co., 80 S. C. 310, 61 S. E. 431 (subsequent repairs of machinery, excluded; "the question may be regarded as settled, under the case of Worthy *v.* Jonesville Oil Mill"); 1922, Holman *v.* Orangeburg, — S. C. —, 110 S. E. 675 (injury at a sidewalk; change of condition mentioned in order to verify the time testified to);
Tennessee: 1900, Illinois C. R. Co. *v.* Wyatt, 104 Tenn. 432, 58 S. W. 308 (subsequent repairs, excluded);
Texas: 1889, Gulf C. & S. F. R. Co. *v.* McGowan, 73 Tex. 355, 362, 11 S. W. 336 (washing out of a culvert; subsequent widening, excluded; but not as an absolute rule); 1889, Missouri P. R. Co. *v.* Hennessey, 75 Tex. 155, 158, 12 S. W. 608 (injury at a railroad crossing; subsequent lighting of the crossing,

Accordingly, it is conceded, by almost all Courts, that no act in the nature of repairs, improvement, substitution, or the like, done after the occurrence of an injury, is receivable as evidence of a consciousness, on the part of the owner, of negligence, connivance, or other culpability in causing the injury.

There may of course be other evidential purposes for which the acts in question may be relevant; in that event, they are to be received, subject to a caution restricting their use to the specific proper purpose. In particular, (*a*) when the defendant's liability depends upon whether a landlord or his tenant was in *control of premises*, or upon whether a municipal corporation was exercising authority over a highway, the acts of control of such a person are provable, and an act of repair done after the injury may chance to be such an act.[2] (*b*) Again, since the condition of a place or thing at the time of an injury may always be evidenced by showing its condition before or after that time, provided no substantial change has occurred (*post*, § 437), the description of the *condition of the place subsequent to the injury*

excluded); 1890, Gulf C. & S. F. R. Co. *v.* Compton, 75 Tex. 667, 675, 13 S. W. 667 (railroad accident; subsequent precautions, excluded);

Utah: 1896, Jenkins *v.* Irrigation Co., 13 Utah 100, 44 Pac. 829 (change in the method of using an irrigation ditch, made after suit brought, admitted to show consciousness of former negligence);

Vermont: 1834, Richardson *v.* W. & R. T. Co., 6 Vt. 496, 504 (injury by the falling of a bridge; subsequent erection of a stronger bridge, intimated to be not admissible); 1901, McGovern *v.* Smith, 73 Vt. 52, 50 Atl. 549 (injury at a crossing; defendant's maintenance of electric signals at other crossings, held no evidence of negligence in not having them at this crossing); 1901, Sias *v.* Consol. Lighting Co., 73 Vt. 35, 50 Atl. 551 (that the defendant, being the employer of the plaintiff, had furnished medical or nursing assistance, held not receivable); 1916, Desmarchier *v.* Frost, 91 Vt. 138, 99 Atl. 752 (motor-car colliding with a bridge; subsequent careful driving, excluded);

Washington: 1893, Christenson *v.* U. T. Line, 6 Wash. 75, 83, 32 Pac. 1018 (discharge of the defendant's employee causing the injury, excluded); 1894, Bell *v.* W. C. S. Co., 8 Wash. 27, 28, 35 Pac. 405 (subsequent changes in machinery, not admissible to show negligence); 1899, Carter *v.* Seattle, 21 Wash. 585, 59 Pac. 500 (sidewalk injury; subsequent repairs, excluded); 1906, Thomson *v.* Issaquah S. Co., 43 Wash. 253, 86 Pac. 588 (subsequent change here admitted to show that there was another feasible method of guarding a machine);

Wisconsin: 1871, Castello *v.* Landwehr, 28 Wis. 522, 530 (subsequent safeguards for a bridge, excluded); 1890, Lang *v.* Sanger, 76 Wis. 71, 74, 44 N. W. 1095 (planing-mill accident; subsequent repairs, excluded), 1894, Anderson *v.* R. Co., 87 Wis. 195, 202, 58 N. W. 79 (railroad accident; subsequent precaution as to speed, excluded); 1895, Jennings *v.* Albion, 90 Wis. 22, 62 N. W. 926 (subsequent repairs, excluded); 1898, Green *v.* Water Co., 101 Wis. 258, 77 N. W. 722 (supplying contaminated water; precautions after the injury, excluded); 1901, Kreider *v.* Wisconsin R. P. & P. Co., 110 Wis. 645, 86 N. W. 662 (subsequent repair of machinery, excluded); 1907, Odegard *v.* North Wis. L. Co., 130 Wis. 659, 110 N. W. 809 (sawmill; subsequent working, excluded).

[2] 1907, Diamond Rubber Co. *v.* Harryman, 41 Colo. 415, 92 Pac. 922 (sidewalk obstruction); 1883, Lafayette *v.* Weaver, 92 Ind. 477, 479 (repairs as acts of dominion by a city over a street; but the Court here practically infringes on the preceding rule by allowing this evidence even though "the city's obligation . . . were sufficiently shown by other evidence"; this is going too far); 1870, Manderschid *v.* Dubuque, 29 Ia. 73, 82 (repairs done to a highway by a city, admitted as acts of dominion); 1879, Readman *v.* Conway, 126 Mass. 374 (on the question whether landlord or tenant had the control of and the duty to repair a platform, the acts of the landlord in making repairs after the injury were admitted); 1904, Perkins *v.* Rice, 187 Mass. 28, 72 N. E. 323 (like Readman *v.* Conway); 1887, Brennan *v.* St. Louis, 92 Mo. 488, 2 S. W. 481 (acts of repair of a highway); 1905, Bailey *v.* Kansas City, 189 Mo. 503, 87 S. W. 1182 (city's repairs, not admitted where control was conceded); 1878, Sewell *v.* Cohoes, 75 N. Y. 45, 51 (injury at a low bridge built, by a coal company on land owned by the defendant city; subsequent removal of it by the defendant, admitted as an act of control involving responsibility); 1899, Siglin *v.* R. Co., 35 Or. 79, 56 Pac. 1011 (acts of repair of a fence admitted to show ownership).

may necessarily involve a mention of the fact of repairs;[3] but this use of the fact should be guarded against misuse for the forbidden purpose. (*c*) Furthermore, the failure to observe a *precaution required by law* may, if unexcused, be in itself a ground of liability, though it is sometimes dealt with in terms of a rule of evidence.[4]

For similar reasons, an *offer to an injured person* to *remedy the harm* suffered should be inadmissible. In particular, the *offer of remedial assistance*, to an injured person, by one whose apparatus or conduct has caused the injury or on whose premises the injury has occurred, ought not to be evidence of an admission of culpable causation.[5] And in general, an offer to pay money in *settlement or compromise* is as such inadmissible; here, however, the offer may be accompanied by an *admission of liability*, which is admissible, and is not excluded merely because it is involved in the offer to settle (*post*, § 1061).

§ 284. **Same: (4) Failure to Prosecute; Failure to make Complaint; Failure to explain Innocence.** (1) In general, a *delay* in instituting a prosecution,[1] or a *reluctance*, overcome only by the instigation of others,[2] is some indication — perhaps only a slight one in fact — of a consciousness of the weakness of

[3] A few instances of this occur in the citations of note 1, *supra*; *e.g.* in Alabama and Iowa. Other instances are as follows: 1907, Brunger *v.* Pioneer R. P. Co., 6 Cal. App. 691, 92 Pac. 1043 (machine); 1912, Koskoff *v.* Goldman, 86 Conn. 415, 85 Atl. 588 (admitted as contradictory of certain expert testimony); 1908, Sample *v.* Chicago B. & Q. R. Co., 233 Ill. 564, 84 N. E. 643 (subsequent filling of a hole, admitted to show error in the opponent's photograph); 1909, Consolidated G. E. L. & P. Co. *v.* State, 109 Md. 186, 72 Atl. 651 (electric wires).

So, also, a change of practice may be admissible to show that the *different method was feasible* for avoiding danger: 1919, Husbands *v.* Paducah & I. R. Co., 186 Ky. 294, 216 S. W. 840 (street obstruction; construction of a better way of access, admitted); 1919, Franklin *v.* Webber, 93 Or. 151, 182 Pac. 819 (installation of a guard, to show practicability of guarding without impairing efficiency of the machine, allowed); 1911, Fonder *v.* General Construction Co., 146 Wis. 1, 130 N. W. 884 (change in method of placing workmen at a derrick).

See, also, where the *possibility of several causes* requires such description: 1909, Place *v.* Grand Trunk R. Co., 82 Vt. 42, 71 Atl. 836.

[4] The following statute is typical: Ohio Gen. Code Annot. 1921, § 999 (failure of a factory proprietor to make alterations or safeguards ordered by inspector "shall be 'prima facie' evidence of negligence").

[5] 1921, Nage *v.* Reid, — Mass. —, 133 N. E. 98 (conduct of defendant's driver in carrying the injured child into a near-by building and then going to summon a doctor, held not admissible); 1908, Binewicz *v.* Haglin, 103 Minn. 297, 115 N. W. 271 (injury received on a building; the defendant's payment of a weekly sum to the injured man's wife, and his promises of further assistance, admitted, but treated as of little weight); 1914, Grogan *v.* Dooley, 211 N. Y. 30, 105 N. E. 135 (the plaintiff was injured while in the employ of the defendant; the mere fact that the defendant offered to pay the plaintiff's wages during disability and his physician's bill, held not admissible); 1911, Perez *v.* Guanica Centrale, 17 P. R. 927 (personal injury; furnishing medical attention, etc., is not an admission of liability); 1904, Clarke *v.* N. Y. N. H. & H. R. Co., 26 R. I. 59, 58 Atl. 245 (setting fire to timber by locomotives; that the defendant's employees aided in putting out the fire, held not to allow an inference).

§ **284**. [1] 1902, R. *v.* Higgins, 35 N. Br. 18, 24 (failure of the accused to name G. as the guilty person, until the accused testified in his own behalf at the trial, admissible); 1895, Fussell *v.* State, 93 Ga. 350, 21 S. E. 97; 1908, Louisville & N. R. Co. *v.* Varner, 129 Ga. 844, 60 S. E. 162 (failure to complain of an injury, admitted); 1907, Page *v.* Hazelton, 74 N. H. 252, 66 Atl. 1049 (failure to demand an alleged debt, though in need of money); 1918, Marsh *v.* State, 16 Ala. App. 597, 80 So. 171 (arson: citing the above text with approval).

Contra: 1902, Davis *v.* Hamilton, 88 Minn. 64, 92 N. W. 512 (libel; plaintiff's failure to sue or otherwise call defendant to account for prior similar utterances by defendant, not receivable as an admission).

For a *failure to make or file a claim*, in answer to a request, etc., as constituting an admission by silent assent, see *post*, § 1072 (admissions).

[2] 1876, Rogers *v.* People, 34 Mich. 345.

one's cause. So also is the *failure to sue* or prosecute *in the jurisdiction* or court which would naturally be sought.[3] These are but a few illustrations of a great variety of the party's conduct which may be and constantly is inquired into as affecting his belief in the merits of his cause. Like all similar circumstances, it is of course open to explanation.[4]

(2) The *failure to complain* speedily of a *rape* is universally conceded to be a damaging circumstance against the woman making the charge. There is much question here over the allowable methods of explaining away, or meeting beforehand, this inference; and as the doctrines of impeachment and rehabilitation of witnesses are mainly concerned, the subject is examined in detail elsewhere (*post*, §§ 1134–1140).

(3) The *woman's failure in travail to name her seducer*, the father of her bastard, is by old tradition in some jurisdictions receivable as a significant fact. Here, too, the doctrines about witnesses come to be concerned, and the subject is examined elsewhere (*post*, § 1141).

(4) The failure to lodge immediate *information of a robbery* is similarly a circumstance discrediting the charge; for like reasons it is dealt with in another place (*post*, § 1142).

(5) The *failure to protest one's innocence*, on being arrested for a crime — a circumstance perhaps not to be distinguished from the conduct already considered in § 273 — leads to the question whether the fact of such protestation may be shown to repel in advance the inference that might otherwise have been made; this is considered elsewhere (*post*, § 1144).

(6) The *failure to explain the possession of stolen goods*, when arrested, is a significant circumstance which gives rise to the question whether an explanation actually made at the time is receivable; this trenches upon the Hearsay rule, and with other related questions is there considered (*post*, § 1781).

§ 285. **Failure to Produce Evidence, as indicating Unfavorable Tenor of Evidence; (1) in general.** The consciousness indicated by conduct may be, not an indefinite one affecting the weakness of the cause at large, but a specific one concerning the defects of a particular element in the cause. The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure.

[3] 1894, Merritt *v.* R. Co., 162 Mass. 326, 38 N. E. 447.

Here also must be considered the scarcely distinguishable *admissions by silence* (*post*, § 1072) in failing to include a claim, to deny an opponent's claim, and the like.

[4] Cases cited *supra*, § 281; 1908, Louisville & N. R. Co. *v.* Varner, 129 Ga. 844, 60 S. E. 162 (complaint of injury uttered to B, not admitted to explain away a failure to complain to A; unsound).

But the propriety of such an inference in general is not doubted. The non-production of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its tenor is unfavorable to the party's cause. Ever since the case of the Chimney-sweeper's Jewel,[1] this has been a recognized principle:[2]

285. [1] Of course the mode of reasoning was understood and applied long before this case. An earlier record of it is found in Ward *v.* Apprice, 6 Mod. 264 (1705), quoted *post*, § 291.

[2] ENGLAND: 1754, Canning's Trial, 19 How. St. Tr. 312; 1794, Rowan's Trial, 22 How. St. Tr. 1140, 1142, 1170; 1798, Bond's Trial, 27 How. St. Tr. 605; 1835, Boyce *v.* Chapman, 2 Bing. N. C. 222 (issue as to the stealing of the plaintiff's goods by the defendant's porter; the defendant's failure to call the porter, admitted); 1839, Tracy Peerage Case, 10 Cl. & F. 154, 180, 189 (failure to produce available witnesses, taken as negativing the fact alleged); 1874, Vaughton *v.* R. Co., 12 Cox Cr. 580, 588 (similar facts); 1880, R. *v.* Labouchere, 14 Cox Cr. 419, 432, Cockburn, C. J. (libel charging that the prosecutor gained his livelihood by card-sharping; that certain co-players were not produced by the prosecutor, was allowed to be considered; "you may fairly ask yourselves whether, if these persons had not been associated with the prosecutor in the evil practices alleged, he would not have been eager to produce them as witnesses to rebut the charges made against him").

CANADA: 1878, Briggs *v.* McBride, 17 N. Br. 663, 666; 1899, Hesse *v.* St. John R. Co., 30 Can. Sup. 218, 225, 234 (personal injury).

UNITED STATES: *Federal:* 1874, Steamship Ville du Havre, 7 Ben. 328, 332, 16 Fed. 943 (failure to call a steward who had trimmed a light, to show what condition the light was in); 1880, U. S. *v.* Schindler, 18 Blatch. 227, 230, 3 Fed. 338; 1882, The Fred M. Laurence, 15 Fed. 635; 1896, Kirby *v.* Tallmadge, 160 U. S. 379, 383, 16 Sup. 349; 1897, The Joseph B. Thomas, 81 Fed. 578 (failure to produce probable eye-witnesses); 1902, *Re* Kellogg, 113 Fed. 120, 130; 1902, Sauntry *v.* U. S., 55 C. C. A. 148, 117 Fed. 132 (principle applied to proof of the value of timber cut by a trespasser); 1903, Marande *v.* R. Co., 59 C. C. A. 562, 124 Fed. 42; 1906, Grunberg *v.* U. S., 145 Fed. 81, 89, C. C. A. (failure to call employees, inference allowed); 1906, Quilichini *v.* Agostini, 2 P. R. Fed. 258, 270 (fraud of Creditors); 1907, Le Brun *v.* Romero, 3 P. R. Fed. 225, 239 (negotiable instruments);
Alaska: Comp. L. 1913, § 1505 (like Or. Laws 1920, § 799, par. 5, 6);
California: C. C. P. 1872, § 1963 (it is to be presumed "5, that evidence wilfully suppressed would be adverse, if produced", "6, that higher evidence would be adverse, from inferior being produced"); § 2061 ("6. That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict; and, therefore, 7. That if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust");
Connecticut: 1895, Throckmorton *v.* Chapman, 65 Conn. 441, 454, 32 Atl. 930 (conveyance in fraud of creditors: inference allowed for failure to call the debtor and his wife); 1921, Stuart *v.* Doyle, 95 Conn. 732, 112 Atl. 653 (collision of automobiles; defendant's failure to call two of his own employees, known only to himself held open to inference);
Columbia (Dist.): 1906, Alexander *v.* Blackman, 26 D. C. App. 541, 551 (inventor's wife and daughter, etc., in a patent case); 1919, Rappaport *v.* Capital Traction Co., 48 D. C. App. 359 (personal injury);
Florida: 1895, Leslie *v.* State, 35 Fla. 171, 17 So. 555 (failure to call a person who could have explained an alleged larceny; inference allowed);
Georgia: 1883, Mitchell *v.* State, 71 Ga. 128, 137 (homicide); 1885, Gainesville & J. S. R. Co. *v.* Wall, 75 Ga. 282 (failure of defendant to produce fireman of engine, in an action for killing a cow); 1885, Davis *v.* R. Co., 75 Ga. 645, 648 (similar); 1885, East Tennessee V. & G. R. Co. *v.* Culler, 75 Ga. 904, *semble* (similar); 1886, Savannah F. & W. R. Co. *v.* Gray, 77 Ga. 440, 442, S. E. 158 (similar; but on the facts the inference was held not proper); 1887, Harrison *v.* Kiser, 79 Ga. 588, 592, 4 S. E. 320 (employer's liability; inference denied on the facts); Code 1910, § 5749, P. C. 1910, § 1015 (a presumption arises, "where a party has evidence in his power and within his reach . . . and omits to produce it, or having more certain and satisfactory evidence in his power relies on that which is of a weaker and inferior nature", that the opponent's "charge or claim is well founded"); 1908, Georgia F. & A. R. Co. *v.* Sasser, 4 Ga. App. 276, 61 S. E. 505 (rule applied where depositions were used, as allowed in this State — see *post*, § 1415, n. 5 — though the deponents were present in court); 1922, Cook *v.* Korshak, 301 Ill. 603, 134 N. E. 49 (trover against a pawnbroker for a stolen diamond; cited more fully *post*, § 439; a Lord Mansfield was sadly needed in this case);

1722, *Armory* v. *Delamirie*, 1 Strange 505; a chimney-sweeper's boy, finding a jewel, took it to the defendant, a jeweler, for appraisal, but the defendant would not restore it. In an action of trover, in proving the value, "the Chief Justice [Pratt] directed the jury that unless the defendant did produce the jewel and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages; which they accordingly did."

1774, Lord MANSFIELD, C. J., in *Blatch* v. *Archer*, Cowp. 66: "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted."

1820, BEST, J., in *R.* v. *Burdett*, 4 B. & Ald. 122: "If the opposite party has it in his power to rebut it by evidence, and yet offers none, then we have something like an admission that the presumption is just. . . . The law does not impose impossibilities on parties; it expects that a man who has the means of knowing who may be witnesses shall call them."

1806, Mr. *W. D. Evans*, Notes to Pothier II, 128: "When weaker and less satisfactory testimony is tendered in support of a fact the nature of which will admit of elucidation from proofs of a more direct and explicit character, the same caution which rejects evidence of an inferior degree when higher evidence might be produced will awaken suspicion; and it will reasonably be supposed that a more perfect exposition of the subject would have laid open deficiencies and objections which a more obscure and uncertain representation was intended to conceal."

Indiana: 1897, Hinshaw *v.* State, 147 Ind. 334, 47 N. E. 158;
Iowa: 1883, State *v.* Rodman, 62 Ia. 456, 458, 17 N. W. 663:
Kansas: 1877, State *v.* Grebe, 17 Kan. 458;
Louisiana: 1899, Pruyn *v.* Young, 51 La. An. 320, 25 So. 124;
Maine: 1890, Freeman *v.* Fogg, 82 Me. 408, 411, 19 Atl. 907;
Massachusetts: 1860, Com. *v.* Clark, 14 Gray 367, 370, 373; 1862, Whitney *v.* Bailey, 4 All. 173, 175; 1895, Com. *v.* McCabe, 163 Mass. 102, 37 N. E. 777;
Michigan: 1875, Wallace *v.* Harris, 32 Mich. 380, 394; 1879, People *v.* Gordon, 40 Mich. 716, 720; 1882, Ruppe *v.* Steinbach, 48 Mich. 465, 466, 12 N. W. 658; 1921, Douglass *v.* Insurance Co., 215 Mich. 529, 184 N. W. 539 (failure to call defendant's agent);
Missouri: 1879, State *v.* Degonia, 69 Mo. 485, 490; 1918, State *v.* Kester, — Mo. —, 201 S. W. 62 (eye-witness of an assault);
Montana: Rev. C. 1921, § 10606, par. 5, 6 (like Cal. C. C. P. § 1963); Rev. C. 1921, § 10672, par. 7 (like Cal. C. C. P. § 2061); 1909, Sullivan *v.* Girson, 39 Mont. 274, 102 Pac. 320 (diamond ring converted by defendant, who refused to produce it);
Nebraska: 1904, Chicago, B. & O. R. Co. *v.* Krayenbuhl, 70 Nebr. 766, 98 N. W. 44 (failure to call defendant's employee; inference allowed);
New Hampshire: 1900, Hersey *v.* Hutchins, 70 N. H. 130, 46 Atl. 33;
New York: 1860, People *v.* Dyle, 21 N. Y. 578 (inferences allowable from failure to contradict an accomplice on a material point);
North Carolina: 1876, State *v.* Smallwood, 75 N. C. 104, 106 (inference allowed from failure to call a witness overhearing a confession);
Oregon: Laws 1920, § 799, par. 5, 6, § 868 (similar to Cal. C. C. P. § 1963);
Pennsylvania: 1856, Fowler *v.* Sergeant, 1 Pa. 355 (malpractice; failure to call an assisting surgeon); 1883, Rice *v.* Com., 102 Pa. 408, 411 (seduction; failure to call a person present at an alleged confession of the defendant); 1862, Steininger *v.* Hoch's Ex'r, 42 Pa. 432 (failure to call a witness to the transaction, held open to inference); 1893, Hall *v.* Vanderpool, 156 Pa. 152, 26 Atl. 1069 (title to property claimed under the plaintiff's father; the plaintiff's failure to call her father, held open to inference); 1906, Green *v.* Brooks, 215 Pa. 492, 64 Atl. 672 (title to personalty; the plaintiff's failure to call his son, who was in court, held open to inference);
Philippine Isl. C. C. P. 1901, § 334, par. 5 (like Cal. C. C. P. § 1963); 1910, U. S. *v.* Tria, 17 P. I. 303 (illegal voting);
Porto Rico: Rev. St. & C. 1911, § 1470 (like Cal. C. C. P. § 1963); § 1530 (like ib. § 2061);
Texas: 1915, Ables *v.* State, 77 Tex. Cr. 302, 177 S. W. 1161 (larceny; defendant's sister testified for defendant that she and her husband counted certain money; on cross-examination, the fact that her husband, not called, was "in jail in Oklahoma" was held admissible; Davidson, J., diss.);
West Virginia: 1892, Robinson *v.* Woodford, 37 W. Va. 377, 391, 16 S. E. 602; 1902, Garber *v.* Blatchley, 51 W. Va. 147, 41 S. E. 222; 1903, Vandervort *v.* Fouse, 52 W. Va. 214, 43 S. E. 112 (but using the entirely improper phrase that a "conclusive presumption" is raised).

1846, NELSON, J., in *Clifton* v. *U. S.*, 4 How. 247: "One of the general rules of evidence, of universal application, is that the best evidence of disputed facts must be produced of which the nature of the case will admit. This rule, speaking technically, applies only to the distinction between primary and secondary evidence; but the reason assigned for the application of the rule in a technical sense is equally applicable, and is frequently applied, to the distinction between the higher and inferior degrees of proof, speaking in a more general and enlarged sense of the terms. . . . Even in cases where the higher and inferior testimony cannot be resolved into primary and secondary evidence, technically, so as to compel the production of the higher, . . . the same presumption exists in full force and effect against the party withholding the better evidence, especially when it appears, or has been shown, to be in his possession or power, and must and should in all cases exercise no considerable influence in assigning to the inferior proof the degree of credit to which it is rightfully entitled."

1877, BREWER, J., in *State* v. *Grebe*, 17 Kan. 458 (approving an instruction that "where evidence which would refute or explain certain facts and circumstances of a grave and suspicious nature is peculiarly within the defendant's knowledge and reach, and he makes no effort to procure that testimony", an inference may arise): "It seems to us that that clause is only a recognition of a well-understood principle of human action. The instinct of self-preservation impels one in peril of the penitentiary to produce whatever testimony he may have to deliver him from such peril. Every man will do what he can to shield himself from the disgrace of a conviction of crime, and the burden of punishment. We all know this. We all expect it. Whenever then a fact is shown which tends to prove crime upon a defendant, and any explanation of such fact is in the nature of the case peculiarly within his knowledge and reach, a failure to offer an explanation must tend to create a belief that none exists. Will not a man, who can, explain that which unexplained will stamp him a criminal and consign him to the felon's cell? The criminal law furnishes in its rules more than one illustration of this principle. The possession of recently-stolen property casts upon the possessor the duty of explaining such possession. Why? Because the fact and manner of acquiring that possession are peculiarly within his knowledge and reach, and the instinct of self-preservation will compel him to give an explanation thereof consistent with his innocence, if any such explanation exists. Other illustrations might be cited, but it is scarcely necessary. The principle itself rests in the common knowledge and conviction of all."

This undoubted general principle has been frequently applied in numerous rulings, most of which throw no special light upon its doubtful features and are of little service as precedents.

§ 286. **Same: (2) Witnesses not Produced. (*a*) Witnesses Unavailable or Privileged.** There remains some uncertainty in the judicial treatment of certain conditions preliminary to the inference. It is plain that the inference is based, not on the bare fact that a particular person is not produced as a witness, but on his non-production when it would be natural to suppose that he would have been produced if the facts known by him had been favorable. What are the additional elements which justify us in saying that it would have been natural?

(*a*) In the first place, the person must be *within the power* of the party to produce. This is unquestioned.[1] This lack of power may be due to the

§ 286. [1] This is mentioned or assumed in almost all the cases, *e.g.*: 1909, Tetreault *v.* Connecticut Co., 81 Conn. 556, 71 Atl. 787 (personal injury); 1876, Schuell *v.* Toomer, 56 Ga. 168, 171; 1887, People *v.* Sharp, 107 N. Y. 427, 463, 14 N. E. 319; 1902, State *v.* Buckman, 74 Vt. 309, 52 Atl. 427.

person's absence from the jurisdiction, or to his illness, or to other circumstances.[2] In particular, it may be due to the *party's ignorance* of the whereabouts of the witness or the witness' possession of useful information,[3] or of the need of proving the facts in question;[4] for here knowledge is essential to power. Further, it may be due to the person's *disqualification* as a witness.[5] When the *witness* is *privileged*, and the privilege is *independent of the party's control*, the witness' claim of privilege renders the party unable to use his testimony;[6] but it would seem that the witness should at least have been summoned and asked, for he may waive his privilege.[7] But where the privilege is one which lies *within the control of the party* himself, it is obvious that the employment of the witness is in fact within the party's power; and thus, so far as the present principle is concerned, the inference might be justified. Nevertheless, the question arises whether thus the privilege might not be undermined and destroyed by indirection; and this depends so much on the nature of the privilege that it is better examined under the heads of the respective privileges.[8]

Of course, a rule of evidence *other than a rule of privilege* for the party is a means of excluding evidence which he is always entitled to take advantage of; and his objection to prohibited evidence (or his failure to waive an objection) cannot in any way be construed to his disadvantage,[9] since by hy-

[2] Compare the circumstances allowed in explanation: *post*, § 287.

[3] 1896, State *v.* Fitzgerald, 68 Vt. 125, 34 Atl. 429; 1902, McKinstry *v.* Collins, 74 Vt. 147, 52 Atl. 438 *semble* (the testimony must be within the peculiar knowledge of the opponent; but the objecting party must show that it was not).

[4] Compare the rule as to notice to produce documents, *post*, § 291.

Whether a *corporation* can be defaulted for its failure to cause its officer, being out of the jurisdiction, to appear as a witness, is considered in Central Grain & S. Exch. *v.* Board of Trade, C. C. A., 125 Fed 463 (1903).

[5] 1893, Graves *v.* U. S., 150 U. S. 118, 120, 14 Sup. 40 (wife alleged to have been present at a place with defendant, and desired so as to allow of identification; she was incompetent, both for and against him; failure to produce her, not admissible); 1900, Knox *v.* State, 112 Ga. 373, 37 S. E. 416 (failure to call a minor, not shown competent, who was an eye-witness, not to be considered; Little, J., diss., because the witness was competent); 1920, Carney *v.* Sheedy, 295 Ill. 78, 128 N. E. 810 (disqualified as interested survivors); 1907, Jamison *v.* U. S., 7 Ind. Terr. 661, 104 S. W. 872 (wife incompetent for or against the accused); 1862, Carter *v.* Beals, 44 N. H. 408, 413 (party's husband disqualified; but otherwise, where he is as joint defendant qualified to testify for himself); 1904, Wright *v.* Davis, 72 N. H. 448, 57 Atl. 335 (a plaintiff disqualified as a survivor to some of the facts; the defendant's counsel allowed to allude to the plaintiff's failure to testify at all, but, on the principle of § 1807, *post*, not to assert that the defendant would have waived any disqualification of the plaintiff); 1909, Rhea *v.* Terr., 3 Okl. Cr. 230, 105 Pac. 314 (the defendant's wife being qualified to testify for him, but he and she being privileged that she should not testify against him, his failure to call her was held to be open to inference).

[6] This seems not to be questioned: 1912, Com. *v.* Spencer, 212 Mass. 438, 99 N. E. 266 (wife competent but not compellable); 1915, Hopkins *v.* State, 11 Okl. Cr. 385, 146 Pac. 917 (defendant's failure to call co-defendants and a co-defendant's wife, held not properly commented on).

[7] This situation would be chiefly likely to occur for a witness privileged not to produce documents, under the principle of § 2211, *post;* see the cases as to non-production of documents, *post*, § 291.

Compare the rule permitting the use of copies of *documents in a third person's hands*, but requiring that at least a demand or service of process be first shown: *post*, §§ 1211–1213.

[8] For the privilege between *husband and wife*, see *post*, §§ 2243, 2340; for the privilege between *attorney and client*, see *post*, § 2322; for the privilege against *self-crimination*, see *post*, §§ 2272, 2273; for the privilege covering *patient's communications to a physician*, see *post*, § 2386. The effect of claiming a privilege as a *civil party* may be sufficiently examined here, in § 289, *post*.

[9] 1901, Laird *v.* Laird, 127 Mich. 24, 86 N. W. 436 (failure to waive objection to incompetency by survivorship).

pothesis the evidence is prohibited, not for his personal sake on grounds independent of the value of the evidence, as privileged evidence is (*post*, § 2196), but because of the untrustworthiness of the evidence. No doubt a party usually does take advantage of such rules because the forbidden evidence is unfavorable, and no doubt the opponent constantly seeks by innuendo to give an unfavorable meaning to such objections. But the rules of evidence could never be enforced if parties were not guaranteed free scope in calling attention to the impending violation of the rules; and it is universally assumed and understood that no inference can lawfully be urged in consequence of such objections.

§ 287. **Same: (*b*) Witnesses Prejudiced or Inferior in Value.** (*b*) In the next place, the inference is clearly not a proper one where the person in question is one who by his position would likely be so *prejudiced* against the party that the latter could not expect to obtain from him the unbiassed truth.[1] Furthermore, it seems plain that possible witnesses whose testimony is for any reason comparatively *unimportant*, or *cumulative*, or *inferior* to what is already utilized, might well be dispensed with by a party on general grounds of expense and inconvenience, without any apprehension as to the tenor of their testimony. In other words, put somewhat more strongly, there is a general limitation (depending for its application on the facts of each case) that the inference cannot fairly be drawn except from the non-production of witnesses whose testimony would be *superior* in respect to the fact to be proved. This limitation should not be enforced with any strictness; otherwise it would become practically objectionable; but on principle it is sound, and has often been recognized:[2]

§ 287. [1] 1882, State *v.* Cousins, 58 Ia. 250, 12 N. W. 281 (inference not allowable for a failure to call an alleged accomplice). This doctrine is implied in the following cases: 1895, Com. *v.* McCabe, 163 Mass. 98, 39 N. E. 777 (illegal keeping of liquor; the failure of the defendant to produce persons present at the time of the seizure, allowed as ground for inference; their probable relations to the defendant being such as to make it useless for the prosecution to call them, when it had other evidence); 1898, Fonda *v.* R. Co., 71 Minn. 438, 74 N. W. 166 (defendant's failure to call the employee who injured the plaintiff, admissible, though he was equally accessible to plaintiff); 1921, People *v.* Slover, 232 N. Y. 264, 133 N. E. 633 (murder; failure to call a convicted accomplice, not a subject for inference); 1921, Button *v.* Knight, — Vt. —, 115 Atl. 499 (alienation of affections).

[2] *Accord: Alabama:* 1852, Patten *v.* Rambo, 20 Ala. 485 (two physicians had examined a slave, whose soundness was in issue; one only was called; the failure to call the other held no ground for an inference, without a showing that his testimony would have been more valuable); 1884, Jackson *v.* State, 77 Ala. 18, 21, 25 (two eye-witnesses of a homicide; no inference allowed against the prosecution for producing one only; so also for hearers of a dying declaration); 1885, Carter *v.* Chambers, 79 Ala. 223, 224, 231 (driver of the defendant's carriage, who ran over the plaintiff, not called; a charge that the failure to produce any available witness justifies an inference, rejected); 1892, Haynes *v.* McRae, 101 Ala. 318, 13 So. 270 (purchaser from an attached debtor, suing the sheriff: failure of the plaintiff to call the debtor as to the consideration of the sale, etc., held no ground for inference); 1900, Louisville & R. N. Co. *v.* Sullivan, 128 Ala. 95, 27 So. 760 (defendant's failure to call fireman of engine; no inference allowed); *California:* 1898, People *v.* Dole, — Cal. —, 51 Pac. 945 (C. C. P. § 1963, par. 6, quoted *ante*, § 285; "weaker" held hardly a proper synonym for "inferior"); *Georgia:* 1867, Doe *v.* Stevens, 36 Ga. 463, 473 (execution of a deed denied; held that proof by witnesses to an alibi, instead of witnesses to handwriting or the like, raised no inference); *Michigan:* 1904, Cavanagh *v.* Riverside, 136 Mich. 660, 99 N. W. 876 (highway injury; failure to call the highway overseer; inference not allowed); *Porto Rico:* Rev. St. & C. 1911,

1885, STONE, C. J., in *Carter* v. *Chambers*, 79 Ala. 223, 224, 231 (disapproving a charge that "if a party has a witness within his power to produce, and fails to produce him, the presumption is fair that the witness if produced would not support the right of the party"): "Carried to its extent, it would require of a suitor that he should produce all the witnesses, no matter how numerous they might be, who knew anything of the transaction. . . . There is a rule, and a just one, that if a party has a witness possessing a peculiar knowledge of the transaction, and supposed to be favorable to him, and fails to produce such witness when he has the means of doing so, this, in the absence of all explanation, is ground of suspicion that such better-informed testimony would make against him."

§ 288. **Same: (c) Witnesses Equally Available to Both Parties.** (c) It is commonly said that no inference is allowable where the person in question is *equally available* to both parties;[1] particularly where he is actually in court;[2] though there seems to be no disposition to accept such a limitation absolutely or to enforce it strictly.[3] Yet the more logical view is that the failure to

§ 1470 (like Cal. C. C. P. § 1963): *West Virginia:* 1909, Cooper v. Upton, 60 W. Va. 618, 64 S. E. 523.

So, too, 'a fortiori', when it does not appear what the witness would testify to: 1886, State v. Starnes, 94 N. C. 973, 975.

For the rule in a few jurisdictions that *all eye-witnesses* must be called in criminal cases by the prosecution, see *post*, § 2079.

§ 288. [1] *Federal:* 1902, Erie R. Co. v. Kane, 55 C. C. A. 129, 118 Fed. 223, 239, *semble* (no inference to be drawn against either party, where the witness was an employee of defendant but was summoned by plaintiff and in court); 1913, Iowa Court R. Co. v. Hampton E. L. & P. Co., 8th C. C. A., 204 Fed. 961 (defendant's employee); *Alabama:* 1897, Nelms v. Steiner, 113 Ala. 562, 22 So. 435; 1899, Brock v. State, 123 Ala. 24, 26 So. 329 (defendant's failure to call one jointly indicated but separately tried for adultery; Tyson, J., rightly dissenting on the ground that a witness is not in truth "accessible" if, though present and compellable, he "may be so hostile to the prosecution or so connected with the defendant that his testimony would be unavailable to the State"); 1899, Coppin v. State, 123 Ala. 58, 26 So. 333 (similar); 1909, Goedan v. Austin, 161 Ala. 585, 50 So. 70; *Arkansas:* 1906, Mutual Industrial I. Co. v. Perkins, — Ark. —, 98 S. W. 709; *Connecticut:* 1858, Scovill v. Baldwin, 27 Conn. 316, 318; *Georgia:* 1900, Ray v. Camp, 110 Ga. 818, 36 S. E. 242; *Indiana:* 1882, Haymond v. Saucer, 84 Ind. 3, 13; 1887, Coleman v. State, 111 Ind. 563, 569, 13 N. E. 100; *Hawaii:* 1916, Terr. v. Meyer, 23 Haw. 121, 131 (larceny of cattle; non-production of putrefying hide, accessible to both parties; inference allowed against both, citing with approval the text above); *Iowa:* 1881, State v. Rosier, 55 Ia. 517, 8 N. W. 345; 1882, State v. Cousins, 58 Ia. 250, 12 N. W. 281; *Massachusetts:* 1913, Delaney v. Berkshire St. R. Co., 215 Mass. 591, 102 N. E. 901 (defendant's argument, calling attention to a statute allowing discovery of witnesses' names, and aiming to rebut a possible inference that the defendant had the power to produce more witnesses than the plaintiff, held properly suppressed by the trial court); *Missouri:* 1921, Atkinson v. United R. Co., 286 Mo. 634, 228 S. W. 483 (personal injury; defendant's failure to call as witness one of three physicians designated by the Court to examine the plaintiff, at the defendant's request, held not open to inference, the physician not being the defendant's witness); *New York:* 1922, Hayden v. New York R. Co., 233 N. Y. 61, 134 N. E. 826 (taxicab driver, in action by passenger against third person); *Oklahoma:* 1913, Fulsom-Morris C. & M. Co. v. Mitchell, 37 Okl. 575, 132 Pac. 1103; *Vermont:* McCabe's Will, 73 Vt. 175, 50 Atl. 804 (but here stated in modified form).

On this ground the following case apparently rests: 1887, Blackman v. State, 78 Ga. 592, 595, 3 S. E. 418 (trial having been postponed, on defendant's motion, to enable him to procure witnesses to an alibi, and the witnesses attending but not being called, no inference as to guilt was held allowable).

[2] 1891, Pollak v. Harmon, 94 Ala. 420, 10 So. 156 (purchase from an attached debtor; both grantors being in court, it was held that no suspicion or presumption could arise against the purchaser for not calling them); 1892, Bates v. Morris, 101 Ala. 282, 286, 13 So. 138 (the husband of the plaintiff, in Court and available for both parties; inference not allowed); 1895, Crawford v. State, 112 Ala. 1, 23, 21 So. 214; 1921, State v. Segar, 96 Conn. 428, 114 Atl. 389 (forgery; witness in Court and called by neither party; no inference allowable); 1885, Davis v. R. Co., 75 Ga. 645, 648.

[3] 1899, Frank Waterhouse Co. v. Rock Island A. M. Co., 38 C. C. A. 281, 97 Fed. 466 (opponent's failure to produce an employee to whom leave of absence has been granted, open to inference, the proponent having fruitlessly subpœnaed him); 1878, McAdory v. State, 62 Ala. 151, 157, 162 (presence of witnesses not called; left to trial Court's discretion); 1897, Western & A. R. Co. v. Morrison, 102 Ga. 319,

produce is open to an inference against both parties, the particular strength of the inference against either depending on the circumstances.[4] To prohibit the inference entirely is to reduce to an arbitrary rule of uniformity that which really depends on the varying significance of facts which cannot be so measured.

§ 289. **Same: (*d*) Party himself failing to Testify.** (*d*) At common law the *party-opponent in a civil case* was ordinarily privileged from taking the stand (*post*, § 2217); but he was also disqualified; and hence the question could rarely arise whether his failure to testify could justify any inference against him. But since the general abolition both of the privilege and the disqualification (*post*, §§ 2218, 577), the party has become both competent and compellable like other witnesses; and the question plainly arises whether his conduct is to be judged by the same standards of inference. This question should naturally be answered in the affirmative:

1862, APPLETON, J., in *Union Bank* v. *Stone*, 50 Me. 595, 599: "There was evidence proving or tending to prove that a notice of demand and non-payment had been given the defendant. He had been notified to produce it, and did not. He was present and not a witness. If he had never received such a notice, he knew it, and, knowing it, would be little likely to omit an opportunity of stating a fact thus conclusively in his favor. The evidence tended strongly to charge him. A word from his lips might exonerate him from all liability. . . . If notice had been received, and the defendant knew it, he might well be silent. The utterances of the truth would establish the plaintiff's claim. . . . If he were a witness, he must either state the truth or a falsehood. If he testified truly, his hope of a successful defence was at an end. The defendant does not offer his own testimony. He prefers the adverse inferences which he cannot but perceive may be drawn therefrom, to any statements he could truly give or to any explanations he might make. He prefers any inferences to giving his testimony. Why? Because no inferences can be more adverse than would be the testimony he would be obliged by the truth to give. — The fact of not testifying was obvious to the jury. . . . No Court could perceive such a fact without attaching some degree of importance — more or less — to its existence, according to the necessity of the testimony and the emergencies of the defence. No judge exists who would not, if the trial had been before him, regard this as a fact bearing on

29 S. E. 104 (failure to put on the stand a material witness, who is however produced in Court, may be commented on by counsel; Simmons, C. J., diss.); 1917, People v. Munday, 280 Ill. 32, 117 N. E. 286 (conspiracy to defraud a bank; "if those transactions . . . were as fair and clean as counsel would have you believe, why is n't William Lorimer here?" held improper because L. "was as accessible to the State as to the defense"; unsound, because L. was the chief of the defrauders, and the defendant was merely his tool); 1899, Harriman v. R. Co., 173 Mass. 28, 53 N. E. 156 (failure to call a witness available for both; left to jury to infer upon the circumstances); 1919, London v. Bay State R. Co., 231 Mass. 480, 121 N. E. 394 (personal injury; defendant's failure to call its employee, not the subject of inference); 1900, Story v. R. Co., 70 N. H. 364, 48 Atl. 288 (defendant's failure to produce the engineer who had caused the accident, held admissible, even though plaintiff might have taken his deposition; yet "ordinarily no inference can be drawn because a witness equally at the command of each party is not called"); 1905, Lambert v. Hamlin, 73 N. H. 138, 59 Atl. 941 (employee of defendant, in the city at the time of trial; inference allowed against the defendant); 1892, Arbuckle v. Templeton, 65 Vt. 205, 211, 25 Atl. 1095 (inference not allowable from a mere omission to ask a witness while on the stand, because the opponent also might have asked).

[4] 1894, Mitchell v. R. Co., 68 N. H. 96, 116, 34 Atl. 674 (fireman, conductor, and M., being within ear-shot of a train, were not called to testify as to the bell-ringing; either party held entitled to argue as to the inference from this); 1901, State v. Slamon, 73 Vt. 212, 50 Atl. 1097 (undecided); 1892, Robinson v. Woodford, 37 W. Va. 377, 392, 16 S. E. 602, *semble*.

his decision. To direct a jury to disregard it would be to direct them to disregard a fact existent, material, and probative. However much so directed, they could not fail to perceive, and, perceiving, could not avoid regarding it."

1875, AGNEW, C. J., in *Brown* v. *Schock*, 77 Pa. 471, 478: "A man of ordinary intelligence must know that his failing to appear, when he had a strong motive to appear, would be evidence against him; if he relies upon his ability to disprove the motive imputed, he takes the risk, but he leaves the effect of his conduct, as a matter of evidence for the opposite side, to go to the jury."

1922, RUGG, C. J., in *Attorney-General* v. *Pelletier*, —Mass.—, 134 N. E. 406 (removal of a district attorney for misconduct of office): "The respondent did not testify. He called no witnesses. He offered no evidence. He rested at the conclusion of the evidence introduced by the informant. There was ample evidence introduced by the informant tending to prove that the respondent was guilty of many of the charges set forth in the information. This evidence, if believed, constituted abundant proof of malfeasance and misfeasance in office arising from motives utterly unworthy of an upright man. The case shown by the evidence vitally affected the official conduct and personal character of the respondent. Instant impulse, spontaneous anxiety, and deep yearning to repel charges thus impugning his honor would be expected from an innocent man. Refusal to testify himself or to call available witnesses in his own behalf under such circumstances warrants inferences unfavorable to the respondent. It is conduct in the nature of an admission. It is evidence against him. This principle of law has long been established and constantly applied. The reason is that it is an attribute of human nature to resent such imputations. In the face of such accusations, men commonly do not remain mute but voice their denials with earnestness, if they can do so with honesty. Culpability alone seals their lips. The law simply recognizes the natural probative force of conduct contrary to that of the ordinary man of integrity."

The only dissent from this view seems to be based on that subtle sentiment of honor (scarcely capable of appreciation outside of the Southern States) which recognizes the repugnance that an honorable and sensitive man feels to placing himself in a situation where his word may be doubted by reason of his interested motives. The legislation making parties competent has not even yet been received in those communities without scruple and apprehension. Where such motives of delicacy prevail, it would obviously be unfortunate to place that party in the dilemma of either violating his scruples by testifying or of suffering discredit by remaining silent:

1877, BLECKLEY, J., in *Thompson* v. *Davitte*, 59 Ga. 472, 480: "The request [which was properly refused] was based on the assumption that because the propounder was present and competent to testify, he was bound to do so, or else suffer by his failure to offer himself as a witness in his own case. We think, on the contrary, that it is becoming, and to be commended, in a party not to testify, if he can avoid it without positive injury to the cause of truth and justice. As long as he is unheard, there should be no presumption that his silence is counseled by prudence rather than by modesty. While his case should not gain by his forbearance to testify, neither should it lose by it. Public policy forbids that a suitor should feel constrained to mount the witness-stand for no purpose but to let the jury know that he has something to say in his favor, or to show them that he can face the terrors of a cross-examination without breaking down. The encouragement of anything like competition in swearing would be too sure to breed perjury. Let those testify in their own behalf who voluntarily present themselves; but let no uncharitable imaginations light upon those who stay away, merely because they might swear if they would."

These standards of honor, however, cannot be expected to be considered in the Courts of other communities not affected by them in daily life. Moreover, it does not appear that the Southern Courts are either unanimous or rigorous in applying them. It would be generally agreed, to be sure, that the mere fact of the party's failure to testify is not of itself open to inference; it is his failure when he could be a useful and natural witness (*ante*, § 287) that is significant. But, granting this much, it is to-day conceded, except in a few Courts or in peculiar instances, that the party's conduct is to be judged by the standard of other witnesses.[1]

§ 289. [1] ENGLAND: 1831, Taylor *v.* Willans, 2 B. & Ad. 845, 856 (malicious prosecution; the prosecutor's failure to testify at the prosecution, held not inapt "under the very peculiar circumstances of this case, to raise an inference that his motive was a consciousness that he had no probable cause for instituting the prosecution"); CANADA: *Alta.:* Rules of Court 1914, No. 378 (like Ont. Rule 275); 1916, Batt *v.* Batt, 27 D. L. R. 718 (alimony; plaintiff's failure to testify, though present in court, to the facts of desertion, etc., held to "militate strongly against her"); *Manitoba:* Rev. St. 1913, c. 46, Rule 473 (like Ont. Rule 275); *New Brunswick:* 1858, Tufts *v.* Hatheway, 4 Allen N. B. 62 (trover for cordwood taken; the defendant's failure to testify as to the exact quantity, usable to infer the amount to be unfavorable to him); *Ontario:* Rules of Court 1913, No. 275 (if the opponent is within the jurisdiction and fails on notice to appear as witness at the trial, judgment may be given against him).

UNITED STATES: *Federal:* 1895, Kirby *v.* Tallmadge, 160 U. S. 379, 383, 16 Sup. 349 (failure of defendants to take the stand to explain an alleged fraudulent purchase; inference allowed); 1919, Plunkett *v.* Livingston, 7th C. C. A., 258 Fed. 889 (action for false representations in a sale);
Alabama: 1880, McGar *v.* Adams, 65 Ala. 106, 110 (agent's good faith; defendant's failure to take the stand, held not necessarily to raise an inference, where, on the facts, he might "properly rely on that which his adversary introduces when it is without contradiction"); 1911, DuBose *v.* Conner, 1 Ala. App. 456, 55 So. 432;
California: 1909, Bone *v.* Hayes, 154 Cal. 759, 99 Pac. 172 (failure to testify in explanation);
Connecticut: 1895, Throckmorton *v.* Chapman, 65 Conn. 441, 32 Atl. 930 (inference allowed; but here it did not appear that the absence was unexplained, and the circumstance hence could not be considered); 1906, Hull *v.* Douglas, 79 Conn. 266, 64 Atl. 351 (inference allowed);
Georgia: 1875, Emory *v.* Smith, 54 Ga. 273, *semble* (no inference allowed); 1877, Thompson *v.* Davitte, 59 Ga. 472, 480 (see quotation *supra*);
Illinois: 1878, Moore *v.* Wright, 90 Ill. 470 ("it was a personal privilege"; no inference allowed); 1899, Harding *v.* American Glucose Co., 182 Ill. 551, 55 N. E. 577;
Kansas: 1908, Belknap Hardware Co. *v.* Sleeth, 77 Kan. 164, 93 Pac. 580 (client's refusal in a deposition to explain, "on advice of counsel", the advice being bad, held open nevertheless to inference);
Kentucky: 1906, Reinhardt *v.* Mark's Adm'r, — Ky. —, 93 S. W. 32 (but here not applicable; because the party was disqualified);
Louisiana: 1901, Bastrop State Bank *v.* Levy, 106 La. 586, 31 So. 164;
Maryland: 1903, Safe Deposit & T. Co. *v.* Turner, 98 Md. 22, 55 Atl. 1023;
Massachusetts: 1873, McDonough *v.* O'Neil, 113 Mass. 92, 96 (inference allowed); 1884, Lynch *v.* Peabody, 137 Mass. 92 (same); 1908, Howe *v.* Howe, 199 Mass. 598, 85 N. E. 945; 1922, Attorney-General *v.* Pelletier, 240 Mass. 264, 134 N. E. 406 (proceedings on information to remove a district attorney for malfeasance, etc.; respondent's failure to testify, allowed to be used as evidence; quoted *supra*);
Michigan: 1889, Mooney *v.* Davis, 75 Mich. 188, 193, 42 N. W. 802 (party's failure to testify in denial of certain representations attributed to him, held open to inference); 1890, Cole *v.* R. Co., 81 Mich. 156, 159, 45 N. W. 983 (personal injury: plaintiff's failure to testify, held open to inference on the facts; the rule is applicable where the party "possesses knowledge of the facts in controversy unknown to others who have been called as witnesses and such facts would supply positive evidence of what would otherwise be established by inference from other facts"); 1893, Cole *v.* R. Co., 95 Mich. 77, 80 (same case on re-trial; plaintiff's failure to testify, held open to inference); 1896, Connell *v.* McNett, 109 Mich. 329, 67 N. W. 344 (silence at a former trial; inference allowed); 1905, McDonald *v.* Smith, 139 Mich. 211, 102 N. W. 668;
Mississippi: 1901, Buncklev *v.* Jones, 79 Miss. 1, 29 So. 1000 (failure of plaintiff and his father to testify, held admissible under the circumstances);
Missouri: 1919, Clapp *v.* Kenley, 277 Mo. 380, 210 S. W. 10 (party to a fraud; inference allowable); but not here, where the opponent had used the party's deposition);
New Mexico: Annot. St. 1915, § 2172 (if op-

The party's refusal to submit to a *physical examination* should likewise be open to inference, for he is virtually withholding evidence; and this is generally conceded (*post*, § 2220); the curious thing is that it is equally conceded by Courts which decline to compel a submission and thus in effect recognize a privilege.

The failure of the *accused* in a *criminal case* to take the stand ought to permit, so far as the present principle is concerned, the same inference as for witnesses and parties in general. But here the question arises whether the use of such an inference would not indirectly infringe on the privilege; and this can best be considered after examining the privilege (*post*, §§ 2272, 2273).

The following principles are distinct from the foregoing, although in their application the difference is sometimes obscured: (1) that the failure of a witness (or party) to give certain *testimony at a former trial* which he now gives amounts to a self-contradiction (*post*, § 1042); that a party's *silence during adverse testimony* may sometimes be equivalent to assent and therefore to an admission of its truth (*post*, § 1072); that a party's *failure to deny in a chancery answer* the allegations of the bill may amount to an admission; this is a question of chancery pleading.

The effect of a party's *failure to produce a document* is dealt with in § 291, *post*.

posing party fails to testify when summoned, it shall be taken "as an admission 'pro confesso' unless otherwise ordered by Court," and judge may non-suit, order a general finding, or postpone on terms);
New York: 1877, Bleecker *v.* Johnson, 69 N. Y. 309, 311 (failure to call one of the defendants, held to authorize "the jury to say whether under all the circumstances the absence of the defendant was suspicious, so as to authorize an unfavorable inference");
North Carolina: 1868, Devries *v.* Phillips, 63 N. C. 53, 55 (no inference from the mere failure to call; but there may be "according to the circumstances, as the introduction or non-introduction of any other witness might be commented on"); 1889, Goodman *v.* Sapp, 102 N. C. 477, 9 S. E. 483; 1913, Powell *v.* Strickland, 163 N. C. 393, 79 S. E. 872 (like Devries *v.* Phillips); 1921, Maney *v.* Greenwood, 182 N. C. 579, 109 S. E. 636 ("Goodman *v.* Sapp, and the later cases approving it, has settled the law in this respect, notwithstanding the varying and not altogether consistent expressions used in some of the previous decisions");
Oklahoma: 1908, Brooks *v.* Garner, 20 Okl. 236, 94 Pac. 694;
Oregon: 1912, Bonelli *v.* Burton, 61 Or. 429, 123 Pac. 37;
Porto Rico: 1911, Fajardo *v.* Tio, 17 P. R. 230 (filiation; defendant's failure to testify held open to inference; citing the above text with approval);
Tennessee: 1898, Weeks *v.* McNulty, 101 Tenn. 495, 48 S. W. 809 (inference not allowable, if his testimony could add nothing valuable); 1911, Fisher *v.* Travelers' Ins. Co., 124 Tenn. 450, 138 S. W. 316 (of course, this inference may be made equally well where there are admissions which might be explained away);
Vermont: 1906, Sears *v.* Duling, 79 Vt. 334, 65 Atl. 90;
Virginia: 1906, Aragon Coffee Co. *v.* Rogers, 105 Va. 51, 52 S. E. 843 (*bona fide* purchase of a note by the plaintiff; the plaintiff's refusal on the stand to explain his motive for the investment, held open to inference);
West Virginia: 1885, Hefflebower *v.* Dietrick, 27 W. Va. 16, 23 (inference allowed against a defendant who did not testify to facts within his knowledge; the result partly affected by the presence of a demurrer to evidence); 1906, Loverin & B. Co. *v.* Bumgarner, 59 W. Va. 46, 52 S. E. 1000 (defendant's failure to testify in denial of letters, etc., though present at the trial, held open to inference).

The same inference may apply to the *prosecuting witness* in a criminal case: 1905, Morgan *v.* State, 124 Ga. 442, 52 S. E. 748.

On *interrogatories before trial*, an answer given after provisional refusal may prevent this use of the refusal: 1913, Harrington *v.* Boston Elev. R. Co., 214 Mass. 563, 101 N. E. 977 (a corporation president's answers, as party, to interrogatories, were refused by him subject to the Court's direction, later the Court directed him to answer, and he did so; held, that the reading of the original refusal to answer was improper).

§ 290. **Same: (*e*) Sundry Distinctions: Criminal Cases; Good Character; Experts; Experiments; Depositions; Explanations; Nature of Inference; Burden of Proof; Presumptions.** (1) The principle under consideration applies equally in *criminal cases* as in civil cases, both for the prosecution as for the accused.[1] So far, however, as it affects the accused, some complications arise in discriminating the generally prohibited inference from the accused's *own failure to testify* by claiming privilege, and the permissible inference from his *failure to produce other evidence;* and such problems are therefore best considered in connection with the privilege against self-crimination (*post*, §§ 2272–2273).

One thing only (which does not involve the effect of the privilege) may be noted here, namely, that by general concession the accused's failure to produce testimony to his *good character* is not open to the inference that the character is bad; since otherwise the rule (*ante*, § 57) would be evaded that the prosecution cannot invoke and prove his bad character until he offers to prove his character good.[2] But it is incorrect to say [3] that the accused's good character *is presumed;* this inconsistently gives him the untrammelled benefit of evidence which, if he had introduced it, might have been disputed. What really happens, or ought to, is that the defendant's character is simply a non-existent quantity in the evidence; this distinction has sometimes been expressly pointed out.[4]

§ 290. [1] The cases cited *ante*, *passim*, illustrate this; in particular, the passage quoted from Mr. J. Brewer in § 284.

[2] *Federal:* 1899, McKnight *v.* U. S., 38 C. C. A. 115, 97 Fed. 208; 1906, Lowdon *v.* U. S., 79 C. C. A. 361, 149 Fed. 673, 677; 1919, Hall *v.* U. S., 4th C. C. A., 256 Fed. 748 (sedition; failure of any friend or citizen to protest on behalf of defendant, or to testify for him, held improper to mention in argument); *California:* 1898, People *v.* Gleason, 122 Cal. 370, 55 Pac. 123; 1905, People *v.* Davis, 147 Cal. 346, 81 Pac. 718; People *v.* Lee, 1 Cal. App. 169, 81 Pac. 969 (qualifying the preceding); *Illinois:* 1920, People *v.* Haas, 293 Ill. 274, 127 N. E. 740 (but erroneously stating that "the cases are not in harmony in other States"; not citing Addison *v.* People, Ill., *infra*, n. 4; citing State *v.* McAllister, Me., *infra*, but ignoring the later cases in that State); *Indiana:* 1874, Fletcher *v.* State, 49 Ind. 134; *Iowa:* 1874, State *v.* Kabrich, 39 Ia. 277; 1876, State *v.* Dockstader, 24 Ia. 436; 1878, State *v.* Northrup, 48 Ia. 584; 1910, State *v.* Dudley, 147 Ia. 645, 126 N. W. 812; *Nebraska:* 1881, Olive *v.* State, 11 Nebr. 1, 29, 7 N. W. 444; *New York:* 1840, People *v.* White, 24 Wend. 524, 546, 554, 555, 560, 584 (Walworth, Ch., diss. at 537; this case overrules People *v.* Vane, 12 Wend. 82; 1834); 1845, People *v.* Bodine, 1 Den. 281, 292, 314; *North Carolina:* 1831, State *v.* Collins, 3 Dev. 118; 1847, State *v.* O'Neal, 7 Ired. 251; 1881, State *v.* Sanders, 84 N. C. 729; *Pennsylvania:* 1895, Com. *v.* Weber, 167 Pa. 153, 31 Atl. 481; *South Carolina:* 1839, State *v.* Ford, 3 Strobh. 522, 527, *semble* (here holding that the absence of good-character evidence simply leaves the defendant without such a benefit as it might have given in persuasion, and *semble*, that this is not the same as directing an inference that the character is bad).

The only jurisdiction in which any doubt remains is *Maine:* 1844, State *v.* McAllister, 24 Me. 139, 144 (inference allowed); 1854, State *v.* Upham, 38 Me. 261 (*contra*); 1862, State *v.* Tozier, 49 Me. 404 (left undecided).

[3] As in Mullen *v.* U. S., 1901, C. C. A., 106 Fed. 892.

[4] 1914, Price *v.* U. S., 8th C. C. A., 218 Fed. 149; 1914, Chambliss *v.* U. S., 8th C. C. A., 218 Fed. 154 (Smith, J., diss.); 1919, Galbreath *v.* U. S., 6th C. C. A., 257 Fed. 648 ("Mullen *v.* U. S. . . . is not to be taken as the law, in view of Greer *v.* U. S., 245 U. S. 559"); 1918, DeMoss *v.* U. S., 8th C. C. A., 250 Fed. 87; 1918, Greer *v.* U. S., 245 U. S. 559, 38 Sup. 209 (disapproving Mullen *v.* U. S.); 1904, Gater *v.* State, 141 Ala. 10, 37 So. 692; 1916, Warren *v.* State, 197 Ala. 313, 72 So. 624; 1908, McDuffee *v.* State, 55 Fla. 125, 46 So. 721 (approving the above comment); 1911, State *v.* Gruber, 19 Ida. 692, 115 Pac. 1; 1901, Addison *v.* People, 193 Ill. 405, 62 N. E. 235; 1880, Knight *v.* State, 70 Ind. 380; 1916, State *v.* Gaunt, 98 Kan. 186, 157 Pac. 447 (homicide); 1908, People *v.* Kemmis, 153 Mich. 117, 116 N. W. 554 ("We approve and adopt the rule

Failure to *prove an attempted alibi* involves a further distinction already noted (*ante*, § 279).

(2) The *kind of witness* or evidence is immaterial. The inference, for example, may be drawn from a failure to use *expert testimony*,[5] or a failure to employ *experiments* or samples or like instructive evidence.[6] So also the *form* of the testimony withheld is immaterial; the failure to *take a deposition*, where it could have been taken,[7] or to *use a deposition*, where it has been taken by the party not using it,[8] may be equally open to inference.

(3) In any event, the party affected by the inference may of course *explain it away*[9] by showing circumstances which otherwise account for his failure to produce the witness. There should be no limitation upon this right to explain, except that the trial judge is to be satisfied that the circumstances thus offered would, in ordinary logic and experience, furnish a plausible reason for non-production.[10]

stated by Mr. W."); 1906, People *v.* Pekarz, 185 N. Y. 470, 78 N. E. 294; 1913, People *v.* Lingley, 207 N. Y. 396, 101 N. E. 170 (approving the above passage); 1914, State *v.* Knotts, 168 N. C. 173, 83 S. E. 972; 1914, Durham *v.* State, 128 Tenn. 636, 163 S. W. 447.

[5] 1898, McKim *v.* Foley, 170 Mass. 426, 49 N. E. 625 (signature denied; failure to call experts said to have been consulted, admissible, in trial Court's discretion; doctrine may be applied to expert witnesses); 1901, Vergin *v.* Saginaw, 125 Mich. 499, 84 N. W. 1075 (failure to call physicians who had examined plaintiff's injuries; inference allowed); 1901, Wilkins *v.* Flint, 128 Mich. 262, 87 N. W. 195; 1886, Bullard *v.* R. Co., 64 N. H. 27, 31, 5 Atl. 838 (personal injury; plaintiff's failure to call one of the physicians consulted by her, held to be open to inference).

[6] 1900, Concord L. & W. P. Co. *v.* Clough, 70 N. H. 627, 47 Atl. 704 (failure to show subsoil at a view). *Contra:* 1893, U. S. Sugar Refin. *v.* Allis Co., 6 C. C. A. 121, 9 U. S. App. 550, 552, 56 Fed. 786 (rule refused to be applied to a buyer's failure to test a machine as evidence of its defects). 1880, Philadelphia *v.* Rule, 93 Pa. 15, 18 (action for pavement laid; failure to present samples of work done, held not to be considered);

For a *party's* failure to submit to *corporal examination* of his injuries, see *post*, § 2220.

For the non-production or concealment of *chattels* or other *material objects*, see *post*, § 291.

[7] Compare the cases cited *ante*, *passim*, and the following: 1895, Leslie *v.* State, 35 Fla. 171, 17 So. 555 (allowing comment on a failure to take out a commission, after filing interrogatories, for an alleged witness, so material that the failure indicated that the witness was a fictitious person); 1884, Judevine *v.* Weaks, 57 Vt. 278, 281.

Contra: 1901, Lindle *v.* Com., 111 Ky. 866, 64 S. W. 986 (introducing an affidavit for continuance containing the testimony of supposed absent witnesses, and then proving that the witnesses were present and that their testimony had not been offered by the accused either on the stand or by affidavit, held improper; this ruling seems unsound);

[8] 1882, Learned *v.* Hall, 133 Mass. 417, *semble;* 1885, Com. *v.* Haskell, 140 Mass. 128, 2 N. E. 773 (on the facts, held a matter for the jury to determine); 1904, People *v.* McGarry, 136 Mich. 316, 99 N. W. 147; 1917, Staples-Howe Printing Co. *v.* Building & L. Ass'n, 36 P. I. 417.

Distinguish the question whether the taking and filing of a deposition is such an adoption of it as amounts to an *admission of its truth* (*post*, § 1075); and also the question whether the opponent may use a deposition taken but not used by the other party (*post*, § 1389).

[9] On the general principle of Explanation, *ante*, § 34.

[10] Some of the following circumstances would have sufficed to forbid in the first instance any comment on the failure to produce: 1920, Bernhardt *v.* City Suburban R. Co., — D. C. App. —, 263 Fed. 1009 (physician's refusal to testify, or to examine for the purpose of testifying, held not an adequate explanation of the failure to call him; "plaintiff had his choice, either to call the doctor or suffer the effects of the presumption"; note the error here in referring to the inference as a "presumption"); 1917, Verdi *v.* Donahue, 91 Conn. 448, 99 Atl. 1041 (departure of a possible witness to Italy); 1905, Starke *v.* State, 49 Fla. 41, 37 So. 850 (but merely the service of a subpœna does not suffice, where an attachment for non-appearance was available); 1904, Foster *v.* Atlanta R. T. Co., 119 Ga. 675, 46 S. E. 840 (but the explanation cannot include a statement that the absent alleged eyewitnesses know nothing of the affair; this ruling is over-strict); 1905, Macon R. & L. Co. *v.* Mason, 123 Ga. 773, 51 S. E. 569; 1905, Warth *v.* Lowenstein, 219 Ill. 222, 76 N. E.

(4) The *inference* (supposing the failure of evidence not to be explained away) is of course that the tenor of the specific unproduced evidence would be contrary to the party's case, or at least would not support it. In other words, the inference does not affect indefinitely the merits of the whole cause, as it does when fraudulent conduct is involved (*ante*, § 277), but affects specifically and only the evidence in question.[11]

(5) The opponent whose case is a denial of the other party's affirmation has no *burden of persuading the jury;* and, therefore, until the burden of producing evidence has shifted, he has no call to bring forward any evidence at all, and may go to the jury trusting solely to the weakness of the first party's evidence. Hence, though he takes a risk in so doing, yet his failure to produce evidence cannot at this stage afford any inference as to his lack of it; otherwise the first party would virtually be evading his legitimate burden. This distinction has been recognized [12] and is unquestionable; but it has been little developed in its application. The nature of the two burdens of proof (*post*, §§ 2485, 2487) is here involved.

(6) So, too, where by the *pleadings* or otherwise a party has *judicially admitted* a fact favoring his opponent, the opponent may rely on this admission, and his failure to produce evidence to prove the admitted fact cannot be taken as evidence against the truth of the admission.[13]

(7) In a few instances the question arises whether conduct of the present sort raised a *presumption of law*, *i.e.* shifts to the opponent the burden of

378 (why a party's brother had left the country, allowed); 1875, Com. *v.* Costello, 119 Mass. 214 (that the missing witnesses had been threatened by the prosecuting officer with prosecution for perjury on a collateral charge, and had fled the jurisdiction); 1895, Com. *v.* McCabe, 163 Mass. 98, 39 N. E. 777; 1897, Rumrill *v.* Ash, 169 Mass. 341, 47 N. E. 1017 (failure to look for probable evidence: reasons for failure, allowed); 1898, Hall *v.* Austin, 73 Minn. 134, 75 N. W. 1121 (witness' illness, admitted in explanation); 1875, Pease *v.* Smith, 61 N. Y. 477, 482 (trover for goods stolen by the defendant's porter; the plaintiff allowed to show that the porter was then in prison for the theft, as explaining why he was not produced); 1913, Curtis & G. Co. *v.* Pribyl, 38 Okl. 511, 134 Pac. 71 (subpœnas for eye-witnesses who had failed to appear, admitted, as rebutting the inference from failure to call them); 1885, Hoard *v.* State, 15 Lea (Tenn.) 321 (person not summoned, shown to be mentally incapable); 1895, Weatherford M. W. & N. R. Co. *v.* Duncan, 88 Tex. 611, 32 S. W. 878 (a showing that the witnesses had been subpœnaed but were in defendant's employ); 1874, Durgin *v.* Danville, 47 Vt. 95, 105 (a former willingness to be examined, held allowable to explain away a later refusal on the score of feebleness); 1907, Weidner *v.* Standard Life & A. Ins. Co., 132 Wis. 624, 113 N. W. 50 (illness of eye-witnesses, admitted, as explaining the failure to call them).

[11] *Accord:* 1904, Harrison *v.* Harrison, 124 Ia. 525, 100 N. W. 344 (attempting to eloign a witness); 1905, McDonald *v.* Smith, 139 Mich. 211, 102 N. W. 668; 1908, State *v.* Callahan, 76 N. J. L. 426, 69 Atl. 957.

In the following opinion the two inferences were erroneously interchanged: 1887, Allen, J., in Bleker *v.* Johnson, 69 N. Y. 309, 311, 313 (the jury, on failure of the defendant to call a co-defendant, "might take a less favorable view of the testimony on the part of the defence", but should not infer "that his testimony would be adverse to the defendants").

[12] 1897, Brill *v.* Car Co., 80 Fed. 909 (the plaintiff was bound to prove an intent in the defendant to infringe; the defendant's failure to adduce testimony to the contrary, held to be no evidence); 1908, McDuffee's Adm'x *v.* Boston & Maine R. Co., 81 Vt. 52, 69 Atl. 124, brakeman killed; the defendant resting without evidence, held that no inference could be based thereon).

Yet it is a tenable view that this doctrine is unsound. Certainly, it is artificial; and it tends to obstruct the direct getting at the truth.

[13] 1893, East Tennessee V. & G. R. Co. *v.* Kane, 92 Ga. 187, 192, 18 S. E. 18.

producing evidence. These instances are examined in dealing with the various presumptions of law (*post*, §§ 2490, 2524).

(8) Whether a *new trial* should be granted on the ground of the successful party's withholding of evidence [14] depends upon the law of new trials (*ante*, § 21), and does not involve the admissibility of evidence.

§ 291. **Same: (3) Documents or Chattels Destroyed or not Produced.** The applicability of the general principle to an opponent's non-production or suppression of *documents or chattels* has always been assumed. From the beginning of the recognition of the principle in England, some sort of inference has been acknowledged to be legitimate.[1] In this country, similarly, the tradition has been continued and steadily enforced, in numerous in-

[14] As in Standen *v.* Edwards, 1 Ves. Jr. 133.

§ **291.** ENGLAND: 1617, R. *v.* Arundel, Hob. 109 (title to a manor, claimed by the king; the title-deeds being "very vehemently suspicious to have been suppressed" on the defendants' behalf, the decree gave the land to the king "till the defendants should produce the deeds"); 1698, Anon., 1 Ld. Raym. 731 (Holt, C. J., said, "that if a man destroys a thing that is designed to be evidence against himself, a small matter will supply it"; and so "a copy sworn" was admitted to prove a note of defendant torn by him); 1705, Ward *v.* Apprice, 6 Mod. 264 ("if very slender evidence be given against him, then, if he will not produce his books, it brings a great slur upon his cause"); 1706, Sanson *v.* Rumsey, 2 Vern. 561 (the defendant, having burnt certain articles of marriage-settlement, was kept in jail "until he had consented to admit the articles were to the effect in the bill"); 1718, Young *v.* Holmes, 1 Stra. 70 (ejectment for a leasehold; "it being proved the defendant had the lease in her custody, and refusing to produce it, an attorney who had read it was allowed to give evidence of its contents; and the C. J. [Parker] said, he would intend it made against the defendant, it being in her power, if it was otherwise, to show the contrary"); 1721, Dalston *v.* Coatsworth, 1 P. Wms. 731 (bill for relief against suppression of a deed; decree made according to the contents as testified to); 1722, Armory *v.* Delamirie, 1 Stra. 505 (jewel refused to be produced by bailee; see quotation *ante*, § 285); 1749, Cookes *v.* Hellier, 1 Ves. Sr. 234 (L. C. Hardwicke: "If deeds or writings are destroyed by a party who would take benefits thereof, a court of equity 'in odium spoliatoris' will go farther than a court of law"); 1764, R. *v.* Smith, 3 Burr. 1475 (charge of trading without a license; refusal to produce it held to be sufficient evidence); 1769, Roe *v.* Harvey, 4 Burr. 2484, 2489 (the plaintiff in ejectment would not produce a deed affecting his title; L. C. J. Mansfield observed that the Court "leave the refusal to do it, after proper notice, as a strong presumption to the jury"); 1807, Clunnes *v.* Peggy, 1 Camp. 8 (sale of liquor; proof of bottles delivered, and nothing more; the jury authorized to assume that only the cheapest liquor of the plaintiff was therein); 1815, The Hunter, Dods. Adm. 480, 486 (spoliation "generates a most unfavorable presumption"); 1826, James *v.* Biou, 2 Sim. & St. 600, 606 (non-production of receipts, treated as "evidence that these receipts afford inferences unfavorable" to that party); 1826, Barker *v.* Ray, 2 Russ. 63, 73 (discussing the jurisdiction of Chancery in cases of spoliation, and negativing the existence of an absolute presumption; Lord Eldon, L. C.: "To say that if you once prove spoliation, you will take it for granted that the contents of the thing spoliated are what they have been alleged to be, may be in a great many instances going a great length"); 1841, Curlewis *v.* Corfield, 1 Q. B. 814 (non-production of a letter called for, held relevant to show its contents to be as claimed); 1854, Gray *v.* Haig, 20 Beav. 219, 224 (bill for an account; destruction by a party of documents of unsettled accounts, held ground for presuming "everything most unfavorable to him which is consistent with the rest of the facts"); 1857, Sutton *v.* Devonport, 27 L. J. C. P. 54 (to verify a description identifying a document, it was offered, but was objected to by the other party and was withdrawn; held, that the jury might infer it to be as described); 1858, Att'y-Gen'l *v.* Dean & Canons, 24 Beav. 679, 706 (suppression of a deed affecting title is "always to be taken most strongly against the persons" keeping it back);

CANADA: 1895, St. Louis *v.* R., 25 Can. Sup. 649 (account-books, etc.); 1905, Hale *v.* Leighton, 35 N. Br. 256 (a book of entries kept for both parties, but in the plaintiff's possession; the plaintiff's refusal to produce it, held open to inference, on the facts, but not merely because he did not produce the original on notice to produce).

Contra: but never law, being merely a casual aberration: 1913, Cooper *v.* Gibbons, 3 Camp. 363 (sale of goods, the defendant setting up a joint debtor; the non-production of his books by the plaintiff after notice, not allowed to be considered).

stances, where the opponent has destroyed, suppressed, or refused or failed to produce a document or chattel whose contents or quality came into issue or became relevant under the issues.[2]

[2] *Federal:* U. S. Code 1919, § 10104 (in proceedings not criminal under revenue laws, if the defendant or claimant refuses or fails to produce business documents, etc., on motion by the Government and order of the Court, and does not satisfactorily explain the refusal, "the allegations stated in the said motion shall be taken as confessed"); 1817, The Pizarro, 2 Wheat. 227, 241 (per Story, J., "a very awakening circumstance, calculated to excite the vigilance and justify the suspicions of the Court", but not always a ground for refusal of further evidence, nor, in prize cases, a substantive cause for condemnation); 1844, Hanson *v.* Eustace, 2 How. 653 ("the refusal to produce books, under a notice, lays the foundation for the introduction of secondary evidence", and "all inferences shall be taken from the inferior evidence most strongly against the party refusing to produce"; but "the refusal itself raises no presumption of suspicion or imputation to the discredit of the party, except in a case of spoliation or equivalent suppression"; "in other words, with the exception just mentioned, the refusal to produce books or papers upon notice is not an independent element from which anything can be inferred as to the point which is sought to be proved by the books or papers"; this is too narrow); 1846, Clifton *v.* U. S., 6 How. 242, 247 (falsely invoicing to defraud the customs; inference allowed where the books of account, and one of the sellers, being available, were not produced to show the prices); 1873, Chaffee *v.* U. S., 18 Wall. 516, 528, 544 (revenue frauds; defendant's failure to produce his books, held not to throw the burden of explanation upon him and to serve to remove reasonable doubt; poor opinion); 1884, U. S. *v.* Flemming, 18 Fed. 907, 916 (fraudulent gambling in stocks; inference allowable, from failure to produce account-books, that they would not help the defendant's case); 1893, Runkle *v.* Burnham, 153 U. S. 216, 225, 14 Sup. 837 (power of attorney; non-production held open to inference); 1900, Missouri K. & T. R. Co. *v.* Elliott, 42 C. C. A. 188, 102 Fed. 96, 102 (failure to produce train books, held open to inference); 1909, New York C. & H. R. R. Co. *v.* U. S., 212 U. S. 481, 29 Sup. 304 (corporation's failure to produce certain books); 1913, *In re* Herman, D. C. N. D. Ia., 207 Fed. 594 (destruction of letters by the party alleging a loan, considered); 1918, Hamburg-American S. P. Co. *v.* U. S., 2d C. C. A., 250 Fed. 747, 767 (conspiring to defraud the U. S.; comment allowed on failure to produce documents placed by defendant in the custody of the German embassy, because the papers had been voluntarily placed there and because no effort was made to obtain them for use in court); 1918, U. S. *v.* Leonhardt, U. S. Court for China, 1 Extra-terr. Cas. 790, 795 (conspiracy to defraud the government);

Alabama: 1916, Russell *v.* Bush, 196 Ala. 309, 71 So. 397 (destruction of a letter by the party when interrogated); 1917, McCleery *v.* McCleery, 200 Ala. 4, 75 So. 316 (ejectment);

California: 1866, Leese *v.* Clark, 29 Cal. 664, 668 (refusal to produce an original deed in possession; inference may be drawn, though an alleged copy is offered);

Connecticut: 1843, Merwin *v.* Ward, 15 Conn. 377 (party's books; whether an inference could be drawn from secondary evidence, undecided; but no presumption of law, and *semble*, no inference can arise where the documents would not be admissible without the opponent's consent);

Georgia: 1878, Davis *v.* Alston, 61 Ga. 225, 228 (no inference allowable, where the Court rules that the document need not be produced);

Illinois: 1846, Rector *v.* Rector, 8 Ill. 105, 119 (failure to produce bond; inference allowed as to contents); 1868, Law *v.* Woodruff, 48 Ill. 399 (breach of marriage-promise, the defendant's failure to produce the plaintiff's letters, after the defendant's answers to them had been introduced by them to the plaintiff, held not to raise a presumption, nor to require an unfavorable construction of defendant's letters); 1877, Gage *v.* Parmelee, 87 Ill. 329, 341 (partnership-settlement; inference from destruction of account-books, held on the facts not to overcome the weight of evidence); 1878, Downing *v.* Plate, 90 Ill. 268, 272 (contract and indorsements burned; inference to be drawn against the spoliator); 1882, Anderson *v.* Irwin, 101 Ill. 411, 415 (destruction of a will; slight evidence by the propounder, held to suffice); 1891, Carter *v.* Troy Lumber Co., 138 Ill. 533, 539, 28 N. E. 932 (no inference to be drawn from non-production where the document could be used only by the opponent's consent; moreover, that the production might prove "injurious to his case", other than by showing the contents and inferences from them to be as alleged, held not a proper inference from a failure to produce); 1902, Momence Stone Co. *v.* Groves, 197 Ill. 88, 64 N. E. 335 (rule applied to non-production of a book); 1919, Hudson *v.* Hudson, 287 Ill. 286, 122 N. E. 497 (grantor destroying a deed; "the presumption is that it conveyed the highest title it could convey, that is, a fee simple"); 1920, Vulcan Detinning Co. *v.* Industrial Com., 295 Ill. 141, 128 N. E. 917 (employee's death; widow's refusal to consent to autopsy after undertaker's preparation of body for burial, held not an admission);

Nevertheless, there remains much uncertainty as to the precise nature of the inference and the conditions in which it may legitimately be drawn. At the outset, certain unquestionable points may be removed from the discussion. (1) It is not here a question of a *presumption of law*, *i.e.* of a rule shifting the burden of producing evidence. There may be such a rule (*post*, § 2524), but, if it exists, it is independent of and additional to the present

Indiana: 1857, Thompson *v.* Thompson, 9 Ind. 323, 332 (presumption from spoliation, not conclusive);
Iowa: 1917, Jahn's Will, 184 Ia. 416, 165 N. W. 1021 (acknowledgment of a debt);
Louisiana: 1871, Lucas *v.* Brooks, 23 La. An. 117 (inference not drawn, upon the facts of the case from a destruction); 1884, Crescent C. I. Co. *v.* Ermann, 36 La.An. 841 (bills indicating to whom credit was given; inference drawn from non-production); 1902 Johnson *v.* Levy, 109 La. 1036, 34 So. 68 (inference allowed for certain drafts not produced); 1904, Hannay *v.* New Orleans Cotton Exch., 112 La. 998, 36 So. 831 (agency for investment; inference allowed from failure to produce contemporaneous writings);
Maine: 1829, Emerson *v.* Fisk, 6 Greenl. 200, 206 (inference allowable, but only after notice before trial to produce); 1858, Tobin *v.* Shaw, 45 Me. 331, 349 (inference allowable if notice to produce has been given); 1878, Davie *v.* Jones, 68 Me. 393 (book of accounts; inference allowable from non-production);
Massachusetts: 1830, Thayer *v.* Ins. Co., 10 Pick. 326, 329 (like Cross *v.* Bell, N. H., *infra*); 1859, Beecher *v.* Denniston, 13 Gray Mass. 354 (conversion of watch, etc.; defendant's concealment of them from plaintiff's value-witnesses held not to be without significance; opinion obscure); 1886, Berney *v.* Dinsmore, 141 Mass. 42, 5 N. E. 273 (conversion of pearl-ring; rule of Armory *v.* Delamirie, that the value of the best jewels should be presumed, repudiated; expert's testimony to value of a similar article should be taken); 1905, Com. *v.* Bond, 188 Mass. 91, 74 N. E. 293 (forgery; the defendant's destruction of the proceeds, etc., admitted); 1905, Sullivan *v.* Sullivan, 188 Mass. 380, 74 N. E. 608 (action on a note requiring an attesting witness' signature; an instruction that the defendant's destruction of it would justify the inference that it was a witnessed note, held proper on the facts);
Michigan: 1871, Page *v.* Stephens, 23 Mich. 357, 363 (books of account; inference allowable from non-production); 1893, Lambie's Estate, 97 Mich. 49, 55, 56 N. W. 223 (destruction of a second will by the parties benefited by the first is evidence that contents were as claimed against them; and is also evidence of due statutory execution); 1901, Battersbee *v.* Calkins, 128 Mich. 569, 87 N. W. 760 (inference allowed, on the facts); 1916, Barras *v.* Barras, 191 Mich. 473, 158 N. W. 192 (deed);
Mississippi: 1878, Botts *v.* Wood, 56 Miss. 136, 440 (spoliation, the inference can only be drawn when there is other evidence of contents; and it cannot be drawn when the other evidence fully supports the spoliator's claim);
Missouri: 1882, Pomeroy *v.* Benton, 77 Mo. 64, 85 (partnership account; defendant's destruction of book of account, after suit brought, held to be open to inference; careful opinion); 1886, State *v.* Chamberlain, 89 Mo. 129, 134, 1 S. W. 145 (destroying or concealing forged notes, inference allowable); 1918, Thomas *v.* Equitable Life Ass. Soc., 198 Mo. App. 533, 205 S. W. 533 ("green slip" on a policy);
New Hampshire: 1856, Cross *v.* Bell, 34 N. H. 82, 88 (the inference not to be drawn simply from the fact of non-production; but if some secondary evidence is given of the contents, "and such evidence is imperfect, vague, and uncertain, every intendment and presumption is to be made against the party who might remove all doubt by producing the higher evidence");
New Jersey: 1879, Jones *v.* Knauss, 31 N. J. Eq. 609, 614 (declaration of trust destroyed; "slight evidence of the contents of the instrument will usually in such a case be sufficient"); 1916, Rabinowitz *v.* Hawthorne, 89 N. J. L. 308, 98 Atl. 315 (plaintiff's testimony to profits lost, based on recollection, admitted; his failure to keep books of account, allowed to be considered as affecting the reliability of his testimony); 1917, Stuart *v.* Burlington Co. Farmers' Exchange, 90 N. J. L. 584, 101 Atl. 265 (crops not produced by fertilizer; plaintiff's failure to produce his books showing sales and losses, held not to require the rejection of his oral testimony);
New York: 1820, Jackson *v.* M'Vey, 18 Johns. 331, 334 (inference allowed from non-production, after some evidence of contents had been given); 1831, Life & Fire Ins. Co. *v.* Ins. Co., 7 Wend. 31, 34 (the same; the rule of this case is stated in full in Cross *v.* Bell, N. H., *supra*); 1922, McChesney's Will, Surr. Ct., 194 N. Y. Suppl. 893 (will executed in duplicate, testator and attorney each retaining one duplicate; failure to produce the duplicate retained by the testator, held to raise an inference of its revocation and therefore of the revocation of the other also);
North Carolina: 1841, Little *v.* Marsh, 2 Ired. Eq. 18, 27. *semble* (inference allowable from spoliation);

principle. Here the sole question is whether the jury may legitimately draw a certain inference from a certain fact. (2) If the document is the subject of a *privilege*, the inference is not available. This much may be here assumed, because the nature of a privilege is usually held to be incompatible with the allowance of an inference from exercising the privilege. It is true that, while at common law the privilege of an opponent in a civil case to withhold his documents was fully recognized (*post*, § 2219), nevertheless during all that time the courts permitted an inference to be drawn against the opponent refusing to produce.[3] But, since the general abolition of the privilege of a civil party, the propriety of such a ruling is removed from practical importance, and in the privileges that continue to exist the doctrine of the incompatibility of the privilege with an inference from its exercise is generally conceded.[4] (3) If a failure to produce on one's own behalf is the fact in question, it is at least necessary (under the general principle, *ante*, § 286) that the document be in the party's *power to produce;* and if a refusal to produce on behalf of the opponent is the fact relied upon, it is at least necessary that a *demand or notice* by the opponent should have been made, because

Oregon: 1895, Connell *v.* McLaughlin, 28 Or. 230, 42 Pac. 218 (there must be other evidence of contents than the inference from non-production; but speaking of it confusedly as a presumption of law); 1896, Schreyer *v.* Mills Co., 29 Or. 1, 43 Pac. 719 (inference allowable from non-production);
Pennsylvania: 1826, Wishart *v.* Downey, 15 S. & R. 77, 79 (non-production of a receipt for money; inference allowable); 1837, McReynolds *v.* McCord, 6 Watts 288, 290 (destruction by the opponent; "before he can be fixed with the character of a spoiler, the purport of the paper must be proved to have been what it is surmised to have been"); 1870, Frick *v.* Barbour, 64 Pa. 120 (assumpsit; the non-production of receipts, held open to inference);
Philippine Islands: 1909, Samson *v.* Salvilla, 12 P. I. 497, *semble* (defendant's statement of contents of a document not produced plaintiff on notice is to be accepted);
Texas: 1890, Martin Brown Co. *v.* Perrill, 77 Tex. 199, 203, 13 S. W. 975 (no inference allowable, for documents inadmissible as irrelevant);
Utah: 1898, McIntyre *v.* Mining Co., 17 Utah 213, 53 Pac. 1124 (failure to produce a contract-copy because he was not sure that it was correct and was advised by counsel that if not correct it could not be used, *semble*, evidence of its terms being as claimed by opponent);
Vermont: 1905, Patch Mfg. Co. *v.* Protection Lodge, 77 Vt. 294, 60 Atl. 74 (boycott by a union; the defendant refused to produce its books; held that "the spoliation of evidence . . . cannot supersede the necessity of other evidence"; on the facts, this ruling was too favorable);
Virginia: 1905, Neece *v.* Neece, 104 Va. 343, 51 S. E. 739 (executor's suppression and concealment of deceased's title-deeds from the family, held open to inference under the present principle);
West Virginia: 1886, Bindley *v.* Martin, 28 W. Va. 773, 789 (contract of sale; the effect of withholding documents is not "to supersede the necessity of other evidence" but to furnish "matter of inference in weighing the effect" of other evidence); 1904, Stout *v.* Sands, 56 W. Va. 663, 49 S. E. 428 (the suppression is not an admission to the fullest extent; "there must be some other evidence in support of the claim; a 'prima facie' case must be made"; here said of a contract); 1918, Chambers *v.* Spruce Lighting Co., 81 W. Va. 714, 95 S. E. 192 (loss of profits of a hotel; failure to produce the register and other books, held to prevent recovery);
Wisconsin: 1879, Dimond *v.* Henderson, 47 Wis. 172, 174 (partner's accounting; the imperfect method of keeping the accounts, held to involve this principle against the accountant).

To the above rulings are to be added the statutory provisions collected *post*, § 1859, in dealing with the right to *inspect an opponent's documents before trial;* on his failure to permit such inspection or to produce at the trial, it is provided in a majority of jurisdictions that the Court may direct the jury to presume the contents to be as the demandant alleges it to be.

[3] All the cases cited *supra*, before the middle of the 1800s, illustrate this.

[4] For the privilege against *self-crimination*, see *post*, §§ 2264, 2273; the privilege against *anti-marital testimony*, see *post*, §§ 2233, 2243; the privilege against *marital communications*, see *post*, §§ 2337, 2340; the privilege against *communications between attorney and client*, see *post*, §§ 2307, 2322.

otherwise it does not appear that the party was not willing to produce.[5] (4) Upon the same general principle, namely, that the inference can arise only where the document was one that could have been used if produced, it is obvious that the inference is not available from mere non-production where the *document* would have been *inadmissible* on the possessor's or the demandant's behalf or is declared by the Court to be unnecessary or useless.[6]

These plain postulates being removed from consideration, the real field for controversy remains, namely (*a*) whether the inference alone will *suffice* as evidence of the *contents of the document* in question, and (*b*) whether there is in this respect any difference between *spoliation* or destruction and mere *refusal* or failure to produce.

(*a*) First, then, we meet with a strong current of authority which disfavors the *sufficiency of the inference* as of itself evidence of the contents. This view is carefully stated in the following passage:[7]

1806, Mr. *W. D. Evans*, Notes to *Pothier*, II, 145: "What is said [by Lord Mansfield][8] respecting leaving the refusal as a presumption to the jury should be received with considerable qualification; for it cannot be admitted that such a presumption should stand instead of all other evidence and supply the total deficiency of proof. It is only in weighing the effect and substance of evidence in its nature adequate to the support of a fact in question that the jury can take into consideration the opportunity allowed to the opposite side of contradicting the evidence if false, or of destroying the inference from it if erroneous, and thereby conclude that evidence otherwise suspicious is true, or that an inference otherwise slight and feeble is correct."

But, after all, why is any additional evidence required as a matter of law? All that is asked is that the jury be allowed to make the inference if they are in truth convinced to that effect. What hardship or unfairness is involved to the possessor of the document? He has deliberately failed to show, by production, that which it was in his power to show, and he has by hypothesis given no other fact in explanation than the apparent one, namely, that he is afraid to submit the document to the tribunal's inspection. If there were any risk of the inference being too strong, would he not immediately make production? And does not his failure to do so indicate that the production would, in his belief, be more damaging to him than any inferences which the tribunal may make for lack of the document itself? Add to this that no one who withholds evidence can be in any sense a fit object of clemency or protection. The truth is that there is no reason why the utmost inference logically possible should not be allowable, namely, that the contents

[5] As in Emerson *v.* Fisk, Me. The rules for the time and form of notice would naturally be the same as those for the notice which permits the non-possessor to use secondary evidence (*post*, §§ 1202-1210).

[6] As in Merwin *v.* Ward, Conn.; Carter *v.* Lumber Co., Ill.; Martin Brown Co. *v.* Perrill, Tex.; compare also Davis *v.* Alston, Ga.; Law *v.* Woodruff, Ill. Compare the rule as to inference from *unanswered letters* (*post*, § 1073).

So, also, no inference can be drawn where the failure to produce was *not objected to* and the secondary evidence was used virtually by common consent: 1919, Fagan *v.* Central R. Co., 93 N. J. L. 203, 107 Atl. 422.

[7] It is less lucidly stated in Hanson *v.* Eustace, U. S., *supra*, note.

[8] In Roe *v.* Harvey, *supra*, note 1.

of the document (when desired by the opponent) are what he alleges them to be, or (when naturally a part of the possessor's case) are not what he alleges them to be.

The existence of a contrary view seems to be due chiefly to two distinct influences. One of these is the general tendency at common law to regard litigation as a sport of high quality, and to concede to the parties the right to hamper and obstruct their opponents, so far as may be, by the retention of such casual advantages (including the possession of documents) as chance has placed in their hands at the outset. This spirit has been totally discountenanced at the present day by the statutes which almost universally have given the power of forcing an opponent to disclose beforehand his documentary evidence, and have thus radically condemned the gaming theory of the British common law (*post*, §§ 1847, 1859). The other influence is due to a half-conscious recognition of a logical requirement which must be kept in mind and yet does not properly affect the general principle. For example, when A desires to prove his title by a deed from X to Y, describing the land he claims, and upon B's failure to produce it, A shows that B has burned a deed from X to Y and argues that the deed be taken to read as he alleges, and B maintains that the burned deed, though from X to Y, concerned a piece of land totally different from the land in controversy, it is obvious that A has not yet made out a case ripe for inference; he is arguing from the supposed fact that B has destroyed the deed that A wants, but it does not yet appear that the destroyed deed *was* the one which A wants. In the words of an eminent judge, " the act of a spoiler [*i.e.* of a desired document] is in its nature equipollent to a confession; but before he can be fixed with the character of a spoiler, the purport of the paper must be proved to have been what it is surmised to have been." [9] In short, we must at least avoid the fallacy of begging the question. Thus, when B denies the identity of the document spoliated or the identity of the document failed to be produced, no inference can be drawn until the jury find the fact against B's denial, and obviously this cannot be done until some evidence of this identity has been introduced by A. It is this consideration of caution, this logical requirement, which seems to account partly for the rule as laid down by some Courts that some evidence of the contents of the document must be introduced as a preliminary to the use of the inference.[10]

Keeping in mind, then, the object of the requirement, the rule might correctly be stated as follows: The failure or refusal to produce a relevant document, or the destruction of it, is evidence from which alone its contents may be inferred to be unfavorable to the possessor, *provided the opponent, when the identity of the document is disputed, first introduces some evidence tending to show that the document actually destroyed or withheld is the one* as to whose con-

[9] 1837, McReynolds *v.* McCord, 6 Watts 288, 290 (the opponent had destroyed a paper obtained from the plaintiff's witness).

[10] The question cannot usually arise for a refusal to produce; for a refusal is usually made upon a specific demand and thus the identity of the document is likely to be apparent.

tents it is desired to draw an inference. In applying this rule, care should be taken not to require anything like specific details of contents, but merely such evidence as goes to general marks of identity.

(*b*) In answering the preceding question, the second one has also been answered. There is no distinction, in the present connection, between *spoliation* and *non-production*. If the latter admits of the inference, certainly the former does also. But so far as spoliation or suppression partakes of the nature of a *fraud*, it is open to the larger inference already examined (*ante*, § 278), namely, a consciousness of the weakness of the whole case. In that respect it differs, of course, from a mere withholding of the document. It is in respect of an inference to the contents of the document that there is no difference between the two acts.[11]

Certain discriminations of other principles remain to be noticed. (1) The failure to produce a certain kind of document sometimes affords an inference of the *document's non-existence*,[12] and in various classes of cases a statutory rule of this sort has been created.[13] These rules, however, seem after all to be no more than an indirect method of placing upon the defendant in a criminal case the burden of producing evidence (*post*, § 2511); for while leaving on the prosecution the burden of proving that the defendant has not a license or certificate (as the case may be), the fact of his failure to produce one is made sufficient evidence of non-possession, *i.e.* in effect he must prove that he has it and this proof he must make by production. Had the burden fallen originally on the defendant of pleading and proving his license (as it naturally would have fallen), such statutes would not have been necessary. (2) Whether the non-production of a *self-criminating document* may be the subject of an inference is considered under the head of the privilege against self-crimination (*post*, § 2264). (3) The opponent's refusal to produce may serve as a ground for permitting the use of a *copy or other secondary evidence*, under other rules (*post*, §§ 1199–1210). (4) The effect of spoliation as evidence, not merely of the contents, but also of the *due execution* of the document, is more conveniently noticed elsewhere (*post*, § 2132).

§ 292. **Silence, as equivalent to an Admission.** Silence, when the assertion of another person would naturally call for a dissent if it were untrue, may be equivalent to an assent to the assertion. This, however, fixes the party, by adoption, with the other person's assertion, and thus it ceases to be a question of conduct-evidence, and involves a genuine admission in express words. For that reason it is dealt with under the head of Admissions (*post*, §§ 1071–1072).

[11] In the following case, this distinction was not noticed; 1921, Eno's Will, Sup. App. Div., 187 N. Y. Suppl. 757, 779 (destruction of testator's papers by executor; no other evidence of contents being offered, no inference was allowed; unsound).

[12] 1845, State *v.* Simons, 17 N. H. 83, 88 (illegal liquor-selling; non-possession of a license inferable from non-production of it).

[13] There are scores of such statutes, all told; the following are examples: Mass. Gen. L. 1920, c. 149, § 94 (failure to produce certificate of minor's proper age for employment, evidence of illegal employment); N. Y. Cons. L. 1909, Gen. Business, § 33 (refusal to produce peddler's license on demand, evidence of non-possession).

§ 293. **Conduct, as evidence of Consciousness of Innocence (Accused's Voluntary Surrender, Refusal to Escape, Demeanor, etc.).** If guilt leaves the psychological mark which we term "consciousness of guilt", and if this is available as evidence (*ante*, § 273), then the absence of that mark (which for want of a better term may be spoken of as "consciousness of innocence") is some indication of the absence of guilt, *i.e.* of not having done the deed charged. No Court seems to repudiate this proposition (*ante*, § 174); but the tendency to reject evidence of a *consciousness of innocence* is rather due to a distrust of the inference from conduct to that consciousness, since the conduct is often feigned and artificial.[1] Such distrust, however, seems

§ 293. [1] ENGLAND: 1679, Green's Trial, 7 How. St. Tr. 159, 207 (Witness: "It was a good evidence of his innocency that, when he had notice of it, he did not fly. . . . All that I say is, if flight be a sign of guilt, as no doubt it is — 'Adam, *ubi es?*' — and courageousness is a sign of innocency, then this man is innocent"); 1758, Barnard's Trial, 19 How. St. Tr. 833 (charge of sending threatening letters to the Duke of Marlborough; the letters twice made appointments for the Duke to come and pay the blackmail, at Kensington and at Westminster Abbey; he went, and on both occasions found the defendant passing, but, on accosting him, was answered that he knew not what the Duke meant; the defendant, a respectable bridge-builder, admitted his presence on those occasions, but denied all knowledge of the letters, and was allowed to prove, by his family and others, his public and frequent expression of surprise that the Duke should accost him in that singular way);

UNITED STATES: *Alabama:* 1850, Oliver *v.* State, 17 Ala. 587, 595 (that the accused went to town to surrender himself, but was persuaded not to do it till he had obtained bailmen, inadmissible; except under § 281, *ante*, to explain away flight); 1853, Campbell *v.* State, 23 Ala. 44, 79 ("the prisoner could no more make his appearance or conduct evidence than he could his declarations or admissions"; excluding evidence that "he appeared surprised on being informed of the murder"); 1867, Hall *v.* State, 40 Ala. 698, 700, 706 ("conduct and statements", excluded, for the same reason); 1872, Birdsong *v.* State, 47 Ala. 68, 71, 77 (like Oliver *v.* State); 1886, Jordan *v.* State, 81 Ala. 20, 23, 31, 1 So. 577 (refusal to escape, excluded; it would be "to allow him to make evidence for himself"); 1895, Henry *v.* State, 107 Ala. 22, 19 So. 23 (demeanor excluded; same reason); 1896, Dorsey *v.* State, 110 Ala. 38, 20 So. 450 (going voluntarily to the police-station, after hearing of the charge, excluded); White *v.* State, 111 Ala. 92, 21 So. 330 (immediate surrender to the police, admitted); 1901, Vaughn *v.* State, 130 Ala. 18, 30 So. 669 (defendant's voluntary surrender, excluded); 1904, Walker *v.* State, 139 Ala. 56, 35 So. 1011 (murder; defendant's offer to be taken to the dying person to see if she identified him, excluded); 1906, Allen *v.* State, 146 Ala. 61, 41 So. 624 (voluntary surrenders admissible only as contradicting or explaining evidence of flight); *California:* 1879, People *v.* Montgomery, 53 Cal. 576 (refusal to escape when able, excluded); 1896, People *v.* Shaw, 111 Cal. 171, 43 Pac. 593 (voluntary surrender, excluded); *Florida:* 1904, Thomas *v.* State, 47 Fla. 99, 36 So. 161 (excluded, where not part of the 'res gestæ'); *Georgia:* 1860, Pinkard *v.* State, 30 Ga. 759 (putting an officer on the track of the real criminal, admitted); 1895, Boston *v.* State, 94 Ga. 590, 21 S. E. 603 (voluntary surrender, admitted); 1897, Kennedy *v.* State, 101 Ga. 559, 28 S. E. 979 (failure to escape from jail, excluded); 1920, Summerlin *v.* State, — Ga. App. —, 85 S. E. 832 (voluntary surrender, admitted, to rebut alleged flight); *Kansas:* 1868, Lewis *v.* State, 4 Kan. 309 (failure to accept an opportunity to escape when others did, admitted; then explained away by the fact that the accused was ill); *Massachusetts:* 1861, Com. *v.* Hersey, 2 All. 173, 177 (refusal to escape, excluded); *Michigan:* 1860, Dillin *v.* People, 8 Mich. 357, 367 (subsequent mental condition or utterances, not admissible, except as part of the *res gestæ* or as explaining away facts introduced by the prosecution; here admitted for the latter purpose, by the majority); *Mississippi:* 1909, Bailey *v.* State, 94 Miss. 863, 48 So. 227 (defendant's refusal to accept an opportunity to escape from prison, excluded, Whitfield, C. J., diss.); *Missouri:* 1890, State *v.* Musick, 101 Mo. 260, 274, 14 S. W. 212 (voluntary surrender, excluded); 1892, State *v.* Smith, 114 Mo. 406, 424, 21 S. W. 827 (same); 1899, State *v.* McLaughlin, 149 Mo. 19, 50 S. W. 315 (voluntary surrender, excluded); 1900, State *v.* Strong, 153 Mo. 548, 55 S. W. 78 (that defendant went for a physician after the stabbing, excluded); *New Hampshire:* 1909, Hoxie *v.* Walker, 75 N. H. 308, 74 Atl. 183 (question not decided; here, the defendant's expression of indignation on hearing that a detective of the plaintiff was watching the defendant's house); *New York:* 1839, People *v.* Rathbun, 21 Wend. 509, 519 (refusal to escape, excluded); *North Carolina:*

improper. Certainly in the inferences of ordinary life we attach as much weight to that inference as to the inference of consciousness of guilt; the bearing of one accused person as consciously innocent impresses us no less strikingly than the bearing of another as consciously guilty. Moreover, it is judicially conceded (as noticed *ante*, § 273) that the inference of consciousness of guilt is a highly dubious one, and that the evidence is never to be emphasized or treated as of much value. If this be so, why should we strain a doubt to admit a dubious inference against the accused, and yet refuse to admit in his favor a scarcely more dubious one? Such an attitude is wholly inconsistent with itself and is out of harmony with the spirit of our law. Let the accused's whole conduct come in; and whether it tells for consciousness of guilt or for consciousness of innocence, let us take it for what it is worth, remembering that in either case it is open to varying explanations and is not to be emphasized. Let us not deprive an innocent person, falsely accused, of the inference which common sense draws from a consciousness of innocence and its natural manifestations. With singular perversity, however, a majority of the Courts profess to refuse to allow conduct to be considered for the purpose of drawing an inference of consciousness of innocence; but one consequence of this is the frequent occurrence of inconsistent rulings by the same Court.

1903, State *v.* Wilcox, 132 N. C. 1120, 44 S. E. 625 (refusal to escape, excluded; Connor, J., doubting); *Oklahoma:* 1906, Sneed *v.* Terr., 16 Okl. 641, 86 Pac. 70 (voluntary surrender, excluded); *South Carolina:* State *v.* Vaigneur, 5 Rich. L. 391, 403 ("the conduct of the accused, whether before or after he is charged . . . is a source of evidence, sometimes for him as well as the prosecution"); *West Virginia:* 1903, State *v.* Bickle, 53 W. Va. 597, 45 S. E. 917 (failure to escape from jail, when he might have done so, excluded).

Compare the citations *post*, §§ 1144, 1732, 1765, 1781, concerning the admissibility of an accused's *protestations of innocence* or other explanatory statements; and of an accused's expressions of loyalty in *sedition* cases, *post*, § 367.

SUB-TITLE II (*continued*): EVIDENCE TO PROVE A HUMAN QUALITY OR CONDITION

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

CHAPTER XII

1. General Principles

2. Forgery and Counterfeiting

3. False Pretences or Representations

4. Knowing Possession or Receipt of Stolen Goods

5. Embezzlement

6. Fraudulent Transfers

7. Sundry Frauds; and Fraud in General

8. Larceny and Kidnapping

9. Robbery, Burglary, and Extortion

10. Arson

11. Rape and Abortion

1. General Principles

§ 300. **Discrimination between Various Principles.** In the two foregoing Chapters have been examined the principles upon which Knowledge, Intent, and Design may be evidenced. It remains to examine here the admissibility of similar offences or acts (*i.e.* similar to the one charged) offered for the purpose of showing such a Knowledge, Intent, or Design. Since the conditions may differ under which the same conduct will evidence one or another of these propositions, it is essential to compare the respective conditions before determining what test to apply to the offered evidence. Practically, the difference of theory may be important; for if these conditions are less stringent for one purpose than for another, and if the one purpose is by the nature of the issue a proper one, while the other is not, all will depend on the precise purpose involved and the requirements appropriate to it.[1]

It is worth while at this point to re-state briefly the distinction between Knowledge, Intent, and Design. (1) *Knowledge* signifies a being aware (*ante*, § 244); and, in the usual case of the present sort, this knowledge has to refer to the nature of a thing used in the alleged crime. Even where the doing of the act involved is not disputed, a knowledge existing at the time of the act may be in dispute. Thus, proof of knowledge becomes a usual necessity for certain offences, such as the uttering of forged or counterfeit paper and the possession of stolen goods; while it is rarely an element to be proved in other offences, such as robbery, rape, and homicide. (2) *Intent* involves often nothing more than knowledge or hostile feeling; or, what is practically not very different, if knowledge or hostile feeling (malice) can be shown specifically, there may be inferred immediately the criminal intent, without further evidence. But Intent more frequently signifies (*ante*, § 242) merely the absence of accident, inadvertance, or casualty, — a varying state of mind which is the contrary of an innocent state of mind, whatever may be pointed out by the nature of the crime as an innocent state of mind. Thus, in homicide the criminal intent may signify the absence of good faith as to self-

§ 300. [1] From the point of view of logic and psychology as applicable to argument before the jury (not the rules of Admissibility), see the materials collected in the present author's "Principles of Judicial Proof, as given by Logic, Psychology, and General Experience, and illustrated in Judicial Trials" (1913), §§ 39–50, 121–129.

defence or the absence of inadvertance; in assault with intent to rape, the criminal intent is a design to rape, instead of any other design; in embezzlement, the criminal intent is a will to hold the money unlawfully, as distinguished from a will to hold it for the owner or from a merely inadvertant possession. This element, then, of Intent — simple in its generality, yet changeable — is a different thing from Knowledge. In a given offence — as in uttering counterfeit money — the proof of Knowledge may practically affect the proof of Intent; but in such a case the evidence is directed specifically to show Knowledge and is governed by the rules appropriate to that subject. But if the issue does not involve specifically the element of Knowledge, then the rules about evidencing Knowledge have no application. In short, Intent may sometimes be indirectly got at by proving Knowledge; but this is not necessary nor is it (for most kinds of offences) usual; and since in any case Intent may be conceived of apart from Knowledge, the mode of proving Intent is a problem distinct from that of proving Knowledge, even where the latter is also concurrently available. (3) *Design.* The peculiarity of Intent, as a ' factum probandum ', is that an act is assumed as done by the defendant, and the issue is as to the kind of state of mind accompanying it. Design or Plan, however (with reference to present bearings), is not a part of the issue, an element of the criminal fact charged, but is the preceding mental condition which evidentially points forward to the doing of the act designed or planned (*ante*, §§ 237, 242). Thus, the peculiarity of Design is that the act is not assumed to be proved, and the design is used evidentially to show its probable commission. It is obvious that something more definite and positive is here involved than in the case of Intent. In proving Intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it. In proving Design, the act is still undetermined, and the proof is of a working plan, operating towards the future with such force as to render probable both the act and the accompanying state of mind. The Intent is a mere appendage of the act; the Design is a force producing the act as a result.

§ 301. **Theory of evidencing Knowledge.** In resorting to former offences or other similar acts to show Knowledge, it is sufficient to invoke the general principles of proving Knowledge, as already set forth. It may perhaps be practicable to employ acts of conduct as exhibiting ' a posteriori ' the inward state of mind (according to the principle of § 265, *ante*), — as when a person, finding his counterfeit coin closely examined by his vendor, attempts to run away. But such a case presents no problem of the present sort. The problem now to be dealt with — the use of evidence of former offences — involves the other general mode of showing knowledge, namely, the use of external circumstances likely ' a priori ' to have produced Knowledge. It has been seen (*ante*, § 245) that this mode of proof rests on the following process of thought. When fact X is used to show a person's knowledge of fact A, it is assumed (a) that through fact X there probably was received an

impression by the person; and (b) that this impression would probably result in notice or warning of fact A. Thus (a) a prior injury to an employee by a machine would probably have come to the employer's notice in some way, and (b) the notice of the accident would probably reveal to him the defect in the machine. These two elements may not both be doubtful in a given case, but they are always impliedly present if the inference is to have any validity. Apply this to the class of cases we are now concerned with. Suppose A's knowledge of the poisonous nature of a substance X is to be shown; suppose the fact offered that he once gave it to a sick dog and that the dog died; if we are to base an inference of probable knowledge upon this, it is because we believe it probable (a) that the dog's death came to his notice, and (b) that the fact of the death would suggest to him that it was the substance X and not the illness that caused the dog's death. Again, suppose A's knowledge of the counterfeit nature of a certain silver dollar is to be shown; suppose the fact offered that he twice passed counterfeit ten-dollar bank-notes; if we are to base on this an inference of probable knowledge, it is because we believe it probable (a) that in the course of using the bank-notes, at one time or another up to their final disposal, some one probably doubted to him their genuineness, and (b) that a doubt as to the genuineness of the bank-notes would probably suggest a doubt as to the genuineness of the silver dollar. Again, if A's knowledge of the stolen character of a bar of iron is to be shown, and the fact is offered that he has also received and possessed a stolen bicycle, then our inference must assume (a) that A's receipt of the bicycle was under such circumstances as to suggest its vendor or pledgor to be a thief, or as to result in a reclamation by the owner and a warning to the defendant; so that (b) when the bar of iron was offered to A, by the same or another vendor or pledgor, the circumstances were such that the former transaction would naturally suggest that this bar of iron was also stolen.

Such, then, is the strict and legitimate scope of evidence of other similar acts to show Knowledge. The process of thought is: The other act must probably have resulted in some sort of warning or knowledge; this warning or knowledge must probably have led to the knowledge in question. There may occasionally be a logical short-cut or a condensation of this process — as where A at a former attempt to pass the same counterfeit bill, was expressly told that it was counterfeit — but such cases cause no difficulty; and the difficulty that does arise can always be accounted for by a doubt as to one or the other of the above two elements. The principle is clearly enough seen in its application in the detailed rules of the ensuing sections; but it has been expounded, more or less incompletely, in various judicial utterances:

1846, MAULE, J., in *R.* v. *Dosset*, 2 C. & K. 307: "If a person were charged with having wilfully poisoned another, and it were a question whether he knew a certain white powder to be poison, evidence would be admissible to show that he knew what the powder was because he had administered it to another person who had died."

1849, CRESSWELL, J., in *R.* v. *Cooper*, 3 Cox Cr. 547 (false charge of indecent conduct towards S. with the intent of extorting money, evidence of a previous obtaining of money by such means was offered): "If the prisoner is proved to have stated on other occasions that he had obtained money by the same means that are stated to have been used in this case, is it not a fair inference to make to the jury that his object was to obtain money here?" Serjt. *Ballantine*, for the defendant: " . . . That does not show that he had an intention to obtain money at this particular time. . . . Suppose the charge was breaking into a house with intent to steal; the fact of his having broken into the house before would show that he knew how the offence was to be accomplished, but it could not be adduced to show what his intention was on the second occasion; and this shows the difference between proof of knowledge and that of intention." CRESSWELL, J.: "The question is whether on this occasion he did an act with the design of effecting a certain object. One step in the proof would be to show that he would be likely to know that a certain result would follow; and if it can be proved out of his own mouth that he was aware that such a result would be produced, it is one ingredient in the necessary proof that he contemplated it. Suppose a charge against a man that he attempted to procure abortion; the same medicine might be administered with that intention or without it; if it could be shown that he had often given that medicine before and that he knew that abortion had always followed, surely that would be evidence against him. Or if, on a charge of wounding, a certain instrument had been used by the prisoner with a dangerous result, would not that be admissible to show that he knew the consequences of using it?"[1]

§ 302. **Theory of evidencing Intent.** To prove Intent, as a generic notion of criminal volition or wilfulness, including the various non-innocent mental states accompanying different criminal acts, there is employed an entirely different process of thought. The argument here is purely from the point of view of the doctrine of chances, — the instinctive recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all. Without formulating any accurate test, and without attempting by numerous instances to secure absolute certainty of inference, the mind applies this rough and instinctive process of reasoning, namely, that an unusual and abnormal element might perhaps be present in one instance, but the oftener similar instances occur with similar results, the less likely is the abnormal element likely to be the true explanation of them. Thus, if A while hunting with B hears the bullet from B's gun whistling past his head, he is willing to accept B's bad aim or B's accidental tripping as a conceivable explanation; but if shortly afterwards the same thing hap-

§ **301.** [1] Other passages are as follows: 1882, Devens, J., in Com. *v.* Jackson, 132 Mass. 18 ("It is the knowledge which it may be inferred he must have derived from other transactions . . . that makes the evidence admissible as affording just ground for inference against him as to intent in the matter under examination"); 1811, Mitchell, C. J., in State *v.* Smith, 5 Day Conn. 175, 178 ("It is lawful to prove that the prisoner attempted to utter the note at different times and places where it had been suspected and challenged as false"); 1832, U. S. *v.* Roudenbush, 1 Baldw. 514 (the Court admits the uttering of other notes "if their general resemblance to the one laid in the indictment is such that a person who knows the one to be a counterfeit could not reasonably believe the others were genuine"; and excludes them if they are "so unlike in appearance that an honest man might think one good though the other was known to be bad"); 1873, Allen, J., in Coleman *v.* People, 55 N. Y. 81, 90 (referring to evidence of former receipt of stolen goods: "There must be such a connection of circumstances that a natural inference may be drawn that, if the prisoner knew one article was stolen, he would also be chargeable with knowledge that another was").

pens again, and if on the third occasion A receives B's bullet in his body, the immediate inference (*i.e.* as a probability, perhaps not a certainty) is that B shot at A deliberately; because the chances of an inadvertent shooting on three successive similar occasions are extremely small; or (to put it in another way) because inadvertence or accident is only an abnormal or occasional explanation for the discharge of a gun at a given object, and therefore the recurrence of a similar result (*i.e.* discharge towards the same object, A) excludes the fair possibility of such an abnormal cause and points out the cause as probably a more natural and usual one, *i.e.* a deliberate discharge at A. In short, similar results do not usually occur through abnormal causes; and the recurrence of a similar result (here in the shape of an unlawful act) tends (increasingly with each instance) to negative accident or inadvertence or self-defence or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, *i.e.* criminal, intent accompanying such an act; and the force of each additional instance will vary in each kind of offence according to the probability that the act could be repeated, within a limited time and under given circumstances, with an innocent intent. The general canon of logical inference already examined (*ante*, §§ 31, 32) is here applied and illustrated.

Such is the theory of evidencing Intent, as expounded, in various phrasings and for all sorts of offences, in repeated judicial utterances:

1848, Mr. *Holmes*, arguing in *R.* v. *Mitchel*, 6 State Tr. N. S. 599, 632 (challenging an array as not selected by the sheriff with impartial intent, and offering to show a disproportion between the Catholics and Protestants qualified and those actually summoned; the contention being approved by the Court): "We don't put it on the ground of religion. If a man were playing hazard, if all is fair and the dice are not loaded, there can be no honester game; but if one man always throws 'crabs', as it is called, while the other always throws in his own favor, the presumption is that the dice are loaded. So in this case there is strong evidence that all is not right. If the natural result of the proportionate number of those qualified to be placed on the panel should be that there would be on it two Catholics to one Protestant, and that we find that, so far from that being the case, there are of Protestants five to one on the panel, is not it the natural presumption that there has not been fair dealing in the construction of the panel?"

1874, COLERIDGE, C. J., in *R.* v. *Francis*, L. R. 2 C. C. R. 128: "It seems clear upon principle that when the fact of the prisoner having done the thing charged is proved, and the only remaining question is whether at the time he did it he had a guilty knowledge of the quality of his act or acted under a mistake, evidence of the class received must be admissible. It tends to show that he was pursuing a course of similar acts, and thereby it raises a presumption that he was not acting under a mistake. It is not conclusive, for a man may be many times under a similar mistake, or may be many times the dupe of another; but it is less likely he should be so oftener than once, and every circumstance which shows he was not under a mistake on any one of these occasions strengthens the presumption that he was not on the last."

1878, GROVE, J., in *Blake* v. *Assurance Co.*, L. R. 4 C. P. D. 94, 98: "When the question is whether an act was or was not fraudulent, acts of a similar kind are given in evidence to show intention. I remember in a housebreaking case in which I was counsel, a man was found under suspicious circumstances in a bedroom; it was set up that he was there courting the servant; to show a guilty intention, ERLE, C. J., admitted evidence of

the fact that he was seen in the house a week before under circumstances equally suspicious and which rebutted the idea that he was there for the purpose of courting. . . . To take the common instance of fraud committed by means of begging letters. If a single letter to one individual only were proved, the evidence would probably be insufficient for a conviction; but the particular transaction is shown to be a guilty one by proving that the person charged has done the same thing twenty times before, and that in each case he has told false stories and given fictitious names. Then is there any rule of law to exclude this evidence? I am of opinion that there is not. Where the act itself does not *per se* show its nature, the law permits other acts to be given in evidence for the purpose of showing the nature of the particular act; as, for instance, in cases of uttering counterfeit coin, even in some cases of murder, and generally wherever it is necessary to show the intent with which the act was done. . . . [So in this case] if you show similar shams, carried out under the same false name, and that the defendants are the people who put the money in their pocket in each case, the difficulty arising from any possibility of mistake in the case is removed, and the jury may reasonably be called upon to infer that the defendants intended to pocket the money of the plaintiff in the particular case."

1840, STORY, J., in *Bottomley* v. *U. S.*, 1 Story 135 (to show defendant's fraudulent intent in undervaluations of imports, other instances were offered): "It appears to me clearly admissible upon the general doctrine of evidence in cases of conspiracy and fraud, where other acts in furtherance of the same general fraudulent design are admissible, first, to establish the fact that there is such a conspiracy and fraud; and, secondly, to repel the suggestion that the acts might be fairly attributed to accident, mistake, or innocent rashness or negligence. In most cases of conspiracy and fraud, the question of intent or purpose or design in the act done, whether innocent or illegal, whether honest or fraudulent, rarely admits of direct and positive proof; but it is to be deduced from various circumstances of more or less stringency and often occurring, not merely between the same parties, but between the party charged with the conspiracy or fraud and third persons. And in all cases where the guilt of the party depends upon the intent, purpose, or design with which the act was done, or upon his guilty knowledge thereof, I understand it to be a general rule that collateral facts may be examined into, in which he bore a part, for the purpose of establishing such guilty intent, design, purpose, or knowledge. . . . [After illustrating by the doctrines about counterfeit money, stolen goods, etc.] In short, wherever the intent or guilty knowledge of a party is a material ingredient in the issue of a case, these collateral facts, tending to establish such intent or knowledge, are proper evidence."

1876, Mr. *Clark*, Attorney-General, arguing, in *State* v. *Lapage*, 57 N. H. 245, 261 (the argument being approved by the Court): "Suppose the defendant were tried for breaking and entering the store at the north end of Elm Street in Manchester — the most northern of all the stores on that street — with intent to steal; suppose it were proved that he broke and entered that store; that he was arrested as soon as he entered it, and the only question were whether he intended to steal; suppose there were one hundred other stores on that street, and he had broken and entered every one of them, and stolen something in every one of them, beginning at the south end of the street and taking the stores in succession, on his burglarious march from one end of the street to the other; suppose he did all this in one night, and was completing his night's work when arrested; on the question of his intent in entering the one hundred and first store, would any one think of objecting to evidence of his one hundred larcenies in the other one hundred stores? His robbing one hundred stores would tend to show that he intended to rob the one hundred and first, just as his passing counterfeit money in the one hundred would tend to show that he intended to pass counterfeit money found in his possession in the one hundred and first. There would be no difference between his presence in the one hundred and first store, and his having counterfeit money in his pocket in that store, that would, on the question of intent, affect the admissibility of the evidence of what he had done in the other hundred stores.

Suppose, instead of robbing stores, he had robbed persons, going from one end of the street to the other, knocking down and robbing one hundred men, one after the other, and not touching a single woman; suppose when he had knocked down the one hundred and first man, and before he had had time to rob him, he had been arrested, and the question were whether he intended to rob him, — whether his last offence were an attempt to rob, or a mere assault, or an assault with intent to kill; would anybody suppose his robbing the other hundred men, after he knocked them down, was no evidence of the intent with which he knocked down number one hundred and one? Suppose the one hundred and one persons whom he assaulted were women; suppose he touched no man; suppose he had unsuccessfully attempted to ravish one hundred of them, and were arrested at the instant of his knocking down the one hundred and first, and the question were whether his last assault were a mere assault, or an assault with intent to commit a robbery, or an assault with intent to commit a rape; suppose the last woman assaulted should die of her injuries, and the defendant were indicted for her murder; . . . how would you expect, if you were the prosecuting officers, to find any better evidence of the defendant's intent than his attempts upon the other one hundred women? . . . If a ship-master lands in Congo, obtains a cargo of blacks, and carries them to Cuba, and four years and four months afterwards he is found at another place on the African coast, as far from Congo as Pembroke Academy is from St. Beatrice with a hundred blacks in his possession, — would anybody think that his proved intent or the former occasion had, as a matter of fact, no tendency to show what he intended to do on the latter occasion? . . . No man on earth would refuse to hear it, or to consider it, unless he were bound by some arbitrary and irrational rule overriding his understanding, and dictating a course at war with his common sense. . . . It is the spontaneous and irreversible judgment of every grade of intellect that has appeared, or is likely to appear, in this state of existence. It is an involuntary and unavoidable perception of the inherent and self-evident relations of conduct and intention; a mental revelation as natural as memory, and as trustworthy and unanswerable as consciousness."

1876, CUSHING, C. J., in *State* v. *Lapage*, 57 N. H. 245, 294: "Another class of cases consists of those in which it becomes necessary to show that the act for which the prisoner was indicted was not accidental, — *e.g.* where the prisoner had shot the same person twice within a short time, or where the same person had fired a rick of grain twice, or where several deaths by poison had taken place in the same family, or where the children of the same mother had mysteriously died. In such cases it might well happen that a man should shoot another accidentally, but that he should do it twice within a short time would be very unlikely. So, it might easily happen that a man using a gun might fire a rick of barley once by accident, but that he should do it several times in succession would be very improbable. So, a person might die of accidental poisoning, but that several persons should so die in the same family at different times would be very unlikely. So, that a child should be suffocated in bed by its mother might happen once, but several similar deaths in the same family could not reasonably be accounted for as accidents. So, in the case of embezzlement effected by means of false entries, a single false entry might be accidentally made; but the probability of accident would diminish at least as fast as the instances increased."

1896, TAFT, J., in *Penn M. L. Ins. Co.* v. *M. L. B. & T. Co.*, 19 C. C. A. 286, 72 Fed. 422: "It is a well established rule of evidence that, where the issue is the fraud or innocence of one in doing an act having the effect to mislead another, it is relevant to show other similar acts of the same person having the same effect to mislead, at or about the same time, or connected with the same general subject-matter. The legal relevancy of such evidence is based on logical principles. It certainly diminishes the possibility that an innocent mistake was made in an untrue and misleading statement, to show similar but different misleading statements of the same person about the same matter, because it is less probable that one would make innocent mistakes of a false and misleading character in repeated instances than in one instance."

It will be seen that the peculiar feature of this process of proof is that the *act itself is assumed to be done*, — either because (as usually) it is conceded, or because the jury are instructed not to consider the evidence from this point of view until they find the act to have been done and are proceeding to determine the intent. This explains what is a marked feature in the rulings of the Courts, namely, a disinclination to insist on any feature of common purpose or general scheme as a necessary requirement for the other acts evidentially used. It is not here necessary to look for a general scheme or to discover a united system in all the acts; the attempt is merely to discover the intent accompanying the act in question; and the prior doing of other similar acts, whether clearly a part of a scheme or not, is useful as reducing the possibility that the act in question was done with innocent intent. The argument is based purely on the doctrine of chances, and it is the mere repetition of instances, and not their system or scheme, that satisfies our logical demand.

Yet, in order to satisfy this demand, it is at least necessary that prior acts should be *similar*. Since it is the improbability of a like result being repeated by mere chance that carries probative weight, the essence of this probative effect is the similarity of the instance. Suppose the blowing up of an American warship in Havana Harbor to be in question; the blowing up of various ships of various other nations in the preceding fifty years would have no significance as to the accidental nature of the occurrence (except to show that such an accident is possible); the blowing up of an American warship in the preceding year in Algiers would have scarcely more significance; but the blowing up of an American warship in the same year in Cadiz or in the same harbor of Havana would have striking significance. So, where the intent of an erroneous addition in a bookkeeper's accounts is in issue, the erroneous addition of a bill rendered to a former employer ten years before would have no significance, because it is still within the limits of ordinary casual error that such things should occur at intervals; but several other erroneous additions in the bookkeeper's own favor in the same year and the same book of accounts go to exclude the explanation of casual error, and leave deliberate intent as the more probable explanation. In short, there must be a similarity in the various instances in order to give them probative value, — as indeed the general logical canon requires (*ante*, § 33).

It is just this requirement of similarity which leaves so much room for difference of opinion and accounts for the bewildering variances of rulings in the different jurisdictions and even in the same jurisdiction and in cases of the same offence. Some judges incline to treat the judicial test of probative value as identical with the common-sense test, and to admit such instances as bear a similarity liberally interpreted by the standard of every-day reasoning. Other judges set their faces firmly against every instance which is not on all fours with the offence in issue, regardless of the consideration that justice consists quite as much in protecting the public against evil doers as in showing mercy to those whose guilt has been more or less skilfully concealed.

It is hopeless to attempt to reconcile the precedents under the various heads; for too much depends on the tendency of the Court in dealing with a flexible principle. One Court will be certain to exclude everything that is not too clearly probative for even technical quibblers to oppose, and sometimes will exclude even that. Another Court will accept whatever has real probative value. Something, however, may perhaps be gained by realizing, as to the former, that it is not the law, nor precedent, nor principle, nor policy, that will account for such rulings, but merely a rooted inclination to take the stricter view and a preference to err in favor of criminals and against innocent victims.

§ 303. **Same: Anonymous Intent.** It will be seen that the strength of the foregoing kind of inference does not rest exclusively on a given person's connection with the prior injurious transactions. It is possible to negative accident or inadvertence, and to infer deliberate human intent, without forming any conclusion as to the personality of the doer. Thus, if A's cellar-window is found broken, and the pieces falling inside, one morning after a high wind, he may well assume the probability that the force of the wind blew the glass in; but if on the next morning and the next he again finds a window broken in the same way, though no high wind prevailed the night before, he gives up the hypothesis of the force of the wind as the explanation, and concludes that a deliberate human effort was the highly probable cause of the breakage, although he can form no notion whatever of the personality of the doer. It is thus clear that innocent intent — accident, inadvertence, or the like — may be negatived by *anonymous instances* of the previous occurrence of the same or a similar thing. After assuming or proving the defendant's connection with the deed charged, then, to negative innocent intent, resort is had to the anonymous instances; and they may have equal force for that purpose, whether they are connected with the defendant or not. This mode of proof is not infrequently resorted to; and the following passage illustrates its judicial sanction:

1847, POLLOCK, C. B., in *R.* v. *Bailey*, 2 Cox Cr. 311 (arson; the fire had originated near the kitchen, where the accused stayed as servant; evidence was offered of two fires occurring shortly before in the prosecutor's shop and warehouse attached, though no connection of the prisoner or any one else with these was shown): "I think this is clearly evidence, and may be used at all events for the purpose of showing that the present fire which was the third on the same premises within so short a time, could not have been the result of accident. Surely, if a man finds certain mysterious circumstances to arise day after day in his establishment, he is at liberty to refer to them, if only for the purpose of showing that they could not have had their origin in accident and that a repetition of them could only lead to the conclusion that they resulted from malice and design. This course of evidence is not without precedent and authority, moreover; for on the trial of Donellan for the murder of Sir Theodosius Broughton by administering him some poison, evidence was given that a certain tree, which hung over a deep and dangerous brook near a spot where Sir Theodosius was accustomed to fish, had been sawn almost in two by some unknown person. This was proved to show that some one entertained a design against the life of Sir Theodosius, for he was accustomed to stand on that tree while engaged in fishing; and

the natural presumption was that whoever cut the tree did so with the design of precipitating the deceased into the water. Those facts were given in evidence on the trial of Donellan for murdering Sir Theodosius afterwards, and were received, though quite unconnected with the prisoner, in order to show that some one entertained a design on his life and that the probability was that he had not come to a natural death."

The only limitation upon this mode of proof is that the defendant's doing of the act in issue must be shown by other evidence at some stage of the trial; and the anonymous instances should not be received until the trial Court is satisfied with the amount of evidence introduced or pledged for showing that connection.

§ 304. **Theory of evidencing Design or System.** When the very doing of the act charged is still to be proved, one of the evidential facts receivable is the person's Design or Plan to do it (*ante*, § 102). This in turn may be evidenced by conduct of sundry sorts (*ante*, § 234) as well as by direct assertions of the design (*post*, § 1725). But where the conduct offered consists merely in the doing of other similar acts, it is obvious that something more is required than that mere similarity, which suffices for evidencing Intent (*ante*, § 302). The object here is not merely to negative an innocent intent at the time of the act charged, but to prove a pre-existing design, system, plan, or scheme, directed forwards to the doing of that act. In the former case (of Intent) the attempt is merely to negative the innocent state of mind at the time of the act charged; in the present case the effort is to establish a definite prior design or system which included the doing of the act charged as a part of its consummation. In the former case, the result is to give a complexion to a conceded act, and ends with that; in the present case, the result is to show (by probability) a precedent design which in its turn is to evidence (by probability) the doing of the act designed.

The added element, then, must be, not merely a similarity in the results, but *such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.* Thus, where the act of passing counterfeit money is conceded, and the intent alone is in issue, the fact of two previous utterings in the same month might well tend to negative innocent intent; but where the very act of uttering is disputed — as, where the defendant claims that his identity has been mistaken —, and the object is to show that he had a general system or plan of working off a quantity of counterfeit money and did carry it out in this instance, the fact of two previous utterings may be in itself of trifling and inadequate significance. So, on a charge of assault with intent to rape, where the intent alone is disputed, a prior assault on the previous day upon the same woman, or even upon another member of her family, might have probative value; but if the assault itself is disputed, and the defendant attempts, for example, to show an alibi, the same facts might be of little or no value, and it might be necessary to go further and to show (for example) that the defendant on the same day, with a confederate guarding the house,

assaulted other women in the same family who escaped, leaving the complainant as the only woman accessible to him for his purpose. This requirement of common features for the various acts pointing to a common plan or system as their natural explanation has been set forth by the judges in varying phrases:

1878, LINDLEY, J., in *Blake* v. *Assurance Co.*, L. R. 4 C. P. D. 94, 106: "I agree that in order to prove that A has committed a fraud on B, it is neither sufficient nor even relevant to prove that A committed fraud upon C, D, and E. Stopping there, I admit that proposition. But let it be shown that the fraud on B is one of a class of other transactions having common features, then I disagree altogether with that proposition. . . . The answer to the objection that evidence of frauds on other persons cannot be admitted is that this transaction is one of a class, that there are features in common, the features in common being a false pretence and a knowledge of that false pretence on the part of the defendant company; and the moment that is shown the plaintiff's case is established."

1858, SMITH, J., in *People* v. *Stout*, 4 Park. Cr. 127: "When several felonies are connected together as parts of one scheme or plot, like the different acts in a drama, and all tend to a common end, then they may be given in evidence to show the process of motive and design in the final crime."

1888, C. ALLEN, J., in *Com.* v. *Robinson*, 146 Mass. 571, 16 N. E. 452: "[In the case of] acts or crimes which are shown to have been committed as part of the same common purpose or in pursuance of it, in such cases there is a distinct and significant probative effect, resulting from the continuance of the same plan or scheme and from the doing of other acts in pursuance thereof. It is somewhat of the nature of threats or declarations of intention, but more especially of preparations for the commission of the crime which is the subject of the indictment. If, for example, it could be shown that a defendant had formed a settled purpose to obtain certain property which could only be got by doing several preliminary things, the last of which in the order of time was criminal, the government might show, on his trial for the commission of that last criminal act, that he had formed the purpose to accomplish the result of obtaining the property, and that he had done all of the preliminary things which were necessary to that end. This would be quite plain if the evidence of the purpose were direct and clear, — as, if a letter in the defendant's handwriting should be discovered, stating in terms to a confederate his purpose to obtain the property by the doing of the several successive acts the last of which was the criminal act on trial. In such case, no one would question that proof might be offered that the defendant had done all the preliminary acts referred to, which were necessary steps in the accomplishment of his purpose. But such purpose may also be shown by circumstantial evidence. It is, indeed, usually the case that intentions, plans, purposes, can only be shown in this way. Express declarations of intention, or confessions, are comparatively rare; and therefore all the circumstances of the defendant's situation, conduct, speech, silence, motives, may be considered. The plan itself, and the acts done in pursuance of it, may all be proved by circumstantial evidence, if they are of themselves relevant and material to the case on trial. . . . It is sometimes said that such evidence may be introduced where the several crimes form part of one entire transaction; but it is perhaps better to say, where they have some connection with each other, as a part of the same plan or induced by the same motive."

It will be seen that the difference between requiring *similarity*, for acts negativing innocent Intent, and requiring *common features indicating common design*, for acts showing Design, is a difference of degree rather than of kind; for to be similar involves having common features, and to have com-

mon features is merely to have a high degree of similarity. This is another reason why the precedents are so difficult to reconcile; for the Courts have not always perceived that there are in truth these two distinct purposes and therefore two distinct tests for such evidence. Nevertheless the distinction is a real one. It is to be seen in concrete illustrations, even though in abstract definition it is not easy to formulate. The clue to the difference is best gained by remembering that in the one class of cases the act charged is assumed as done, and the mind asks only for something that will negative innocent intent; and the mere prior occurrence of an act similar in its gross features — *i.e.* the same doer, and the same sort of act, but not necessarily the same mode of acting nor the same sufferer — may suffice for that purpose. But where the very act is the object of proof, and is desired to be inferred from a plan or system, the combination of common features that will suggest a common plan as their explanation involves so much higher a grade of similarity as to constitute a substantially new and distinct test. An occasional error in judicial rulings is to require the higher conditions of the present test where only the preceding test (for Intent) is needed. Thus, to show that certain representations as to goods sold (the making of the representations and their falsity being assumed) were deliberately and knowingly made, and not innocently, the former making of like representations about the same goods to the same or other persons is clearly of value to negative innocent intent; yet in at least one jurisdiction, in such cases, the Court has in terms required that these evidential instances shall be so connected by common features as to indicate a general fraudulent scheme or system. This is a misapplication of the stringent theory of Design or System to a case where the theory of Intent is alone involved. Such misapplications of the rigorous requirements of the Design principle are also met with in rulings upon other kinds of crimes; but the error involved in such rulings may be perceived by an analysis of the purposes of the evidence in a given case.

Two necessary limitations are to be observed in the use of this class of evidence of Design. (1) *Anonymous acts* are not available, as they are for evidencing Intent (*ante*, § 303); for the whole purpose of the evidence is to fix a design upon the defendant, as making it likely that he carried it out, and thus that it was he who did the act charged. Nevertheless, in the order of proof it may not be possible to evidence the defendant's connection with the previous acts until the acts themselves have been testified to; and hence the trial Court, applying the general principle of conditional admissibility (*ante*, § 14) may admit the latter portion of the evidence on the assurance that the defendant's connection with those acts will later be duly evidenced.[1]

(2) The object being to argue to the act charged from a design or plan to do

§ **304**. [1] The following is an example: 1865, People *v.* Frank, 28 Cal. 507, 518 (the order of proof being in the discretion of the trial Court). Compare §§ 1870, 1871, *post*, (order of evidence).

it, the prior acts are received to show that system; since, however, it may require a number of acts and circumstances to furnish the desired mass of conduct illustrating this design or system, and since the production of only parts or fragments of it would in effect violate the principle and remain in evidence merely as affecting the defendant's character, *the trial Court must pass upon the offer beforehand*, to see whether if offered in its entirety it satisfies the proper test and is sufficient to go to the jury; and (on the same principle of § 14, *ante*) must, if the offer is sanctioned, require an assurance that it will be forthcoming in its entirety.[2]

§ 305. **Criminality of Act Immaterial; Character Rule, distinguished.** It has already been noted (*ante*, § 216) that the criminality of prior acts thus offered does not affect their admissibility. Either they are relevant, by the above tests, or they are not; if they are not, they are rejected because they are irrelevant; if they are, they are received in spite of their criminality. The only bearing of the latter quality is that, if they are irrelevant, it furnishes another reason for excluding them, namely, the reason of Undue Prejudice, as enforced in the Character rule (*ante*, § 194); for these other criminal acts would not merely be irrelevant, but would go to evidence the defendant's character and career as bad and thus to create undue prejudice, — a mode of argument against him that is forbidden by a fundamental principle.

It is, however, to this reluctance to violate the Character rule that is due the strictness shown by the Courts in excluding prior criminal acts which do not strictly fulfil the rigorous tests just examined. If the admission of irrelevant evidence had been the only consequence of an error in the ruling, there would undoubtedly have been seen a greater liberality in the judicial application of the foregoing tests. The unsatisfactory result has been that, in this narrow and over-cautious anxiety not to infringe upon the Character rule, evidence highly appropriate to show Knowledge, Intent, or Design, and amply fulfilling the proper tests for that purpose, has often been excluded.

Of the other objections (than Undue Prejudice) from the point of view of that auxiliary policy which creates the Character rule (*ante*, § 194), the objection of Unfair Surprise is the only one that could be supposed to be here applicable. But it has never been treated by the Courts as of consequence. This rational and practical conclusion is easily understood when it is remembered that any other conclusion might result in shutting out most of the appropriate evidence, of this and other sorts, to prove a crime. The legal objection of Unfair Surprise, so far as it is ever recognized, is not founded on the notion that the opponent was not in fact anticipating this specific evidence (*post*, §§ 1845, 1849), but on the notion that he could not have anticipated evidence which might easily be fabricated beyond detection; and

[2] The following is an example: 1888, Com. *v.* Robinson, 146 Mass. 579 (the judge merely deciding that there was sufficient strength in the evidence to submit it to the jury, but not thereby giving it any greater weight with the jury).

the objection is recognized as having force only when the evidence offered is of a class capable of involving the entire range of the person's life. Evidence tending to show, not the defendant's entire career, but his specific knowledge, motive, design, and the other immediate matters leading up to and succeeding the crime, is of a class always to be anticipated and is in each given instance rarely a surprise; moreover, the kernel of the objection of unfair surprise, namely, the impossibility of exposing fabricated evidence, is wanting where the evidence deals with matters so closely connected with a crime as design, motive, and the like:

1804, ELLENBOROUGH, C. J., in *R.* v. *Whyley*, 2 Leach Cr. L., 4th ed. 985: "The observation respecting prisoners being taken by surprise and coming unprepared to answer or defend themselves against extrinsic facts is not correct. The indictment alleges that the prisoner uttered this note *knowing* it to be forged; and they must know that without the reception of other evidence than that which the mere circumstances of the transaction itself would furnish, it would be impossible to ascertain whether they uttered it with a guilty knowledge of its having been forged, or whether it was uttered under circumstances which showed their minds to be free from that guilt."

§ 306. **Other Evidential Purposes Discriminated.** Other similar acts by a defendant may of course be available for other purposes than to show Knowledge, Intent, or Design. These other uses and their distinction from the present one will usually be apparent. It is worth while, however, to point out those which are often available at the same time as the present ones: (1) *Motive.* To show the hostility towards the deceased of a defendant charged with murder, a former assault by him upon the deceased would be relevant (*post*, § 396). Owing to the occasional failure of Courts to distinguish between Motive (Emotion) — the state of feeling impelling towards an act — and Intent — the mental state accompanying an act —, it is not always possible to know whether a ruling admitting such evidence is meant to deal with the subject of Motive or Intent. Its relevancy to show Motive (hostility) has never been doubted. (2) *Identity.* To identify a defendant as the perpetrator of the crime charged, it may become necessary to show former conduct of his, known to be the conduct of the perpetrator (*post*, § 413, *ante*, § 218). (3) *Inseparable acts.* In evidencing the act charged, it may be necessary to describe an affair which involves a number of acts, one or more others of which will also be crimes. Such proof is receivable, because it is inseparable from the act charged (*ante*, § 218). Courts often employ that principle — especially in proving deeds of violence (*post*, § 362) — as the sufficient source of admission, where that of Intent might equally have sufficed.[1]

It remains now to take up the various kinds of offences charged, and examine under each head the application of the foregoing principles to the use of other similar acts to evidence Knowledge, Intent, and Design.

§ 306. [1] For the use of an *accused's confession* of other crimes, see *post*, § 2100.

2. Forgery and Counterfeiting

§ 309. **General Principle; State of the Law in Various Jurisdictions.**[1] The chief forms of offence connected with forged and other counterfeit documents or money are: (1) making the false article; (2) possessing it knowingly with

§ 309. [1] ENGLAND: 1684, Lady Ivy's Trial, 10 How. St. Tr. 555, 621 (to prove the defendant's title deeds forged, the fact was admitted of her forging a number of deeds to support her title); 1777, Graft *v.* Lord Bertie, Peake Evid. 72 (to prove that a deceased attesting-witness had attested a forgery, the fact was offered that other bonds attested by him were forgeries; the objection was made that the plaintiff "could not be prepared to support the authority of other deeds"; and with hesitation Lord Mansfield rejected the evidence); 1792, Balcetti *v.* Serain, Parke 142, Buller, J. (action on a bill claimed to be forged by the drawer's clerk; the fact of a previous forgery of the defendant's name to another acceptance by the same clerk was rejected as not sufficiently connected); 1794, Gibson *v.* Hunter, 2 H. Bl. 288 (H. drew a bill on G., payable to F. (a fictitious person) or order, and indorsed in F.'s name; the plaintiff, a *bona fide* holder for value, sued G., and in order to show that G. knew this particular F. to be a fictitious person, offered the fact of the former issuance of such bills with irregularities and suspicious circumstances of such a nature that they must have made G. aware of the fictitiousness of F.'s name, and it was admitted); 1795, Viney *v.* Barss, 1 Esp. 293, Kenyon, L. C. J. (action against the acceptor of a bill; defence, that it was a forgery by the drawer; evidence of other similar forgeries by the drawer, excluded); 1804, R. *v.* Wylie, 1 B. & P. N. R. 92, 2 Leach 4th ed., 983 (indictment for uttering a forged bank-bill; the fact of three previous utterings in the preceding month to other persons was admitted; Ellenborough, L. C. J.: "The more detached in point of time the previous utterings are, the less relation they will bear to that stated in the indictment. But in such a case the only question would be, whether the evidence was sufficient to warrant the inference of knowledge from such particular transactions; it would not make the evidence inadmissible"); 1806, R. *v.* Hough, R. & R. 120, by all the Judges present (uttering a forged bill; the possession when arrested of three other bills upon the same drawee, admitted to show *scienter*); 1807, R. *v.* Ball, R. & R. 132; by all the Judges present except one (uttering a forged bank-note; the utterance of a similar one three months before, and the possession, at some previous time, of fifteen others, admitted, "subject to observations as to the weight of it, which would be more or less considerable according to the number of the other notes, the distance of time at which they were put off, and the situation of life of the prisoner, so as to make it more or less probable that so many notes should pass through his hands in the course of business"; Chambre, J., dissenting, partly on the ground of surprise); 1808, R. *v.* Ball, 1 Camp. 324 (uttering a forged bank-note; the fact admitted, to show knowledge, of the utterance of various notes of similar manufacture in the preceding six months; Heath, J.: "Everything that you said or did was proper to be admitted to show your knowledge of the forgery"); 1809, R. *v.* Taverner, Carr. Suppl. 195, Ellenborough, L. C. J., Thomson, C. B., and Lawrence, J. (uttering forged bank-notes; an uttering five weeks later excluded, "unless the latter uttering was in some way connected with the principal case or it could be shown that the notes were of the same manufacture"); 1813, R. *v.* Millard, R. & R. 245 (uttering a forged bank-note; the fact of uttering forged notes of other denominations and of the same and another bank two, five, and twelve months before respectively, held admissible; here the evidence was excluded, as not showing that they were forged; but some judges "seemed to doubt" whether the difference of qualities and the distance of time did not exclude the evidence); 1825, R. *v.* Moore, 2 C. & P. 235, Burrough, J. (charge of possessing an edger, for marking money round the edge, with intent to use it; the fact received of his having so used it); 1827, R. *v.* Smith, 2 C. & P. 633, Vaughan, B. (uttering a forged note; another uttering, charged in a second count, excluded, because so charged; and even the use of other uncharged utterings was said to have been questioned by many able lawyers; this ruling never represented the law); 1827, R. *v.* Hodgson, 1 Lew. Cr. C. 103 (to show guilty knowledge of a forged Edinburgh bank-note, the uttering by the defendant of forged Paisley bank-notes was doubted by Hullock, B., his own opinion being for admission, but many judges being thought by him to be against it; here the evidential notes were the subject of another indictment); 1828, R. *v.* Sunderland, 1 Lew. Cr. C. 102 (to show guilty knowledge of a forged Rochdale bank-note, the discovery on the defendant's person of two forged Bank of England notes was admitted); 1829, R. *v.* Phillips, 1 Lew. Cr. C. 105, Bayley, B. (to show guilty uttering of a bank-note, the conduct was admitted of the defendant while previously uttering other forged notes; also, the former uttering of a £1 note was admitted to show knowledge in uttering a £5 note); 1830, R. *v.* Kirkwood, 1 Lew. Cr. C. 103 (facts similar to R. *v.* Hodgson; Littledale, J., "without hesitation overruled the objections"); 1830, R. *v.* Martin, 1 Lew. Cr. C.

intent to utter; (3) knowing utterance of it. In the last two, the defendant's knowledge is always in issue; in the first, it is occasionally in issue, as where the act of writing is conceded but an authority is claimed. In all of them

104, Littledale, J. (similar to R. *v.* Kirkwood); 1831, R. *v.* Smith, 4 C. & P. 411, Gaselee, J. (uttering a forged acceptance; other similar utterances in the next month of forged bills having the same parties' names, admitted, but subject to reservation for the Judges, because occurring subsequent to the charge in issue); 1835, R. *v.* Forbes, 7 C. & P. 224 (forging a bill, the issue being whether the defendant *bona fide* believed himself to have authority to sign; the fact of another similar forgery admitted to show intent: "clear proof" of the other forgery required); 1836, R. *v.* Ball, 1 Moo. Cr. C. 470, 7 C. & P. 429, by all the Judges (uttering forged Austrian notes; the fact of a recent forging and uttering of Polish notes, admitted "in support of the *scienter*"); 1837, R. *v.* Page, 4 B. & Ad. 122 (counterfeit utterance; possession of another counterfeit piece, admitted); 1855, R. *v.* Forster, Dears. Cr. C. 456, by five Judges (to prove a guilty uttering on Dec. 12, an uttering of a similar piece on Dec. 11 was shown; on that occasion the shopkeeper told the defendant the piece was bad, whereupon she promised she would bring her husband and her daughter to show where she got it, but she did not return: a subsequent uttering on Jan. 4 also admitted; the uttering of a shilling was admitted to show knowledge in uttering a crown); 1855, R. *v.* Jarvis, 7 Cox Cr. 53, Dears. Cr. C. 552, before five Judges (knowing possession of counterfeit coin; the discovery in different pockets, of many other coins of similar style and make, each wrapped in paper, was admitted); 1861, R. *v.* Weeks, Leigh & C. 18, by five Judges (knowing possession of a counterfeiting mould; previous utterance of a bad half-crown, not shown to fit the mould, admitted to show *scienter*); 1863, Roupell *v.* Haws, 2 F. & F. 784 (the defendants claimed title, against the heir-at-law, under a deed of gift from the testator; evidence of other forgeries (letters, leases, etc.) of the testator's son were received as showing under the circumstances a system to defraud of which the forgery of the deed of gift was a part); 1867, R. *v.* Goodwin, 10 Cox Cr. 534, Mellor, J. (another uttering admitted to show knowledge; ruled also that a former conviction of false uttering could not alone be admitted to show knowledge); 1914, Mason's Case, 10 Cr. App. 169 (uttering a forged deed; possession of two other sets of forged deeds, a fortnight and five months later, admitted). 1917, R. *v.* Kennaway, 1 K. B. 25 (forgery of L.'s will; forgery of F.'s will 18 years before, admitted, as explaining the reason for some details of defendant's act here).

UNITED STATES: *Federal:* 1827, U. S. *v.* Moses 4, Wash. C. C. 726 (like U. S. *v.* Roudenbush, 8 Pet. *infra*); 1832, U. S. *v.* Roudenbush, 1 Baldw. 514 (uttering; "if their general resemblance to the one laid in the indictment is such that a person who knows the one to be a counterfeit could not reasonably believe the others were genuine . . . , [other utterings are admissible, . . . but therefore inadmissible] when the notes are on different banks or so unlike in appearance that an honest man might think one good, though the other was known to be bad"); 1832, U. S. *v.* Doebler, 1 Baldw. 519, 524 ("if the note is of the same kind or character", other utterings are admissible); 1834, U. S. *v.* Roudenbush, 8 Pet. 288 (apparently recognizing the general doctrine by implication that other utterings are admissible to show intent); 1849, U. S. *v.* Burns, 5 McLean 23, 26 (uttering; possession of other coins, admissible); 1879, U. S. *v.* Brooks, 3 McArth. 315, 317 (obtaining money by a deed of trust on property got shortly before by a forged deed, admitted to show intent in a prosecution for forging the deed); 1903, Withaup *v.* U. S., 127 Fed. 530, 531, 62 C. C. A. 328 (forgery of a pension-check indorsement; forged vouchers, etc., admitted as evidencing a "single scheme to defraud"); 1904, Bryan *v.* U. S., 133 Fed. 495, 66 C. C. A. 389 (uttering counterfeit 5-cent pieces, possession of a mold for counterfeit 25-cent pieces, admitted); 1905, Dillard *v.* U. S., 141 Fed. 303, 308, C. C. A. (forgery of Chinese immigrant duplicate certificates; other forged duplicate certificates admitted to show intent); 1912, Ex parte Schorer, C. C., 197 Fed. 67, 77 (extradition; other uttering of similar forged acceptances, held sufficient on the facts, quoting § 312, *supra*); 1916, York *v.* U. S., 9th C. C. A., 241 Fed. 656 (conspiracy to pass counterfeit money, similar act 6 months prior to the conspiracy, admitted to evidence knowledge);

Alabama: 1849, Tharp *v.* State, 15 Ala. 749 (counterfeit utterance; previous passing of "other and similar spurious coin", admissible); 1903, Wright *v.* State, 138 Ala. 69, 34 So. 1009 (forgery; another forged order about the same time, admitted);

Arizona: 1902, Qualey *v.* Terr., 8 Ariz. 45, 68 Pac. 546 (falsification of books; other alterations of entries in the same book, admitted);

California: 1865, People *v.* Frank, 28 Cal. 507, 515, 517 (forgery; other forged notes or bills "uttered at or about the same time", "whether of the same kind or a different kind", admissible to show knowledge; the time before or after the charge in question being largely in the trial Court's discretion); 1866, People *v.* Farrell, 30 Cal. 316 (possession with intent to utter; sale of such counterfeit coin to a confederate, admissible to show intent); 1896,

the criminal intent, including knowledge and other elements, will be in issue. In any of them, the act charged — making, possessing, or uttering — may be

People *v.* Sanders, 114 Cal. 216, 46 Pac. 153 (forgery; murder by the defendant of the person whose name was forged, before the date of the writing, admitted to show knowledge); 1896, People *v.* Whiteman, 114 Cal. 338, 46 Pac. 99 (forgery; other utterings admissible if clearly shown to be forged); 1898, People *v.* Creegan, 121 Cal. 554, 53 Pac. 1082 (forgery; a series of swindling schemes in other States a few months before, excluded); 1899, People *v.* Bird, 124 Cal. 32, 56 Pac. 639 (forgery; other similar forgeries, unconnected with defendant, held admissible to show intent only, after evidence of the 'corpus delicti'); 1902, People *v.* McGlade, 139 Cal. 66, 72 Pac. 600 ("other forgeries of similar instruments about the same time admitted); 1916, People *v.* Canfield, 173 Cal. 309, 159 Pac. 1046 (forgery; another similar offense, excluded on the facts); 1921, People *v.* Sindici, — Cal. App. —, 201 Pac. 975 (forgery; other forgeries about the same time, in the same manner, and against the same person, admitted to show a scheme to defraud);

Connecticut: 1811, State *v.* Smith, 5 Day 175, 178 (counterfeit utterance; Mitchell, C. J.: "It is lawful to prove that the prisoner attempted to utter the note at different times and places where it had been suspected and challenged as false"); 1832, Stalker *v.* State, 9 Conn. 341 (uttering a base half-dollar; evidence held admissible of other coins "on the same day or near the time", but not of the possession of an engraving like an unsigned bank-note; because "there must be a strong connexion in the subject matter");

Florida: 1894, Langford *v.* State, 33 Fla. 233, 14 So. 815 (uttering of a note with forged indorsements; other prior and subsequent utterings of notes with forged indorsements, etc., admitted to show knowledge and intent; knowledge of the others being forgeries, at the time of the uttering charged, need not be expressly shown); 1905, Wooldridge *v.* State, 49 Fla. 137, 38 So. 3 (forgery of school warrants; forgery of other similar warrants, admitted to show intent); 1906, Pittman *v.* State, 51 Fla. 94, 41 So. 385 (rule of Langford *v.* State applied);

Georgia: 1852, Hoskins *v.* State, 11 Ga. 92, 95 (altering the paper, admissible on a charge of making, to show intent); 1892, Lascelles *v.* State, 90 Ga. 347, 355, 375, 16 S. E. 945 (forgery; false representations as to wealth to the person defrauded, admitted);

Illinois: 1867, Steele *v.* People, 45 Ill. 152, 157 (forgery; "other forged checks", admitted); 1875, Blalock *v.* Randall, 76 Ill. 224, 229 (to show that R. had forged B.'s name, B. having concededly signed his name to documents of another sort, evidence was admitted of R.'s having fraudulently obtained the signatures of other persons by a method similar to that alleged by B.); 1880, Fox *v.* People, 95 Ill. 71, 75 (forgery; previous passing of "similar bills", admissible); 1893, Anson *v.* People, 148 Ill. 494, 503, 35 N. E. 145 (forgery; possession of other forged instruments about the same time, admitted to show intent and knowledge, though not to show the fact of forging);

Indiana: 1852, McCartney *v.* State, 3 Ind. 354 (other utterings of notes upon the same and different banks, admissible); 1859, Bersch *v.* State, 13 Ind. 439 (obscure); 1876, Harding *v.* State, 54 Ind. 359, 365 (forgery; other forged notes offered to the same parties at the same time, admitted); 1879, Robinson *v.* State, 66 Ind. 331, 334 (forgery; another forged note, made to secure the same debt, but in a different name, admitted); 1885, Thomas *v.* State, 103 Ind. 432, 2 N. E. 808 (utterings of similar forged instruments shortly before or after, admissible); 1886, Card *v.* State, 109 Ind. 415, 420, 9 N. E. 591 (forgery of a note; thirteen other forged notes with the same payee but a different maker, admitted; "in order to prove system, isolated crimes are admissible from which system may be inferred"; applying this to a charge of forgery);

Iowa: 1885, State *v.* Breckenridge, 67 Ia. 204, 25 N. W. 130 (forgery: other forgeries to show intent; left undecided); 1886, State *v.* Saunders, 68 Ia. 370, 27 N. W. 455 (forgery of a note to another person: question reserved; "the doubt seems to be whether the paper must not be of the same character or manufacture and precisely similar"); 1901, State *v.* Prins, 113 Ia. 72, 84 N. W. 980 (forgery; other forgeries of similar documents, admissible to show intent); 1902, State *v.* Prins, 117 Ia. 505, 91 N. W. 758 (forgery; other unspecified forgeries, admitted);

Kansas: 1907, State *v.* Calhoun, 75 Kan. 259, 88 Pac. 1079 (forgery of a note; forgery of similar notes transferred at the same time, admitted);

Kentucky: 1897, Barnes *v.* Com., 101 Ky. 556, 41 S. W. 772 (forgery; possession of similar forged checks, admitted to show intent); 1901, First National Bank *v.* Wisdom, 111 Ky. 135, 63 S. W. 461 (forgery of other notes by the same person as a part of one scheme, admitted); 1920, Rakestraw *v.* Sabree D. Bank, 189 Ky. 668, 225 S. W. 506 (defence of forgery, in action on a note; plaintiff bank's possession of six other notes forged in defendant's name, excluded, on the facts);

Maine: 1844, State *v.* McAllister, 24 Me. 139, 143 (counterfeit utterance; uttering of another bill on the same bank, admitted); 1879, Dodge *v.* Haskell, 69 Me. 429 (D. sued the defendant's testator on a note signed by him as surety for S.; defence, alteration by S. before delivery; evidence of the finding in the desk of S., who

disputed, and a plan or system may be offered to evidence the doing; but this will rarely happen except in the first class of offences.

had absconded, numbers of forged and altered notes, blank and partly written notes, bearing the signatures of the testator and other persons, was excluded, on the theory that the argument from former forgeries and from bad character was inadmissible);
Maryland: 1880, Bishop *v.* State, 55 Md. 138, 144 (forged uttering; utterings of similar forged instruments about the same time, admitted);
Massachusetts: 1844, Com. *v.* Bigelow, 8 Mete. 235 (counterfeit utterance; former knowing passing, admitted); 1845, Com. *v.* Stearns, 10 Mete. 256, (former utterances, admissible); 1849, Com. *v.* Miller, 3 Cush. 243, 250 (uttering a forged promissory note; the utterance of thirty other similar ones, at or near the same time, admitted); 1858, Com. *v.* Price, 10 Gray 473 (possession with intent to utter; the fact received of the subsequent possession of counterfeit bills of banks in other States, to show intent); 1862, Com. *v.* Hall, 4 All. 306 (uttering; possession at the same time of another counterfeit bill, admitted to show intent); 1865, Com. *v.* Edgerly, 10 All. 184 (possession with intent to utter; previous possession of and attempts at uttering other counterfeit money, admitted to show "guilty knowledge"); 1882, Com. *v.* Jackson, 132 Mass. 18 (counterfeit utterance; Devens, J.: "It is the knowledge which it may be inferred he must have derived from other transactions, and not the intent that the defendant had in other transactions, that renders the evidence admissible as affording just ground for inference against him as to intent in the matter under examination"); 1888, Com. *v.* White, 145 Mass. 394, 14 N. E. 611 (forging bills for hides, the bill being used by the defendant as a voucher to the employer that the hides were bought by customers, thus enabling the defendant to obtain cash on them; the fact was received of the fabrication of many other bills of a like sort, before and after those in issue, not to show that a forgery was committed, but to show the defendant's fraudulent intent and knowledge);
Michigan: 1878, Carver *v.* People, 39 Mich. 786 (forgery; a general scheme shown to use forged instruments of the sort and in the way in question); 1893, Pearson *v.* Hardin, 95 Mich. 360, 366, 54 N. W. 904 (action against accommodation indorser; plea, that the note was raised; the fact that other notes indorsed by him at the same time were raised, excluded); 1905, People *v.* Peck, 139 Mich. 680, 103 N. W. 178 (embezzlement; a certain receipt from W. offered by the defendant was alleged to be forged; the forgery of other documents as W.'s, excluded);
Minnesota: 1915, State *v.* Lucken, 129 Minn. 402, 152 N. W. 769 (forgery of a bank check; the utterance of three other checks of the same signature, within an hour or two, to other persons, admitted);
Missouri: 1851, State *v.* Mix, 15 Mo. 153, 160 (utterings of other counterfeit bank-notes, of a similar kind, to other persons, before and after the time charged, admitted to show guilty knowledge); State *v.* Wolff, 15 Mo. 173 ("other acts of passing counterfeit money", admissible); 1893, State *v.* Minton, 116 Mo. 605, 611, 22 S. W. 808 (forgery of a deed; other forged deeds by defendant under the same name and in the same region, admitted to show intent and knowledge); 1898, State *v.* Hodges, 144 Mo. 50, 45 S. W. 1093 (uttering a check; similar utterance a few days previously, admitted to show intent); 1907, State *v.* Stark, 202 Mo. 210, 100 S. W. 642 (forgery of a deed; possession of another forged deed to the same land, admitted); 1920, State *v.* Plotner, 283 Mo. 83, 222 S. W. 767 (false entries in a bank-book; other offenses of the same character, admitted);
Montana: 1906, State *v.* Newman, 34 Mont. 434, 87 Pac. 462 (forgery of bounty certificates; other forged certificates, admitted);
Nebraska: 1899, Davis *v.* State, 58 Nebr. 465, 78 N. W. 930 (forgery of railroad ticket; other sales of such tickets to other persons by the defendant on the same day, admitted); 1901, Burlingim *v.* State, 61 Nebr. 276, 85 N. W. 77 (inciting forgery of a deed; another forged deed of the same land, admitted to show intent);
New Jersey: 1810, State *v.* Van Houten, 2 N. J. L. 248 (other utterings on the same day of other counterfeit bills on the same bank, admitted by the majority, to show knowledge and intent); 1838, State *v.* Robinson, 16 N. J. 507 (another uttering of a note on the same bank, admitted; "Vanhouten's case . . . has been followed ever since in this State"; acquittal on the charge of the other uttering, held immaterial); 1897, Ryan *v.* State, 60 N. J. 552, 38 Atl. 672 (counterfeit money; evidence of former offences, rejected on the facts);
New York: 1855, People *v.* Thoms, 3 Park. Cr. 256, 270 (possession with intent to utter; other altered notes found in the possession of the accused, admitted; but notes found in his wife's possession, who had just come from his house, excluded); 1874, People *v.* Corbin, 56 N. Y. 363 (forgery of A's name, the defendant's claim being that he had authority to write it, but the prosecution claiming a revocation of the authority; other forgeries, about the same time, of his father-in-law's name, excluded); 1887, People *v.* Everhardt, 104 N. Y. 591, 11 N. E. 62 (utterance of a forged check; utterance "of other forged checks by him upon other occasions", admitted to negative innocent uttering); 1900, Boyd *v.* Boyd, 164 N. Y. 234, 58 N. E. 118 (whether the defendant forged an assignment of a certificate of redemption in the

The precedents in the various jurisdictions exhibit the application of the following distinctions, both in civil and criminal cases, with more or less

name of a deceased judgment-creditor; a similar forged assignment in the same hand and covering a similar transaction, admitted, on the principle of § 303, *ante*, to show that "an act which had been done by some one was in fact done by the person who designed and pursued the plan"; "there is neither reason nor authority to support the proposition that it must always be limited to cases where motive is material"); 1904, People *v.* Weaver, 177 N. Y. 434, 69 N. E. 1094 (other forged notes, not admitted on the facts; Werner, J., diss.); 1906, People *v.* Dolan, 186 N. Y. 4, 78 N. E. 569 (forgery of a note; utterance of other forged notes in the same and other names, admitted to show knowledge, and also to show a general plan; People *v.* Weaver, distinguished);

North Carolina: 1822, State *v.* Twitty, 2 Hawks 248, 258 (uttering a bank-note; former utterings of counterfeits of other banks, admitted to show knowledge);

North Dakota: 1908, State *v.* Murphy, 17 N. D. 48, 115 N. W. 84 (forgery of tax-receipts; other similar forgeries of receipts for taxes from the same and another taxpayer, admitted);

Ohio: 1831, State *v.* Hess, 5 Oh. 9 (the possession of other counterfeit bank-notes, secreted about the house, admitted); 1846, Reed *v.* State, 15 Oh. 217 (other counterfeit utterances about the same time, admissible; here of the same bank); 1862, Griffin *v.* State, 14 Oh. St. 55, 62 (uttering; the possession of counterfeit money similar in character, admissible); 1882, Lindsey *v.* State, 38 Oh. 507 (uttering a forged warranty deed); other forged warranty deeds and also deeds of trust admitted to show knowledge; sameness of kind not being essential);

Oklahoma: 1917, Montgomery *v.* State, 13 Okl. Cr. 652, 166 Pac. 446 (forgery; other forgeries admitted as part of a scheme);

Oregon: 1907, State *v.* Kelliher, 49 Or. 77, 88 Pac. 867 (forgery of school-land certificate papers; joint-indictee's forgery of numerous similar documents, not admitted on the facts);

Pennsylvania: 1893, Penns. Co. *v.* R. Co., 153 Pa. 160, 164, 25 Atl. 1043 (conversion; forged letter of attorney in issue; other draft forgeries found in defendant's desk of the signatures in question, admitted as showing a plan to forge the one in issue); 1899, Wheeler *v.* Ahlers, 189 Pa. 138, 42 Atl. 40 (alteration of a note by the maker after indorsement; similar alterations by the same person of similar notes transferred to plaintiff, admitted);

South Carolina: 1816, State *v.* Antonio, 2 Constl. Ct. 776, 783, 791, 797, 806 (the possession of "instruments calculated to coin money", offered to show the *quo animo* in passing; admitted, as not involving unfair surprise and as tending to show "that he must have had a knowledge of the baseness of the metal of which the false dollar was composed"; Nott, J., dissenting, because it "did not prove that he knew this dollar to be counterfeit; . . . unless indeed there was some proof, by comparison or otherwise, that these were the moulds in which the dollar passed by the defendant was cast"); 1829, State *v.* Houston, 1 Bail. 300 (forgery; possession of other such instruments, admitted to show intent; quoted *ante*, § 313); 1900, State *v.* Allen, 56 S. C. 495, 35 S. E. 201 (forgery of school certificates; forgery of other similar certificates for the same county within five months later, admitted);

Tennessee: 1840, Peck *v.* State, 2 Humph. 78, 86 (uttering false silver dollars; other utterings of similar coins, if distinctly shown, held admissible, whether before or after the time in issue; "the accidents of trade can hardly be supposed to have placed in his possession so much spurious money"); 1885, Foute *v.* State, 15 Lea 712, 719 (uttering forged bills for jail fees; the fact of uttering "other forged bills for jail fees", admitted "to prove the *scienter*"); 1890, Franklin *v.* Franklin, 90 Tenn. 48, 16 S. W. 557 (a will alleged to be forged by F.; other forgeries held admissible to show guilty motive "if it had been shown that he had written this will and the defence was that it was written innocently or by direction of the testator"; but "it was not competent to show that he had *written* this will by proof that he had forged other papers");

Texas: 1893, Strang *v.* State, 32 Tex. Cr. 219, 228, 22 S. W. 680 (forged utterance; that the defendant had embezzled other funds of the employer, held inadmissible, by a majority);

Vermont: 1830, Keith *v.* Taylor, 3 Vt. 153 (to prove that the name of E. as witness on a note purporting to be the defendant's had been forged by D., a former holder of the note, the fact was offered (1) that D. had written the body of the note; (2) that D. had forged another note, of the same date and about the same amount, with the name of the same E. as witness, but with a different person as maker; excluded); 1897, Redding *v.* Redding's Est., 69 Vt. 500, 38 Atl. 230 (other forgeries, not admitted to show the commission of the one in question);

Virginia: 1827, Finn *v.* Com., 5 Rand. 701, 709 (efforts of the accused to procure counterfeit money, expressed intentions to go where it could be got, and to cultivate the acquaintance of a counterfeiter, admitted as showing a *scienter*); 1830, Martin *v.* Com., 2 Leigh 745 (counterfeit uttering; uttering another note of a different amount, on a bank in the same State, admitted); Spencer *v.* Com., 2 Leigh 751, 756 (other forged notes, admitted); 1834, Hendrick's Case, 5 Leigh 769, 773, 776 (uttering a

consistency. The falsification of documents in *other frauds* than forging and counterfeiting is dealt with elsewhere (*post*, § 341).

310. **Evidence of Knowledge; (1) Other Utterings.** The principle here applicable (*ante*, § 301) is that a former utterance is likely to have resulted in a questioning of the false article by the person to whom it was presented, and thus the attention of the defendant would have been called to its suspicious nature. The former utterance is thus relevant as showing that the defendant thereby probably acquired the knowledge charged.

Two questions here arise, as indicated by the general principle for evidencing Knowledge 'a priori' (*ante*, § 301): (1) Is the fact of a prior *successful utterance* likely to have given warning of the article's false character? Does it not rather show that no such warning was in fact received? In some of the cases it clearly appears that the defendant did receive such notice through an unsuccessful attempt,[1] or that his conduct betrayed such knowledge,[2] and in one ruling it is intimated that the prior uttering must have been an unsuccessful one.[3] Nevertheless no such requirement is laid down in the remaining rulings. One way to explain this is to suppose that the rulings proceeded from the point of view of Intent, for which purpose (*post*, § 312) the mere fact of uttering suffices; but this is incorrect, because in other aspects the Knowledge principle is consistently applied. The truth seems to be that though the single fact of successful utterance is not likely to have resulted in warning at that precise occasion, yet the person receiving the money or paper would probably ultimately have discovered its falsity or have had it returned to himself by some later transferee, and would then have notified the defendant if he could be found; and thus, except in infrequent cases, the chances of the defendant's receiving warning after even a successful utterance are appreciable and become very great with each additional utterance. (2) Even assuming that through the prior occasion a warning came to the defendant, would the warning about that piece of paper or money have involved a fair warning about the one charged, unless the two were of a *similar sort?* All Courts answer this in the negative, and require that the former article have some similarity to the one in question; for otherwise there is no probability of knowledge having been thereby received.[4] But, naturally, no general fixed rule can be laid down to determine what similarity should

forged check; the fact admitted, to prove "guilty knowledge", of uttering forged checks on other banks on the day after);
West Virginia: 1914, First National Bank of Pennsboro *v.* Barker, 75 W. Va. 244, 83 S. E. 893 (alleged forgery of notes by the payee; his "frequent and general use of the names of his neighbors, without their knowledge or authority, as a means of securing money" by forgery, etc., admitted; a sensible and liberal decision):
Washington: 1922, State *v.* Weir, — Wash. —, 203 Pac. 953 (uttering forged check; issuing other checks on no funds, excluded);
Wisconsin: 1859, State *v.* Morton, 8 Wis. 352 (possession with intent; evidence to show *scienter* not stated; but evidence for the defendant that he had examined a "counterfeit-detector", admitted).

§ 310. [1] R. *v.* Forster, Eng.
[2] R. *v.* Phillips, Eng.
[3] State *v.* Smith, Conn.
[4] As well set forth in U. S. *v.* Roudenbush, U. S.

be required. The rulings exhibit views of all degrees of liberality and narrowness.[5]

§ 311. **Same**: (2) **Other Possession.** The possession of other forged or counterfeit articles operates in a different way to show Knowledge. The mere fact of possession has in itself no force for this purpose, though it may be relevant to show Intent (*post*, § 312). But the possession may involve conduct betraying a knowledge of the falsity of the article, — as where counterfeit coins are separately wrapped in paper [1] or counterfeit paper is kept secreted,[2] or tools are also found; [3] and thus the prior knowledge applies equally to the article in question. Here, moreover, similarity of the article would probably be immaterial, for the concealment indicates a general criminal knowledge.

§ 312. **Evidence of Intent**: (1) **Other Utterings.** The principle here applicable (*ante*, § 302) proceeds merely upon the doctrine of chances; it does not attempt to show knowledge or any other possible element of Intent; but it endeavors to negative inadvertence and any other innocent explanation. It argues that the oftener a like act has been done, the less probable it is that it could have been done innocently.[1] (*a*) It is therefore immaterial whether the other attempt to utter was *unsuccessful*, or whether it resulted in notice to the utterer; it is the bare fact of the uttering, or of the attempt to utter, that is evidential. (*b*) As to the *similarity of the article* uttered, it follows that the act as a whole must be like the act charged; so that the test is here in general the same as when it is desired to show Knowledge (*ante*, § 310). No effort seems to have been made to define more closely the similarity to be required; [2] but at least it seems clear that the specific principle applicable to evidence of Knowledge — a similarity such as would have warned the utterer of the falsity of the article in question (*ante*, § 310) — has no application here.

§ 313. **Same**: (2) **Other Possession.** The principle here operates precisely in the same way, — not as tending to show a probable warning, but as negativing, by repetition of instances, the possibility of innocent explanation.[1] The practical difference between the use of such facts to show Knowledge and

[5] R. *v.* Millard, R. *v.* Sunderland, R. *v.* Hodgson, R. *v.* Kirkwood, R. *v.* Martin, R. *v.* Phillips, R. *v.* Ball, R. *v.* Forster, Eng.; Stalker *v.* State, Conn.; State *v.* Saunders, Ia.; Lindsey *v.* State, Oh.; Martin *v.* Com., Va.; State *v.* Twitty, N. C.; U. S. *v.* Doebler, U. S.

§ 311. [1] R. *v.* Jarvis, Eng.

[2] State *v.* Hess, Oh.

[3] State *v.* Antonio, S. C.

§ 312. [1] 1887, Peckham, J., in People *v.* Sharp, 107 N. Y. 467, 14 N. E. 319 ("A man might think the money he passed was good, and he might be mistaken once or even twice; but the presumption of mistake lessens with every repetition of the act of passing money really counterfeit"); see also R. *v.* Francis, quoted *ante*, § 302.

[2] See the cases cited *ante*, § 309.

§ 313. [1] 1829, State *v.* Houston, 1 Bail. S. C. 300 ("His having a number of others of the same description is evidence of a general guilty purpose, of which the act under consideration is only a part; one may by accident come into the possession of a single counterfeit note or coin, but when he is possessed of many or passes many, it must be attributed to something more than accident"); 1853, Thurman, J., in Farrer *v.* State, 2 Oh. St. 73 ("The best evidence of this *scienter* . . . is proof that the accused had more spurious money in his possession than would be likely to come into the hands of an honest man in the ordinary course of business").

to show Intent is that in the former case (*ante*, § 311) something more than possession is theoretically necessary, while here the mere fact of possession is evidential.[2] The difference is also brought out by this, that another possession *after* the act charged would be evidential of Intent,[3] while it could in no way be evidential of anterior Knowledge.

§ 314. **The foregoing Principles Compared.** It is thus seen that the principles to be followed in evidencing Knowledge and Intent differ to some extent at certain points, — each one being in some respects more exacting, in some more lax, in its requirements than the other. Moreover, the Courts seem at some times to have the one principle in view, at some times the other. Which of the two is to control? Neither; and both. The truth is that Intent in general, as well as Knowledge in particular, is in this class of offences always open to be proved; that either object, or both, may be aimed at; but that the evidence should be appropriate to the purpose it is aimed at. The confusion of precedents seems to have come from instinctive perception of the requirements of one or the other of the principles, accompanied by a failure to observe that there were in reality two principles equally available. Every piece of evidence offered in the present connection has these two avenues of entrance, and its right to enter by either, on the general principle of Multiple Admissibility (*ante*, § 13), should be liberally construed.

§ 315. **Evidence of Design or System.** Where the act itself (forging, uttering, or the like) is disputed, and the resort of proof is to a plan or system as tending to show the doing of the act, the prior acts offered must be something more than an individual instance or two; they must be so connected by common features as to suggest a System or Plan (*ante*, § 304). (1) This sort of evidence has not always been intelligently treated by the Courts. It has occasionally been received; [1] it has occasionally been properly rejected; [2] but there are other rejections which cannot be supported,[3] and still others which can only be described as ridiculous and tending to dishonor our law of Evidence.[4] (2) Evidence amounting to proof of System or Design may of course be employed also where the act is not disputed, and the Intent alone (*ante*, § 312) is in issue; [5] the evidence here being merely stronger than is absolutely essential. But it would be erroneous to require such a systematic connection where proof of Intent alone is desired.

§ 316. **Time of other Acts.** (1) Whether *subsequent* acts of uttering should be admitted was in England at one time doubted; [1] but the doubt was afterwards solved in favor of admission,[2] and does not seem in this

[2] See for example the cases in England and Massachusetts.

[3] As in Com. *v.* Price, Mass.

§ **315**. [1] Roupell *v.* Haws, Eng.; Blalock *v.* Randall, Ill.; Card *v.* State, Ind.; Carver *v.* People, Mich.

[2] Viney *v.* Brass, Balcetti *v.* Serani, Eng.

[3] Graft *v.* Lord Bertie, Eng.; Franklin *v.* Franklin, Tenn.; Redding *v.* Redding's Est., Vt.

[4] Dodge *v.* Haskell, Me.; Costelo *v.* Crowell, Mass.; Keith *v.* Taylor, Vt.

[5] Com. *v.* White, Mass.; Finn *v.* Com., Va.

§ **316**. [1] R. *v.* Taverner, R. *v.* Smith.

[2] R. *v.* Forster.

country to have received any support.[3] Subsequent possession is equally admissible.[4] This result emphasizes the difference between evidencing Knowledge and evidencing Intent; for the subsequent uttering could of course result in no warning which should show Knowledge at the anterior time charged; while, in evidencing Intent, it is the repetition of instances that tends to negative innocence in particular instances, and thus it is immaterial whether the instances are found occurring before or after the act charged. (2) The *length of time* over which we may range in search of evidential instances is obviously determinable by no fixed rule. The precedents illustrate various lengths of time.[5] The discretion of the trial Court should here control.[6]

§ 317. **Sundry Limitations.** (1) The *falsity* of the other articles (forged or counterfeit) uttered or possessed must of course be shown.[1] But the defendant's *knowledge* of their falsity need not be shown.[2] The very kernel of the principle (either of Knowledge or of Intent) is that the fact of the uttering tends, in one way or another, to show the defendant's knowledge at the time in issue, either by the probable warning received or by the improbability of innocent intent in repeated instances; and the assumption throughout is that the bare fact of utterance tends to show this. (2) A possession or utterance by a *co-conspirator*, as making the defendant equally responsible if the other person was acting in connection with the defendant, involves a different principle from the present.[3] (3) Whether the *contents* and the uttering of another false article may be evidenced by the defendant's *admission* is a question of the rule requiring the production of an original (*post*, §§ 1205, 1255). (4) Whether the defendant's *acquittal of a former forgery* prevents the use of the former document for the present purpose, when its forgery is duly evidenced, is answered in the negative;[4] because the acquittal may have been due to the defendant's then ignorance of the falsity, or to lack of sufficient evidence of the falsity; and for the present purpose, its falsity is the only material fact.

No further limitations of a general nature have been proposed.

[3] People *v.* Frank, Cal.; Thomas *v.* State, n. d.; State *v.* Mix, Mo.; Peck *v.* State, Tenn.; Hendrick's Case, Va.

[4] Com. *v.* Price, Mass.

[5] R. *v.* Wylie, R. *v.* Hough, R. *v.* Ball, R. *v.* Millard, Eng.; State *v.* Smith, Stalker *v.* State, Conn.; People *v.* Frank, Cal.

[6] Distinguish the question of *criminal pleading* whether, *as the act charged*, any criminal act may be proved as of a time not specified in the indictment; this is sometimes governed by a statute, for the present class of cases; *e.g.*, Me. Pub. St. 1883, c. 120, § 8.

§ 317. [1] R. *v.* Forbes, Eng.; People *v.* Whiteman, Cal.; Peck *v.* State, Tenn.

[2] Com. *v.* Bigelow, Mass., requires this; but the doctrine is not repeated in later rulings.

[3] 1827, U. S. *v.* Craig, 4 Wash. C. C. 729 (parts of the tools were found in other persons' possession, shown to be connected with the defendant in their operations).

[4] 1865, People *v.* Frank, 28 Cal. 507 (forgery of a draft; another draft admitted to show guilty knowledge, though defendant had been tried and acquitted on the charge of forging it; leading opinion, per Sanderson, C. J.); 1852, McCartney *v.* State, 3 Ind. 353 (forgery; similar to People *v.* Frank); 1881, Bell *v.* State, 57 Md. 108, 116 (forgery; similar to People *v.* Frank); 1838, State *v.* Robinson, 16 N. J. L. 507 (cited *post*, § 319, n. 1). 1829, State *v.* Houston, 1 Bail. S. C. 300 (uttering a forged note; similar to People *v.* Frank);

3. False Pretences or Representations

§ 321. **General Principle; State of the Law in the Various Jurisdictions.** The utterance of forged paper or counterfeit money is simply one species of false representation, — a representation in conduct instead of in words. Thus, the general principles of evidencing Knowledge, Intent, and Design, as examined for the preceding topic, apply equally to the present topic. It will be here necessary only to call attention to the specific application of those principles (*ante*, §§ 301–304). The precedents in the various jurisdictions exhibit the application of the ensuing distinctions with more or less consistency, and concern both civil and criminal cases.[1]

§ 321. [1] ENGLAND: 1702, Hathaway's Trial, 14 How. St. Tr. 664 (cheating by pretending to be bewitched by one Sarah M., so that he fasted, went into a trance, etc., through her bewitching; the popular belief was that the sorcery was true, for many people had seen him fasting for twelve weeks; to show that the fasting was a fraud, in that he secretly took food, evidence to that effect was offered covering the last two weeks of it, which, however, fell after the date of the information charging him, and was therefore objected to; L. C. J. Holt: "It is an evidence of his cheating since that time, and that out of the information [*i.e.* not charged]; but it is an evidence also to prove that his pretended fasting before was a mere deceit; for he then pretended to have fasted ten weeks before he came hither, and after pretends to continue fasting in the same manner; if that be proved to be a fraud, it is strongly to be inferred that this pretended fasting before was so too"); 1808, R. *v.* Roberts, 1 Camp. 399 (conspiracy by fraudulent representations to obtain goods; the defendants had held themselves out as wealthy in their mode of life; representations to that effect to another tradesman were admitted); 1824, R. *v.* Whitehead, 1 C. & P. 67 (cheating by false representations as to B.'s property; B.'s representations to the defendant, similar to those of the defendant to others, were admitted to show that the defendant was misled by B.; this is really a mode of proving good faith, under § 256, *ante*); 1831, Irving *v.* Motly, 7 Bing. 543, *semble* (other purchases by representations under similar circumstances, admitted to show fraud); 1856, R. *v.* Roebuck, D. & B. 24, before all the judges but one (obtaining money by offering to pawn a chain of false silver; the fact admitted of a subsequent offering of a similar false chain, and of the possession of twenty-six similar false chains); 1860, R. *v.* Holt, 8 Cox Cr. 411 (before five judges; the fact of another unauthorized obtaining of money near the same time, not admitted to show intent); 1864, R. *v.* Fuidge, L. & C. 390 (false pretences; the fact of the false obtaining of a similar article three days later was rejected, no reasons being given); 1871, R. *v.* Stenson, 12 Cox Cr. 111 (false pretences by causing an order to be given to A., a bookseller, purporting falsely to be from S., a lady of quality, for a book sold by the defendant; the fact of the sending of other false orders of the same sort was received to show the intent); 1874, R. *v.* Francis, L. R. 2 C. C. R. 128 (to show guilty knowledge of the falsity of a ring offered for pawn as a diamond, the fact was received of the offering, shortly before, to other pawnbrokers, of a false gold chain and of other alleged diamond rings; in one of the instances the broker told the accused that the diamond was not genuine; quoted *ante*, § 302); 1875, R. *v.* Saunders, 1 Q. B. D. 19 (false pretences by advertising to give work and requesting money by mail to play for the preliminary instructions; the fact received, to show intent, of a number of other persons having been induced afterwards by him in the same way to forward money on such advertisements); 1878, Blake *v.* Assurance Soc., 14 Cox Cr. 246, L. R. 4 C. P. D. 94 (action to recover a premium obtained by false pretences; H. agreed to lend money to the plaintiff, on condition that he insure his life with the defendant; the defendant insured his life, but H. failed to make the loan; to show that the defendant was in fraudulent collusion with H. for the purpose of obtaining premiums, the fact was admitted of similar policies issued and similar defaults of H. with reference to other persons, the person H. being a mere figurehead or fictitious person; quoted *ante*, § 302); 1899, R. *v.* Rhodes, 1 Q. B. 77 (false pretences in obtaining eggs; the obtaining of eggs from other persons by similar pretences shortly afterwards, admitted as "part of a scheme to fraud"); 1900, R. *v.* Ollis, 2 Q. B. 758, 764 (falsely passing a check upon no funds; similar passing of a check on the same bank to another person about the same time, held admissible, though the defendant had been acquitted of the latter charge on a trial therefor; Bruce and Ridley, JJ., diss.); 1904, R. *v.* Wyatt, 20 Cox Cr. 462, 1 K. B. 188 (obtaining credit for lodging, etc., under false pretences to W.; the facts that the accused had left other persons' apartments while in debt to them were admitted to show a fraudulent system and to negative mistake or honest

In a false representation or pretence, there is involved — alike in all the varieties of offence, and in most civil cases as well as in criminal cases — the

motive); 1905, R. *v.* Smith, 20 Cox Cr. 804 (obtaining credit on false pretences as agent of M., the defendant alleging that he had merely given M.'s name as a reference, his representations to another vendor a few days later that he was agent of M. were admitted; R. *v.* Wyatt commented on; R. *v.* Holt discredited); 1909, Fisher's Case, 3 Cr. App. 176 (obtaining a car, pony, and harness by false pretences; an instance of obtaining a horse by false pretences, held admissible, but instances of obtaining on credit fraudulently fodder and provender, excluded; this ruling, quite unsound on principle, is like a revival of the old-fashioned vain subtleties; indeed, it is a stricter ruling than would have been rendered a century ago; on appeal, [1910] 1 K. B. 149, reversed, on the correct ground that the evidence was of other false representations not sufficiently similar to show a system of swindling by the same method); 1910, R. *v.* Ellis, 2 K. B. 747 (false pretences by an art-dealer in misstating the purchase-cost of an article; two other false pretences to the same buyer, during the preceding nine years, as to the genuineness of articles sold, held not admissible); 1910, Charlesworth's Case, 4 Cr. App. 167 (false pretences as to a fortune; other pretences to another person two years before, admitted on special grounds); 1911, Edinburgh Life Ass. Co. *v.* Y., 1 Dr. R. 306 (action to set aside a policy issued on fraudulent representations of a peculiar sort; similar representations made in obtaining other policies from the same and other companies, held admissible, but only after amendment of the plaintiff's pleadings); 1915, R. *v.* Kurasch, 2 K. B. 749 (false pretences; appellant taking the stand was cross-examined as to living with Mrs. D., his employer, as her husband; held admissible, under par. (*f*) of § 1 of the Act of 1898, quoted *ante*, § 194 *a*, being relevant to the circumstances of the case; following R. *v.* Rodley and R. *v.* Fisher);

CANADA: 1919, Larson *v.* Boyd, 46 D. L. R. 126, Can. S. C. (false representations in a land sale); 1919, R. *v.* Labrie, 60 D. L. R. 582, Que. (false pretences); 1897, Mutual Life Ins. Co. *v.* Jonah, 1 N. Br. Eq. 482 (insurance policy; prior and subsequent similar frauds, admissible); 1889, Kidd *v.* Henderson, 22 N. Sc. 57 (false representations inducing a contract; the plaintiff's similar false representations to others, admitted, by two judges, and *semble*, by all).

UNITED STATES: *Federal:* 1859, Castle *v.* Bullard, 23 How. 172, 186 (fraudulent sale by an agent to an insolvent purchaser; similar connivance in purchases by the same person from others than the plaintiff, about the same time, admitted to show intent); 1868, Lincoln *v.* Claflin, 7 Wall. 132, 138 (case for obtaining goods by false representations as to assets; "other similar fraudulent transactions of the same parties with others, made about the same time", admitted to show intent); 1871, Butler *v.* Watkins, 13 Wall. 456, 464 (deceit; to show intent, the plaintiff was allowed to show "similar conduct towards another, at about the same time, and in relation to a like subject", here, the business of selling the plaintiff's goods for him); 1882, U. S. *v.* Snyder, 4 McCr. 618, 621 (false return as postmaster, in order fraudulently to increase his compensation, during the quarter ending Dec. 31, 1880; evidence admitted of similar false returns before and after that time, to show intent); 1894, Mudsill M. Co. *v.* Watrous, 9 C. C. A. 415, 61 Fed. 163, 172, 179 (fraudulent salting of ore-samples to induce a purchase; the salting of samples in prior negotiations of purchase with other persons, admitted as showing a plan to tamper with the samples; the opinion is one of the best illustrations of the principles of this chapter); 1896, Penn M. L. Ins. Co. *v.* Mechanics' S. B. & T. Co., 19 C. C. A. 286, 72 Fed. 413, 421 (whether a false answer in an insurance application was made with intent to deceive; similar false answers in applications for other policies, admitted); 1898, Spurr *v.* U. S., 31 C. C. A. 202, 87 Fed. 701 (false certification of checks by a bank president knowing the account to be deficient; prior approval of illegal stock-speculations of the cashier by the defendant, admitted to show intent); 1899, Bacon *v.* U. S., 38 C. C. A. 37, 97 Fed. 35 (false report to comptroller by president of national bank; previous false reports, admitted to show intent); 1911, Dyer *v.* U. S., 108 C. C. A. 478, 186 Fed. 614 (using the mails to defraud, by false representations as to medical skill and eminence; the prosecution was not allowed to show that the defendant had been three times convicted of various crimes in the U. S. and other times in England; either counsel or court missed the real point of objective here for obviously the prosecution, in showing the gross falsity of the representations that the defendant was a "noted expert" and "one of the greatest living specialists" in certain diseases, was entitled to show the defendant's life-events to be of the opposite character); 1916, Shea *v.* U. S., 6th C. C. A., 236 Fed. 97 (conspiracy to defraud by fake betting on horse races; a prior instance by the same parties with another victim, admitted, though using slightly different methods, but another instance, similar only in being a confidence game, was excluded); 1920, MacKnight *v.* U. S., 1st C. C. A., 263 Fed. 832, 838 (false pretences based on forged deeds caused to be recorded; similar false records in another country, admitted);

Alabama: 1897, Martin *v.* Smith, 116 Ala. 639, 22 So. 917 (contents of paper signed; false representations as to a similar paper shortly before

general notion of Intent to deceive. Within this, and usually decisive in showing it (but capable, as already noted, of being evidenced by a separate

excluded on the facts); 1899, Bomar *v.* Rosser, 123 Ala. 641, 26 So. 510 (similar representations, to one other person, about the same patent, not admitted to show the making of representations in issue);

Arkansas: 1898, White *v.* B. & F. G. Co., 65 Ark. 278, 45 S. W. 1060 (fraudulent purchase; other purchases about the same time, admissible only when connected by a common purpose); 1905, Johnson *v.* State, 75 Ark. 427, 88 S. W. 905 (conspiracy to cheat by betting on a race; similar acts, including subsequent ones, admitted to show intent);

Columbia (District): 1913, Partridge *v.* U. S., 39 D. C. App. 571 (false pretences as to a stock guaranty; similar false representation to another person, admitted on the facts);

Connecticut: 1805, Gardner *v.* Preston, 2 Root 205 (case for fraudulent representations as to T.'s solvency; similar representations to other merchants in the same town about the same time, admitted, as showing a combination to defraud; here, however, the combination was alleged in the declaration); 1899, Elwell *v.* Russell, 71 Conn. 462, 42 Atl. 862 (fraudulent representations as to a mortgage; subsequent conduct, admitted); 1905, Malley Co. *v.* Button, 77 Conn. 571, 60 Atl. 125 (goods procured by false representations; other similar representations to other stores, excluded);

Illinois: 1871, Allin *v.* Millison, 72 Ill. 201 (sale of a patent-right; the fact admitted that other purchasers had complained to the seller of the patent's worthlessness); 1902, Du Bois *v.* People, 200 Ill. 157, 65 N. E. 658 (similar transactions in a "confidence game" with other persons about the same time, admitted to show guilty knowledge); 1909, People *v.* Weil, 243 Ill. 208, 90 N. E. 731 (confidence game, here by borrowing money through impersonation; prior use of the same trick on another person, admitted); 1914, People *v.* Bertsche, 265 Ill. 272, 106 N. E. 823 (confidence game; other transactions with the same victim, admitted "to show guilty knowledge and intent"); 1920, People *v.* Emmel, 292 Ill. 477, 127 N. E. 53 (confidence game; a transaction three years before, excluded on the facts); 1921, People *v.* Shaw, 300 Ill. 451, 133 N. E. 208 (confidence game, by bogus express money-orders; similar acts in the same town the same evening, admitted, to show knowledge and intent); 1921, People *v.* Ullrich, 299 Ill. 250, 132 N. E. 488 (confidence game; other similar acts, here excluded because not sufficiently evidenced);

Indiana: 1882, Strong *v.* State, 86 Ind. 278 (false pretences to be a travelling Mason in distress; the fact excluded of a former false pretence of the same sort in an adjoining State a few years before, because such evidence is limited to cases where the act charged does not on the evidence carry with it "an evident implication of a criminal intent", as it did here; Elliott, J., diss.); 1897, Crum *v.* State, 148 Ind. 401, 47 N. E. 833 (larceny by trick, in furnishing counterfeit money; the fact of "other like crimes about the time", admitted to show intent; overruling Strong *v.* State, *supra*);

Iowa: 1882, State *v.* Rivers, 58 Ia. 102, 108, 12 N. W. 117 (false representations to a bank that a mortgage was a first lien; the defendant's bank account before and after the transaction, and other matters, admitted as indicating his intent); 1888, State *v.* Jamison, 74 Ia. 613, 617, 38 N. W. 509 (false representation of the contents of a mortgage in obtaining a signature to it; a prior similar pretence to the same person with a similar instrument, admitted); 1897, State *v.* Brady, 100 Ia. 191, 69 N. W. 290 (obtaining money by false warrants; former false warrants, admitted to show intent and also to show a systematic scheme of fraud); 1901, State *v.* Dexter, 115 Ia. 678, 87 N. W. 417 (obtaining property under false pretences; purchases from others on similar representations, admitted); 1902, State *v.* Soper, 118 Ia. 1, 91 N. W. 774 (false pretences; similar representations to others about the same time, admitted to show intent); 1905, State *v.* Seligman, 127 Ia. 415, 103 N. W. 357 (false pretences as life insurance agent; other similar transactions with other persons, admitted to show intent); 1906, Elbert *v.* Mitchell, 131 Ia. 598, 109 N. W. 181 (fraudulent representation as to hogs sold; similar false representations to other persons, admitted for the plaintiff to show intent or scienter, but similar honest transactions with others, not admitted for the defendant); 1908, Gibson *v.* Seney, 138 Ia. 383, 116 N. W. 325 (other false representations to other persons, as to a right of way, admitted); 1922, Farmers' Nat'l Bank *v.* Pratt, — Ia. —, 186 N. W. 924 (stock subscriptions; similar representations to other persons, admitted);

Kansas: 1906, State *v.* Briggs, 74 Kan. 377, 86 Pac. 447 (false pretences as to real estate loans; similar pretences to other persons, admitted); 1912, People's Bank *v.* Reid, 86 Kan. 245, 120 Pac. 339 (fraudulent notes; similar transactions with other persons, admitted);

Kentucky: 1897, Roche *v.* Coleman, 19 Ky. L. Rep. 985, 42 S. W. 739 (false representations as to shares of stock; similar representations to other persons, not received to show the fact of making);

Maine: 1826, McKenney *v.* Dingley, 4 Me. 172 (similar pretences as to solvency, to persons in the same town, about the same time, admitted); *semble*, that a general plan must have existed); Seaver *v.* Dingley, 4 Me. 306, 320 (similar, but more limited, evidence received;

principle), is the element of Knowledge. Lastly, in the (here unusual) case where the act of making the representations is disputed, and resort is

(and no plan required, *semble*); 1840, Hawes *v.* Dingley, 17 Me. 341 (similar case; like fraudulent purchases of others about the same time, admissible; the testimony said "in most cases" to have involved a formed design thus to defraud, but such design apparently not held necessary);

Maryland: 1897, Carnell *v.* State, 85 Md. 1, 36 Atl. 117 (false representations as to money in bank; similar pretences as to such money, to another person, about the same time, admitted, **first**, to show guilty knowledge, and, secondly, to show that he had "devised a scheme to obtain goods wherever and from whomsoever he could" by such representations);

Massachusetts: 1832, Rowley *v.* Bigelow, 12 Pick. 307, 311 (trover for goods bought with fraudulent intent not to pay; the fact of similar purchases of like articles about the same time, admitted to show the fraudulent purpose); 1842, Com. *v.* Stone, 4 Metc. 43, 47 (cheating by knowingly passing the bill of a broken bank; evidence admitted of the passing of other similar bills, to show the *scienter*); 1848, Com. *v.* Eastman, 1 Cush. 189, 195 (conspiring to obtain goods from S. under pretence of buying and with intent not to pay; purchases from nine other persons under the same circumstances of insolvency, etc., admitted to show intent); 1857, Wiggin *v.* Day, 9 Gray 97 (replevin for goods obtained with fraudulent intent not to pay; evidence received of purchases of large amounts of personalty from others at the same time of insolvency, and their secreting); 1872, Jordan *v.* Osgood, 109 Mass. 457 (replevin for goods bought with intent not to pay, and bought under false pretences as to solvency; the fact was rejected of similar false representations to other persons at or about the same time; Morton, J.: "The transaction proposed to be proved for the purpose of showing the fraud which is the subject of controversy must be shown by some evidence, direct or circumstantial, to be so connected with it as to make it apparent that the defendant had a common purpose in both; but if the transaction is distinct and with no connection of design, it is not admissible. . . . The mere fact [in this case] that an insolvent trader makes misstatements as to his pecuniary condition does not justify the inference that he has formed a general scheme to cheat", and there being no other evidence of it, "the evidence of these distinct transactions therefore was not competent"; this opinion was rendered in full view of the preceding line of cases, and of those dealing with transfers in fraud of creditors (*post*, § 333), and was apparently intended to overrule the above line of cases, as well as those cited under § 333 except Williams *v.* Robbins, which it rehabilitates and makes law; the result is to apply the rigorous System rule (*ante*, § 304) even where the object is merely to show Intent, a result wholly unsound, as already suggested (*ante*, § 320), and out of harmony with the rule in other analogous situations; but this misapplication of the System rule in Massachusetts does not seem to extend beyond the present topic of false pretences, that of fraudulent transfers (*post*, § 333), and perhaps that of embezzlement (*post*, § 331); 1875, Haskins *v.* Warren, 115 Mass. 523, 538 (goods purchased fraudulently; the fact of other purchases admitted under the rule of Jordan *v.* Osgood); 1874, Com. *v.* Coe, 115 Mass. 481, 501 (cheating by the false pretence that a certificate of stock was genuine; the fact admitted of the use of other false certificates about the same time, to negative "casual and accidental" possession, and "to show guilty knowledge"); 1882, Com. *v.* Jackson, 132 Mass. 16 (false pretences as to the soundness of a horse; the fact of three similar false warranties in the preceding two months, rejected, as not indicating any single scheme or plan, "any more than the various robberies of a thief"); 1886, Com. *v.* Blood, 141 Mass. 575, 6 N. E. 769 (false pretences about the same article to other persons, admitted as parts of one fundamental scheme); 1902, Com. *v.* Lubinsky, 182 Mass. 142, 64 N. E. 966 (obtaining of goods from other persons about the same time by the same pretences, admitted to show intent: the Court still employs the language of the narrower rule as to a "common scheme to defraud"); 1905, Com. *v.* Clancy, 187 Mass. 191, 72 N. E. 842 (false pretences concerning a business sold; other similar transactions admitted, on the theory of conspiracy; Com. *v.* Jackson distinguished);

Michigan: 1879, Shipman *v.* Seymour, 40 Mich. 274, 280 (other purchases on similar false representations of solvency, two months before, admitted); 1880, Cook *v.* Perry, 43 Mich. 623, 626, 5 N. W. 1054 (sale; subsequent similar representations about the same property, made to a decoy, admitted); 1882, People *v.* Henssler, 48 Mich. 49, 52, 11 N. W. 804 (procuring indorsement to a note; similar previous false representations about other notes to the same person, admitted); 1886, People *v.* Wakely, 62 Mich. 297, 303, 28 N. W. 871 (sale; "previous acts of the same kind", admissible); 1887, Ross *v.* Miner, 67 Mich. 410, 35 N. W. 60 (obtaining goods by false pretences as to credit, etc.; purchases from others, and "the whole business" of the defendant, admitted); 1888, Stubly *v.* Beachboard, 68 Mich. 401, 422, 36 N. W. 192 (false representations as to encumbrances on the same lands to other parties, about the same time, admitted); 1905, People *v.* Hoffman, 142 Mich. 531, 105

had to a system or design to prove it, the stricter test applicable to proving Design may be invoked.

N. W. 838 (obtaining money by false vouchers for inquests; similar false vouchers, admitted to show knowledge and intent); 1919, People v. Rice, 206 Mich. 644, 173 N. W. 495 (false pretences; similar transactions before and after, admitted);
Minnesota: 1898, State v. Wilson, 72 Minn. 522, 75 N. W. 715 (obtaining money by personating an officer; that the defendant "had been engaged in practising like cheats", admitted to show intent); 1899, State v. Southall, 77 Minn. 296, 79 N. W. 1007 (false pretences by circulating "time checks"; circulation of others of the same tenor, admitted to show knowledge and intent); 1920, State v. Friedman, 146 Minn. 373, 178 N. W. 895 (obtaining money from M. by a swindling device; the use of an analogous swindling device on H. shortly afterwards, admitted); 1921, Albrecht v. Rathai, 150 Minn. 256, 185 N. W. 259 (false representations as to contents of a note given for a farm);
Missouri: 1892, State v. Jackson, 112 Mo. 585, 588, 20 S. W. 674 ("confidence game"; similar prior obtaining of money from another person three months before, admitted); 1897, Davis v. Vories, 141 Mo. 234, 42 S. W. 707 (fraudulent representations as to a copyright; similar representations, held admissible); 1898, State v. Turley, 142 Mo. 403, 44 S. W. 267 (similar representations to other merchants about the same time, admissible to show intent); 1898, State v. Wilson, 143 Mo. 334, 44 S. W. 722 (fraudulently obtaining and disposing of goods; similar transactions with other sellers on the same day in the same city, admitted to show intent); 1904, State v. Boatwright, 182 Mo. 33, 81 S. W. 450 (false pretences by a fake race; other fake races, etc., more than a year before, excluded); 1907, State v. Roberts, 201 Mo. 702, 100 S. W. 484 (fraud in exchange of lands for goods; similar fraud on another person about the same time, admitted to show intent); 1913, State v. Foley, 247 Mo. 607, 153 S. W. 1010 (false pretences; other similar frauds, admitted);
Nebraska: 1887, Cowan v. State, 22 Nebr. 519, 524, 35 N. W. 405 (obtaining goods by false pretences; such acts "in two other cases, entirely distinct and separate" from that at bar, excluded); 1896, Johnson v. Gulick, 46 Nebr. 817, 65 N. W. 883 (similar representations to other persons, not admitted to show the fact of making those charged); 1898, Morgan v. State, 56 Nebr. 696, 77 N. W. 64 (similar representations to another person shortly before, excluded); 1903, Barbar v. Martin, 67 Nebr. 445, 93 N. W. 722 (fraudulent representations to another stockholder, admitted);
Nevada: 1900, Swinney v. Patterson, 25 Nev. 411, 62 Pac. 1 (fraudulent representations in obtaining a note; similar ones made about the same time to other persons in the same place, admitted to show intent);
New Hampshire: 1839, Bradley v. Obear, 10 N.H. 477 (replevin for a horse bought by false representations of solvency; the fact received of the purchase of another horse about the same time by "similar fraudulent representations"); 1852, Angier v. Ash, 26 N. H. 109 ("acts or declarations evincing a fraudulent intention or purpose, if connected in point of time", admissible); 1868, State v. Call, 48 N. H. 126, 132 (cheating by false statements as to solvency; the mortgaging of most of his personalty within three days thereafter, to a third person, admitted to show intent); 1873, Hovey v. Grant, 52 N. H. 569 (trover for goods bought with intent not to pay; purchases from other persons about the same time while insolvent, admitted; the limits of time being a question of fact in each case);
New Jersey: 1907, Crosby v. Wells, 73 N. J. L. 790, 67 Atl. 295, 301 (fraud as a defence to an investment-contract; similar false representations as to the same investment, made to other persons, admitted);
New York: 1841, Cary v. Hotaling, 1 Johns. 311, 316 (purchase; similar representations to another person the day before, admitted to show intent); 1808, Allison v. Matthieu, 3 Johns. 235 (trover for goods obtained by false representations in buying furniture for L., said to be a rich foreigner, but really lacking in means and now absconded; the fact received, to show the intent, of similar representations about the same time to other persons); 1859, Hall v. Naylor, 18 N. Y. 588 (Comstock, J.: "K. & Co. concealed the fact of their insolvency, with a design of procuring the goods and not paying for them, it was a fraud which rendered the sale void if the plaintiff [seller] chose so to regard it. On the trial of such an issue, the 'quo animo' of the transaction is the fact to be arrived at: and it is therefore competent to show that the party accused was engaged in other similar frauds at or about the same time. The transactions must be so connected in point of time, and so similar in their other relations, that the same motive may reasonably be imputed to them all"; and accordingly evidence of a prior false representation not fraudulent was rejected); 1861, Hennequin v. Naylor, 24 N. Y. 139 (a case arising out of the same insolvency; this stricter rule was not applied, Hall v. Naylor not being cited, and mere prior purchases from others on the eve of suspension were admitted to show intent); 1864, Hathorne v. Hodges, 28 N. Y. 486, 489 (other purchases while insolvent, admitted in the same way); 1874, Bielschofsky v. People, 60 N. Y. 616 (false representations to obtain money; the same fraud on another

person a day or two before, admitted; no cases cited); 1875, Weyman *v.* People, 62 N. Y. 623 (larceny by obtaining goods by false representations; the procuring of goods from others by the same means, about the same time, admitted, on the principle of Hall *v.* Naylor, that "the similarity in their leading features and characteristics justified the conclusion that they were pervaded and controlled by the same general intention"); 1880, People *v.* Shulman, 80 N. Y. 373, note (obtaining goods by false pretences; other such fraudulent obtainings, after and before, admitted; Hall *v.* Naylor's rule followed, that the transactions must have "some relation to or connection with the main transaction"); 1880, Mayer *v.* People, 80 N. Y. 364, 369, 372 (the same rule laid down, that the other acts, which may be either before or after the time in question, must show "a general purpose or scheme to obtain goods fraudulently", but the fact offered was merely of other false (*i.e.* incorrect) representations of solvency, and not of other fraudulent (*i.e.* knowingly false) representations, nor did the Court prescribe such a limitation); 1881, Shipply *v.* People, 86 N. Y. 376, 380 (larceny by false pretences; a "similar transaction" with another person, admitted, citing the last two cases); 1887, People *v.* Dimick, 107 N. Y. 13, 31, 14 N. E. 178 (representations as to insurance after knowledge of loss; other similar representations during the same season, as to other cargoes, admitted to show intent); 1897, People *v.* Peckens, 153 N. Y. 576, 47 N. E. 883 (larceny by false representations; transactions with other parties tending to show a fraudulent scheme to use the same devices, admissible, "provided the dealings are sufficiently connected in point of time and character to authorize an inference that the transaction was in pursuance of the same general purpose");

North Carolina: 1894, State *v.* Walton, 114 N. C. 783, 784, 18 S. E. 945 (false representations to a treasurer as to orders for money; other instances of the sort, admitted); 1897, State *v.* Durham, 121 N. C. 546, 28 S. E. 26 (similar representations to another person about the same time, admitted);

Ohio: 1878, U. S. Ins. Co. *v.* Wright, 3 Oh. St. 533 (fraudulent representations by an insurance agent; similar representations to others excluded, because not shown to be false nor known by him to be false); 1883, Tarbox *v.* State, 38 Oh. 581 (representations as to the breeding, etc., of two horses; "similar offences" shortly before, in another State, admitted to show knowledge);

Oklahoma: 1914, State *v.* Rule, 11 Okl. Cr. 237, 144 Pac. 807 (false official warrants; "other similar transactions under the same contract, whether before or afterwards", held admissible); 1921, Mathews *v.* State, — Okl. Cr. —, 198 Pac. 112 (false pretences; similar pretences to others, admitted on the circumstances);

Pennsylvania: 1868, Simons *v.* Vulcan Co., 61 Pa. 202, 204, 218 (assumpsit for money obtained by false representations in selling oil-lands; other prospectuses by the defendant, issued about the same time, admitted to show fraud); 1872, Com. *v.* Yerkes, Phila. Com. Pleas, 29 Leg. Intell. 60; 12 Cox Cr. 208, 215, 225, 226 (larceny and false pretences by obtaining a check from the City Treasurer for a purchase as agent for the sinking fund, never made in fact; the fact that upon similar previous transactions checks were thus given by the Treasurer on transactions to be perfected in the future, not received to show innocent intent; two Judges dissenting); 1893, Schofield *v.* Schiffer, 156 Pa. 65, 73, 27 Atl. 69 (similar representations by a debtor-buyer to third persons, admitted to show intent); 1896, White *v.* Rosenthal, 173 Pa. 175, 33 Atl. 1027 (action for deceit by false representations of solvency; a series of purchases admitted as indicating a scheme to obtain by fraud);

Rhode Island: 1902, State *v.* Letourneau, 24 R. I. 3, 51 Atl. 1048 (selling pills on false representations; similar sales to other persons after the sale charged, excluded; no authority cited);

Tennessee: 1870, Defreese *v.* State, 3 Heisk. 53, 62 (larceny by a fraudulent card trick; evidence admitted of other occasions when the defendant and his confederate used it to win money from other persons); 1891, Rafferty *v.* State, 91 Tenn. 655, 663, 16 S. W. 728 (representations as to loss by fire, made to obtain insurance money; evidence admitted of thirteen different claims of fire-loss by the defendant, within three years, in various cities, under different aliases, and of the similarity of the representations in those cases as to the articles lost; compare § 340, *post*);

Texas: 1920, Goree *v.* Uvalde Nat'l Bank, — Tex. Civ. App. —, 218 S. W. 620 (action on promissory notes other frauds by the bank's cashier, not admitted under the circumstances, to show that the amount of the defendant's note had been fraudulently altered);

Virginia: 1878, Trogdon's Case, 31 Gratt. 862, 870 (obtaining goods by false pretences; "similar representations about the same time to other persons", admitted);

Washington: 1896, State *v.* Bokien, 14 Wash. 403, 44 Pac. 889 (drawing a check knowingly on no funds; other such previous drawings excluded; a ruling clearly wrong; if any interim deposits had been made, it was for the defendant to make this explanation); 1906, State *v.* Oppenheimer, 41 Wash. 630, 84 Pac. 588 (obtaining money by false pretences; the obtaining from various other parties by similar false pretences, excluded, because not shown to be part of a scheme, following State *v.* Bokien and the unsound Massachusetts doctrine; it is a pity that this over-strict and unpractical rule should be approved instead of repudiated);

Wisconsin: 1903, Baker *v.* State, 120 Wis. 135, 97 N. W. 566 (false pretences; certain other

(1) *Knowledge.* Other former acts of a similar sort may in certain conditions show the likelihood of a warning being received (*ante*, § 301);[2] but this specific form of proof is rarely brought out clearly. No doubt with every prior occasion of the sort the probability grows that the prior promisees would have sought out and charged the defendant with the falsity of the representations; but this reasoning does not appear to be used by the Courts.

(2) *Intent.* The argument (*ante*, § 302) to the improbability of innocent intent from the repetition of similar acts is the apparently accepted ground for the use of this class of evidence. (*a*) As to the *similarity* of the other representations, no attempt has been made by the Courts to lay down a general test. The precedents illustrate a wide variety of ruling on this point.[3] A common-sense liberality is the best guide for decision. (*b*) As to the *length of time* over which the evidence should range, it is equally impossible to fix a general test; the circumstances of each case must determine.[4] *Subsequent* representations are equally admissible with prior ones;[5] because, on the principle of Intent (*ante*, § 316), it is the repetition of them that is significant, and a subsequent instance reduces the probability of innocence equally as well as a prior one. (*c*) *Knowledge of the falsity* of the other representations need not be shown;[6] for, if it could be shown, there would be an end of the proof, and practically the present question would never need to be discussed. It is the mere recurrence of similar incorrect (not necessarily knowingly false) representations which leads to the belief that they could not have been made innocently; we may assume that any given one might have been innocent, but cannot concede this when we notice the recurrence.

(3) *Design.* When the very act of making the representations is to be proved, and a system or design is to be argued from, the evidence is to be restricted by the rigorous rule applicable to that purpose (*ante*, § 304), *i.e.* there must be shown a connection of features, in all the instances, so strong as to indicate a system throughout them. What is to be noted is that occasionally a Court is found applying the same test where the doing of the act

pretences and lies, excluded); 1904, Standard Mfg. Co. *v.* Slot, 121 Wis. 14, 98 N. W. 923 (contract; plea, false representations; similar representations to others, excluded, intent being immaterial); 1921, Industrial Coöp. Union *v.* Lewis, — Wis. —, 182 N. W. 861 (stipulation to consolidate actions, on a promissory note with plea of fraud; similar representations made at other time and place to one of the defendant's, held not admissible to show the fact of representations to defendant L.; unsound).

[2] R. *v.* Francis, Eng.; Allen *v.* Millison, Ill.; People *v.* Rice, Mich.; State *v.* Bokien, Wash.

[3] For example, Butler *v.* Watkins, U. S.; Tarbox *v.* State, Oh.; Simons *v.* Vulcan Co., Pa.

[4] 1880, Earl, J., in People *v.* Schulman, 80 N. Y. 373, note: ("It is obviously impossible to lay down any general rule limiting the time within which such transactions must have taken place. . . . Each case, as to the application of this rule, must depend largely upon its own circumstances, and not unfrequentiy the limit of them must rest entirely in the discretion of the judge presiding at the trial"); 1880, Mayer *v.* People, 80 N. Y. 364, 372 (approving the preceding).

[5] U. S. *v.* Snyder, U. S.; Hathaway's Trial, R. *v.* Saunders, Eng.; State *v.* Call, N. H.; People *v.* Shulman, N. Y.

[6] Jordan *v.* Osgood, Mass.; U. S. Ins. Co. *v.* Wright, Oh.; Hall *v.* Naylor, N. Y. Compare Mayer *v.* People, N. Y.

is not disputed, but the intent alone is in issue.[7] This is a wholly misplaced strictness, out of harmony with all other analogies, and resting on a confusion of Intent and System.

4. Knowing Possession or Receipt of Stolen Goods

§ 324. **Other Possession of Stolen Goods**; (1) **Knowledge Principle.** The act of possession is in this class of cases (except rarely) conceded, and the question is as to the criminal intent, and specifically, as to the knowledge accompanying the possession. In what way does the fact of possession of other stolen goods at other times throw light upon this knowledge or this intent?

(1) *Knowledge Principle.* From the point of view of the Knowledge principle the argument requires (*ante*, § 301) that the former possession be such as is likely to have led to a knowledge or a warning of the stolen character of those goods, and that such warning would have naturally warned the defendant also of the stolen character of the goods in question. (*a*) As to the first element, it may be assumed that the receipt of stolen goods is in itself always more or less likely to result in a warning, chiefly because the owner is apt to follow them up and reclaim them, but also in part because a purchase not made in the ordinary course of trade has often suspicious features about the vendor's offer. (*b*) As to the second element, the warning thus obtained can affect the subsequent receipt of other goods upon only one condition only, namely, that there is a similarity in the transactions, *i.e.* that the same person comes to dispose of the second article, or that the second article is of the same lot as the first. From these points of view, then, what are the essential limitations?

(*a*) The *mere fact of possession* would seem to be sufficient, as probably leading to a warning through the reclamation of the goods; and it is not necessary additionally to show that the receipt was accompanied by circumstances calculated in themselves to excite suspicion, or that the possession was so concealed as to show guilty knowledge. The latter features, however, are present in some of the precedents, though they do not seem to be treated as a requirement for every instance.[1] There are therefore three possible attitudes to take as to this element: The mere fact of possession suffices; or, The possession must have been obtained under suspicious circumstances; or, Neither of these suffices, and former *knowing* possession is always sufficient. The first view is that represented in most Courts in this country; the second is sometimes hinted at; the third is represented by R. *v.* Oddy, in England, — reached not so much on the above reasoning, as on the doctrine of

[7] Hall *v.* Naylor, People *v.* Peckens, N. Y.; Com. *v.* Jackson, Mass.; see also the Maine cases. Of course, as stronger evidence of Intent, the prior acts may be so cumulated as to show a system, as in Carnell *v.* State, Md.; but it is one thing to allow such a system to be shown (which nobody would oppose) and quite another to require that it be shown.

§ 324. [1] *E.g.* R. *v.* Hinley, R. *v.* Primelt, Eng.; Lewis *v.* State, Kan.

auxiliary policy (*ante*, § 42), a doctrine which if rightly interpreted would exclude evidence of former possession under all conditions whatever.

(*b*) But it remains to be shown that such knowledge or warning would involve warning of the stolen character of the goods in question. In other words, there must be also shown a *similarity* in the transactions, either as to the person bringing the goods or as to their kind, such as would bring the former knowledge or warning to bear in the present instance. What circumstances constitute sufficient similarity is a matter about which no fixed rule can be laid down;[2] but it seems clear that this requirement in its general notion is essential upon the present principle. Moreover, it applies equally whether the proof is of former mere possession or of knowing possession;[3] because the possession is supposed merely to lead up to the inference of knowing possession (by element *a*, above), and when there is thus shown a knowing possession (directly or by this inference) it remains still to show that the former knowledge would have a bearing on the present knowledge, and it is just here that the similarity of the goods or the identity of their vendor is significant. Thus, even the former knowing possession of wholly different goods obtained from a different person could show nothing as to knowledge of the goods charged. From the point of view, then, of the Knowledge principle, it is necessary and sufficient to show (*a*) former receipt and possession (and, perhaps, under suspicious circumstances) (*b*) of goods similar as to the person bringing them or as to their kind or otherwise.

§ 325. **Same**: (2) **Intent Principle.** From the point of view of the Intent principle, the test of admission may be very different. The reasoning of this argument (*ante*, § 302) is that the recurrence of a like act lessens by each instance the possibility that a given instance could be the result of inadvertence, accident, or other innocent intent. Accordingly, the argument here is that the oftener A is found in possession of stolen goods, the less likely it is that his possession on the occasion charged was innocent. It is not a question of specifically proving Knowledge; it is merely a question of the improbability of an innocent Intent. Several practical differences result: (1) It is immaterial whether in the other instances a *knowing* possession is shown. It is the mere fact of the repeated possession of other stolen goods that lessens the chances of innocence. (2) It is immaterial that the other goods were *similar* in kind to those charged, or were received from the same person. On the contrary, the greater the variety of the goods and of the sources they came from, the more striking the coincidence, and the more difficult to believe that the explanation is an innocent one. (3) It is immaterial whether the other possessions occurred *before or after* the possession charged; it is the multiplication of instances that affects our belief, and not the time of their occurrence, — provided the time is not so distant as to be accountable for on the theory of chance acquisition. There are precedents which illustrate all the above three conclusions (except the last), *i.e.* which

[2] Coleman *v.* People, N. Y.

[3] State *v.* Wood, Conn.

do not require that knowing possession be shown, nor that any similarity in the goods or the vendor be shown; and these precedents thus appear to go distinctly upon the theory of Intent, as above set forth, rather than upon the theory of Knowledge.

So far as concerns the reconciliation of the precedents, it may be said (a) that both the above theories (of Knowledge and of Intent) are legitimate; that it is open to show specifically Knowledge, if so desired, or to show, more generally, Intent; and that evidence which satisfies either of these purposes is proper, on the principle of multiple admissibility (*ante*, § 13); but that the two ought to be discriminated and to be employed intelligently, and without confusing the one with the other; (b) that the force of an argument based on the Intent theory lies in the multiplication of instances; that a single instance has from this point of view little or no weight; and that therefore it is much better, in accepting a single instance, to test it by the Knowledge theory, while in accepting several instances it is sufficient to judge it by the looser but then equally satisfactory Intent theory.

§ 326. **Same: State of the Law in the Various Jurisdictions.** In the light of the foregoing explanation, the precedents in the various jurisdictions, even in the same court, will be seen to be not always consistent;[1] but the signifi-

§ **326.** [1] ENGLAND: 1826, R. *v.* Dunn, 1 Moo. Cr. C. 146. by all the Judges (knowing receipt of stolen goods; the fact of having received and pledged, within five months, various other goods stolen from the same persons and brought to the defendant by the same person, was admitted, "as an ingredient to make out the guilty knowledge"); 1833, R. *v.* Davis, 6 C. & P. 177, Gurney, B. (the finding on the accused of many other goods stolen from the same person, admitted; also their receipt at previous times; except the receipt of other articles charged in the indictment); 1843, R. *v.* Hinley, 2 Mo. & Rob. 524, 1 Cox Cr. 12, Maule, J. (knowing receipt of stolen goods; repeated acts of receiving stolen property "under circumstances which must have shown him that the property was not honestly obtained", admitted); 1851, R. *v.* Oddy, 2 Den. Cr. C. 264 (knowing receipt of stolen goods; the fact was rejected of the possession, at the same time, of four other pieces of cloth stolen by some one three months before from another mill and belonging to different persons; Pickering, for the prosecution: "It must be conceded that the moral weight of such evidence is irresistible. Suppose a thousand articles, all stolen at different times, either from the same or different persons, and all of them to be found in the possession of the prisoner; could any one doubt that he received them with a guilty knowledge? . . . Is the rule to be confined to cases which are in all particulars identical with Dunn's Case? Or is the evidence admissible if the goods have been received from the same person, though stolen from a different person or at a different time? Or will it be admissible if the other articles were only stolen from the same person, though received from a different one or at a different time?"; Alderson, B.: "Here the evidence merely went to show that the prisoner was in possession of other property which had been stolen in the previous December, and not that he had received such property knowing it to be stolen. Now the mere possession of stolen property is evidence, 'prima facie', not of receiving, but of stealing; and to admit such evidence in the present case would be to allow a prosecutor, in order to make out that a prisoner had *received* property with a guilty knowledge, which had been stolen in March, to show that the prisoner had in the December previous *stolen* some other property from another place and belonging to other persons"; Campbell, L. C. J., went chiefly on grounds of the Character rule); 1858, R. *v.* Primelt, 1 F. & F. 51 (to show knowing receipt of stolen lead, the fact was admitted of eleven sales of lead of the same sort, false names being given, and the lead in one case being certainly stolen).

The result of R. *v.* Oddy was a legislative change of the law: 1871, St. 34–35 Vict. c. 112, § 19: ". . . evidence may be given . . . that there was found in the possession of such person other property stolen within the preceding period of twelve months, . . . for the purpose of proving that such person knew the property [for which he is indicted] to be stolen." The possession offered in evidence under this statute must be possession at the time he is found in possession of the property charged in

cance of each precedent can perhaps be understood by comparing it with the logical requirements of each principle.

the indictment: 1884, R. *v.* Carter, 15 Cox Cr. 448; affirming R. *v.* Drage, 14 Cox Cr. 85, Bramwell, L. J., and solving the doubt of Keating, J., in R. *v.* Harwood, 11 id. 388; 1909, Powell's Case, 3 Cr. App. 1 (the limitations of St. 34-35 Vict. c. 112, § 19 do not apply to proof of possession of other stolen goods offered to rebut evidence of honest intent). The soundness of this limitation may be questioned; but at any rate it is clear that the whole provision is based on the Intent theory.

But by the second half of the same statutory section, the possession at other times than the time charged may be shown by the fact that the defendant has "within five years immediately preceding been convicted of any offence involving fraud or dishonesty . . . for the purpose of proving that the person accused knew the property which was proved to be in his possession to have been stolen", provided seven days' notice in writing is given. The object of using only the conviction of the offence, instead of proving the offence in the ordinary way, is apparently to obviate Lord Coleridge's objection of unfair surprise and confusion of issues (*ante*, § 194), advanced in R. *v.* Francis, as the main reason for the Character rule; for those objections do not apply to proof by record of conviction. The theory of using the former offence under this clause is clearly that of Intent, not of Knowledge.

By St. 1916, 6 & 7 Geo. V. c. 50, § 43, sub. s. 1 (Larceny Act) the wording of the modern rule is changed, enlarging it to some extent: "[To show guilty knowledge, is admissible] (*a*) the fact that other property stolen within the period of 12 months preceding the date charged was found or had been in his possession"; 1918, R. *v.* Smith, 2 K. B. 415 (receiving stolen metal; other stolen goods having been found in defendant's possession, and this fact being admissible under the Larceny Act 1916, § 43, sub-s. 1, held (1) that defendant's statements made about the other goods were also admissible, (2) that the other goods might be produced, without first evidencing their theft).

CANADA: Crim. Code, R. S. 1906, c. 146, Crim. C. §§ 993, 994 (like Eng. St. 1871, *supra;* substituting three for seven days' notice).

UNITED STATES: *Federal:* 1909, Sapir *v.* U. S., 2d C. C. A., 174 Fed. 219 (receiving stolen property with knowledge; here, pieces of brass; receipt of other pieces of brass, etc., from another person, before and after, admitted); 1921, Degnan *v.* U. S., 2d C. C. A., 271 Fed. 291 (knowing receipt of shoes stolen from a railway car; possession of other shoes stolen from cars at the same station, admitted);
Alabama: 1875, Gassenheimer *v.* State, 52 Ala. 313, 318 (the stolen cotton being found at daybreak in defendant's store, the fact was rejected that during the preceding week persons had been seen going into the store just before daybreak with sacks of cotton and coming out with the sacks empty);
Connecticut: 1881, State *v.* Wood, 49 Conn. 429, 440 (holding it to be necessary and sufficient that the other goods were received from the same person, but not that they were of the same kind or stolen from the same place; the opinion makes no distinction between former knowing receivings and mere receivings);
Delaware: 1919, State *v.* Handy, 7 Boyce's 30 Del. 449, 108 Atl. 95 (receipt by defendant of other articles of jewelry stolen by the same thief from the same store, admitted);
Illinois: 1904, Schulz *v.* People, 210 Ill. 196, 71 N. E. 405 (receiving stolen rings; W. having stolen five or six rings, and D. having shown them all to the defendant, she purchased the two in issue; held error to offer the others in evidence; this is an over-strict ruling, especially as the opinion ignores the purpose of the evidence to show knowledge); 1907, Lipsey *v.* People, 227 Ill. 364, 81 N. E. 348 (receiving stolen goods, — here, electric light sockets; the delivery of another quantity of such goods about the same time, held admissible, citing one N. Y. case and a loose generality from a treatise, and ignoring the foregoing case); 1919, People *v.* Kohn, 290 Ill. 410, 125 N. E. 293 (receiving stolen goods; receipt of other goods not shown to have been stolen, held improper); 1921, People *v.* Niles, 300 Ill. 458, 133 N. E. 252 (perjury in denying a charge of receiving stolen property; subsequent receipt of other stolen property from the same thief, received, after former receipt of other stolen property was evidenced);
Indiana: 1895, Goodman *v.* State, 141 Ind. 35, 39 N. E. 939 (the stolen thing charged as received by the defendant was a calf, and the knowing receipt of a stolen horse was given in evidence); 1905, Beuchert *v.* State, 165 Ind. 523, 76 N. E. 111 (that "other stolen goods" were found, is admissible; here, on a charge of possessing bars of steel stolen from B., the possession of watches and jewelry stolen from other persons was admitted);
Iowa: 1905, State *v.* Levich, 128 Ia. 372, 104 N. W. 334 (receipt of other stolen goods from the same person, admissible);
Kansas: 1868, Lewis *v.* State, 4 Kan. 306 (larceny; the fact was admitted of the finding of many other stolen articles in premises carefully equipped for concealing such things, to show guilty knowledge, because "of the general knowledge men have that such an assortment would not be innocently gathered and secured");

§ 327. **Other Modes of Evidencing.** Needless to say, there are other modes of evidencing the knowledge or the intent of the person possessing the goods charged. The fact itself of their possession is some evidence of probable knowledge,[1] on the theory that the mode of acquisition would as a rule raise suspicion; and in a given instance the circumstances of acquisi-

Kentucky: 1914, Com. *v.* McGarvey, 158 Ky. 570, 165 S. W. 973 (knowing receipt of stolen goods; possession of other kinds of stolen goods, admitted, without showing knowledge that the other goods were stolen);
Massachusetts: 1861, Devoto *v.* Com., 3 Metc. 418 (possession of other stolen goods, admitted);
Missouri: 1851, State *v.* Wolff, 15 Mo. 168, 172, *semble* (possession of "various other articles of stolen property", admissible); 1866, State *v.* Harrold, 38 Mo. 497 (approving State *v.* Wolff); 1894, State *v.* Flynn, 124 Mo. 480, 27 S. W. 1105 (other articles stolen about the same time from the same and other persons, admitted); 1914, State *v.* Cohen, 254 Mo. 437, 162 S. W. 216 (receipt of stolen property; other receipt of different kinds of stolen property from the same person, admitted, without evidence of knowledge of their stolen character);
Nebraska: 1902, Goldsberry *v.* State, 66 Nebr. 312, 92 N. W. 906 (other transactions with stolen goods, admitted on the facts); 1920, Sheppard *v.* State, 104 Nebr. 709, 178 N. W. 616 (receiving a stolen automobile; prior acts of the sort, admitted);
New York: 1857, People *v.* Rando, 3 Park. Cr. 335, 339 ("a series of other acts of the like character", irrespective of the kind of goods or source of obtaining, admitted "to show the knowledge" and "to rebut any presumption of innocent mistake"); 1873, Coleman *v.* People, 55 N. Y. 81, 90, and 58 N. Y. 556, 560 (knowing receipt of twenty-two bars of pig-iron, the property of Burke; evidence rejected of the defendant's possession of some iron-railing stolen from Briggs; both lots had been bought by the defendant from boys, but not the same boys; Allen, J., after noting the limitations sometimes put, that the articles must have been stolen from the same person and brought to the defendant by the same person: "It is unnecessary to say that all these qualifications must exist; but to warrant the introduction of such evidence there must be such a connection of circumstances that a natural inference may be drawn that, if the prisoner knew one article was stolen, he would also be chargeable with knowledge that another was. . . . The Briggs iron had no connection with the pig-iron; it was taken from another place, belonged to another person, was of a different character, and received at another time and — for aught that appears — some of it from different persons. Assuming therefore that the prisoner received the Briggs iron and was chargeable with knowledge that it had been stolen, would that circumstance logically or legally charge him, or tend to charge him, with knowledge that the pig-iron was stolen?"; and the Court answered in the negative, while holding that "every case must depend upon its own circumstances"); 1874, Copperman *v.* People, 56 N. Y. 591 (knowing receipt of two parcels of sewing-silk; the knowing receipt from the same person of similar articles stolen from the same place, admitted); 1881, People *v.* Dowling, 84 N. Y. 486 (the rule is laid down, citing Coleman *v.* People, that other possession is admissible if the property was stolen from the same person and obtained from the same person, *and* if there is such a connection of circumstances, etc.; but this is a careless statement, and is probably entitled to no consideration); 1901, People *v.* Grossman, 168 N. Y. 47, 51, 60 N. E. 1050 (larceny of similar goods from the same owners by the same sellers to defendant, admissible); 1903, People *v.* Doty, 175 N. Y. 164, 67 N. E. 303 (knowing receipt of a stolen cowhide; receipt of other stolen hides from the same thieves, but stolen from other owners, admitted; two Judges diss.);
North Carolina: 1881, State *v.* Murphy, 84 N. C. 741 (larceny of a hog; possession in the same pen of another hog belonging to another person, admitted; the opinion fails to appreciate the bearings of the question);
Ohio: 1872, Shriedley *v.* State, 23 Oh. St. 130, 142 (possession of other goods, known to have been stolen, and received from the same thief, admissible);
South Carolina: 1893, State *v.* Crawford, 39 S. C. 343, 350, 17 S. E. 799 (possession of other kinds of stolen goods, admitted); 1909, State *v.* Winter, 83 S. C. 251, 65 S. E. 243 (prior receipt of similar goods, not knowing them to have been stolen, admitted); 1888, State *v.* Jacob, 30 S. C. 131, 8 S. E. 698 (like State *v.* Winter);
Texas: 1913, Kaufman *v.* State, 70 Tex. Cr. 438, 159 S. W. 58 (concealing stolen property, purchase and concealment of other goods of various sorts obtained from sundry owners by the same set of thieves, admitted as showing system); 1918, Wool *v.* State, 83 Tex. Cr. 113, 201 S. W. 1002 (knowing receipt of stolen goods; the opinions of the judges differed, on the facts);
Washington: 1893, State *v.* Humason, 5 Wash. 499, 503, 32 Pac. 111 (cattle; possession of other cattle, not shown to be stolen, excluded).

§ 327. [1] 1845, R. *v.* Brett, 1 Cox Cr. 261; 1862, R. *v.* Deer, Leigh & C. 240.

tion — for example, the low price paid [2] — may be available to strengthen this probability. Moreover, the conduct of the defendant in concealing the possession may, as always (*ante*, §§ 276, 278), evidence guilty knowledge. The possession of stolen goods in other evidential aspects has been considered elsewhere (*ante*, §§ 152–155).

5. Embezzlement

§ 329. **General Principle.** Here the act of taking the property is usually conceded or otherwise proven, and the purpose of using other acts of the sort is to show the criminal knowledge or intent:

(1) The *Knowledge* principle (*ante*, § 301) has here little scope for application. It may occasionally happen that a former error in accounting would be likely to result in warning of it to its maker, but this does not in itself carry any probability of disclosure of the later error charged or of knowledge of the nature of the property taken.

(2) The *Intent* principle (*ante*, § 302) is the usually appropriate one, and is the one generally accepted by the Courts as governing the use of such evidence. Its theory is that the recurrence of similar takings of property, or, as in the usual case, similar incorrect entries in account-books, suffices to negative mistake or inadvertence on the occasion charged.[1] No doubt; the other instances must have occurred under circumstances fairly similar (*ante*, § 302); but no fixed rule is possible on this subject; whether the other acts must appear to have been done in the same employment or in the same series of accounts, or in the same account-book, must depend on the circumstances of each case.

(3) The *System* principle (*ante*, § 304) may equally be applicable here, where it is desired to argue from a system of embezzlements to the very act of taking in issue, and not merely to the intent in taking. As to this certain limitations may be noticed. (a) A few Courts are found saying [2] that evidence of other acts is receivable "not to prove that the defendant took the money", but to prove that "if he took it, it was done with fraudulent intent." This is unsound, if it is meant absolutely to exclude the inference from System evidence under any conditions; for where the requirements of that principle (*ante*, § 304) are met, such evidence is admissible even to show the very act of taking if it is disputed. (b) Occasionally an intimation is seen [3] that the other acts even when used merely to prove Intent, must be tested by the System rule (*ante*, § 304), *i.e.* must be so connected as to appear to be parts of a gen-

[2] 1860, People *v.* Levison, 16 Cal. 98.

§ 329. [1] 1888, Manisty, J., in R. *v.* Stephens, *infra;* 1887, Peckham, J., in People *v.* Sharp, 107 N. Y. 468, 14 N. E. 319 ("A man indicted for the embezzlement of funds by false entries might claim, with some degree of plausibility perhaps, that the entry was a mistake; but the probability of such mistakes would be greatly lessened by proof that other false entries of the same kind had been made at or about the same time by the same person").

[2] R. *v.* Stephens, Eng.; Com. *v.* Tuckerman, Mass.

[3] Com. *v.* Tuckerman, Mass.

eral system of embezzlement. This is also unsound; all that is required is that the other acts should have been done under sufficiently similar conditions to negative the reasonable chances of casual error. (c) In using the other acts to prove Intent, where the very act charged is also disputed, it is not necessary to apply the System test; the Intent evidence may be left to the jury with instructions not to use it unless they first believe from other evidence that the act charged was done.[4]

§ 330. **Other Principles, discriminated.** (1) To avoid the dangers of *variance* between indictment and proof, statutes have occasionally provided that upon an indictment charging a specific act of embezzlement a certain range of time in the proof is to be allowable. This provision deals with the time of the substantive offence charged, and will be strictly construed;[1] but it has no concern with the time of other acts used merely as evidential of the substantive offence. (2) Other questions of variance, or of the identity or the scope of the substantive offence are equally to be distinguished from the present question as to the evidential use of other acts.[2]

§ 331. **State of the Law in the Various Jurisdictions.** The precedents in the various jurisdictions illustrate with more or less consistency the foregoing principles, and concern both civil and criminal cases.[1]

[4] R. *v.* Stephens, Eng.

§ 330. [1] Mass. Gen. L. 1920, c. 266, § 53 (in prosecutions for embezzlement or fraudulent conversion, evidence is admissible of any such act within six months after the time alleged); 1882, People *v.* Donald, 48 Mich. 491, 12 N. W. 669 (prior embezzlements in June and September received at the trial; conviction held improper, apparently because they were offered as the very substance of the indictment, which charged embezzlement in November; a statute allowing a range of six months after the date charged excludes impliedly any prior offence); 1889, State *v.* Cornhauser, 74 Wis. 42, 41 N. W. 959 (same).

[2] 1871, R. *v.* Balls, L. R. 1 C. C. R. 328 (whether on an indictment for embezzling 1*l.* 1*s.* the embezzlement of sums separately within a short time might be shown in order to prove the total).

§ 331. [1] ENGLAND: 1861, R. *v.* Richardson, 2 F. & F. 343, 8 Cox Cr. 448, Williams, J. (embezzlement by a clerk, by increasing the figures of cash-payments and keeping the difference of money; the fact of many other incorrect entries of the same sort was admitted to negative mistake); 1861, R. *v.* Proud, L. & C. 97, 102 (embezzlement by false entries; other incorrect entries admitted, *semble*, to show guilty intent); 1864, R. *v.* Reardon, 4 F. & F. 79, Willes, J. (other takings, admitted to negative mistake); 1888, R. *v.* Stephens, 16 Cox Cr. 387 (on a charge of embezzlement of three separate sums, from the same master in the course of the same work, the evidence for all the counts was held properly considered under each; Manisty, J., quoting with approval Roscoe on Evidence: "'This cannot be done merely with a view of inducing the jury to believe that, because the prisoner has committed a crime on one occasion, he is likely to have committed a similar offence on another; but only by way of anticipation of an obvious defence, — such as that the prisoner did the act of which he was accused, but innocently and without any guilty knowledge, or that he did not do it because no motive existed in him for the commission of such a crime, or that he did it by mistake.' . . . It is not with a view of proving guilt, but of proving the intention with which the act was done, that you anticipate it [by such evidence]").

CANADA: 1914, R. *v.* Minchin, 15 D. L. R. 792, Alta. (theft of public moneys; to show the effect of a shortage, other discrepancies in cash items, partly by entries of clerks under defendant, were received).

UNITED STATES: *Federal:* 1896, American Surety Co. *v.* Pauly, 18 C. C. A. 644, 72 Fed. 470 (embezzlement by a bank; cashier by falsification of the books; to negative "mere oversight or negligence", similar acts of fraud and dishonesty, prior to the date of his surety bond, were admitted); 1900, Dorsey *v.* U. S., 41 C. C. A. 652, 101 Fed. 746 (making false entries, etc., in national bank; other false dealings with same bank, admitted, Sanborn, J., diss.); 1900, Wolfson *v.* U. S., 41 C. C. A. 442, 101 Fed. 430, 102 Fed. 134 (misapplication of national bank funds; instances of similar misapplication for three years previous, ad-

6. Fraudulent Transfers

§ 333. **Transfers in Fraud of Creditors.** Here the question is whether the transfer was made with intent to defraud the transferor's creditors by deceiving, delaying, or hindering them. The act of transfer is conceded; no specific question as to Knowledge (except of insolvency) usually arises

mitted to show intent; Boarman, J., diss., in an opinion full of misconceptions and singularly illiberal views);
California: 1884, People *v.* Gray, 66 Cal. 271, 274 (embezzlement by a clerk of the Harbor Commissioners; the fact was admitted of other acts of embezzlement while in that office, to negative ignorance or mistake); 1894, People *v.* Bidleman, 104 Cal. 609, 613, 38 Pac. 502 (embezzlement; the receipt, etc., of other sums than those charged, admissible as "tending to show a system" to conceal the takings and "the intent" of the taking);
Florida: 1896, Thalheim *v.* State, 38 Fla. 169, 20 So. 938 (a preceding embezzlement admitted); 1904, Eatman *v.* State, 48 Fla. 21, 37 So. 576 (embezzlement; prior conversions of other sums collected for the same employer, admitted to show intent);
Illinois: 1876, Kribs *v.* People, 82 Ill. 425 (embezzlement; fraudulent collection "of money belonging to other parties", excluded);
Iowa: 1905, State *v.* Carmean, 126 Ia. 291, 102 N. W. 97 (other transactions, held inadmissible on the facts); 1916, State *v.* Glaze, 177 Ia. 457, 159 N. W. 260 (embezzlement; other acts, excluded on the facts);
Kentucky: 1897, Shipp *v.* Com., 101 Ky. 518, 41 S. W. 856 (falsifying account-books; other false entries admitted to show a common purpose to deceive the bank officers); 1908, Morse *v.* Com., 129 Ky. 294, 111 S. W. 714 (embezzlement; other embezzlements admitted, with certain too refined distinctions as to the purpose); 1915, Clary *v.* Com., 173 Ky. 171, 173 S. W. 171 (embezzlement; a prior offence while in the same employ, excluded);
Louisiana: 1915, State *v.* Hammons, 137 La. 854, 69 So. 277 (embezzlement; another misappropriation eight months earlier, admitted);
Massachusetts: 1857, Com. *v.* Tuckerman, 10 Gray 173, 179, 197 (embezzlement by taking and using his employer's money; the fact was admitted of other embezzlements from the same employer having as transactions "a peculiar and intimate, if not also an inseparable, connection with" the transaction charged; "not for the purpose of proving or as having a tendency to prove that the defendant took the money charged in the indictment, but for the purpose of showing that if he took it, it was done with the fraudulent intent to convert it"); 1861, Com. *v.* Shepard, 1 All. 575, 581 (embezzlement; the fact received of another act of embezzlement in the same week and out of the same books, to show intent); 1902, Perkins *v.* Spaulding, 182 Mass. 218, 65 N. E. 72 (embezzlement of "other articles at about the same time, from the same owner, and under the same general circumstances", admissible to show intent); 1914, Com. *v.* Dow, 217 Mass. 473, 105 N. E. 995 (embezzlement from a corporation; transactions with another corporation whose accounts were connected, admitted); Gen. L. 1920, c. 266, § 53 (on a charge of embezzlement of money, etc., any embezzlement "committed within 6 months after the time stated" may be evidenced);
Michigan: 1895, People *v.* Hawkins, 106 Mich. 479, 64 N. W. 736 ("previous acts of embezzlement", admitted "to prove intent");
Minnesota: 1896, State *v.* Holmes, 65 Minn. 230, 68 N. W. 11 (prior takings admitted);
Montana: 1912, State *v.* Hall, 45 Mont. 498, 125 Pac. 639 (embezzlement; other offences of the same nature, admitted);
Nevada: 1918, State *v.* McFarlin, 41 Nev. 486, 172 Pac. 371 (embezzlement; other shortages, admitted);
New Jersey: 1906, State *v.* Newman, 73 N. J. L. 202, 62 Atl. 1008 (embezzlement of timber; another act of the same sort, excluded; erroneous on the facts); 1921, State *v.* Fisher, 94 N. J. L. 12, 114 Atl. 247 (embezzlement; similar misuse of the same party's money 18 years before, excluded);
Ohio: 1914, Baxter *v.* State, 91 Oh. 167, 110 N. E. 456 (embezzlement; other embezzlements at prior times and places, not admitted on the facts);
Oklahoma: 1911, Carter *v.* State, 6 Okl. Cr. 232, 118 Pac. 264 (embezzlement; other similar offences admissible, if a part of a system, to show that the defendant did take the money); 1919, Winston *v.* State, — Okl. Cr. App. —, 182 Pac. 249 (embezzlement; prior embezzlements from the same employer while in the same capacity, admitted);
Oregon: 1895, State *v.* Reinhart, 26 Or. 446, 38 Pac. 822 ("a series of connected transactions", covering "many acts done in a series of years", admitted);
Washington: 1912, State *v.* Downer, 68 Wash. 672, 123 Pac. 1073 (embezzlement; subsequent similar acts, admitted; prior rulings collected and explained);
Wyoming: 1894, Edelhoff *v.* State, 5 Wyo. 19, 27, 36 Pac. 627 (embezzlement of rents; other similar takings, admitted to negative mistake).

Compare the related precedents cited *ante*, § 321 (false pretences).

(*ante*, § 301); and the inquiry is simply as to the Intent accompanying the act.

On the Intent theory (*ante*, § 302), other transfers of property may have some bearing on this question by tending to negative the probability of good faith. They will have such a probative value whenever they are made under such circumstances that they cannot be naturally accounted for by the ordinary course of business in which such transfers occur from time to time with good faith. The difficulty is to determine what circumstances are essential to produce this improbability that the transfer was in that ordinary course of business which involves good faith. (1) The *quantity* of property conveyed will have great weight — as where all the debtor's estate is conveyed; but this is not an essential. (2) The *persons* to whom the transfers are made will have weight; because ordinary transfers are naturally made to various persons, and a multiplicity of transfers to the same person is hardly to be accounted for by good faith. Moreover, the family or friendly relationship of the transferee may strengthen the improbability. But it is not essential that the transferee should be the same person in each case or should be intimately related.[1] (3) The *time* of the other transfers has much weight; for in the ordinary course of business a large proportion of the entire property may be casually sold from time to time, but not repeatedly within a short time. But the time is chiefly important so far as the other transfers occur during the period when the transferor is insolvent; because the singularity of such transfers at that time is less accountable by the ordinary course of business than at any other time. It is usually said that the other transfers offered must have occurred about the same time or recently;[2] and perhaps they must have occurred during a time of insolvency, actual, or impending, but this should hardly be required as a rule. Subsequent as well as prior transfers equally avail to negative good faith.[3] (4) The *consideration* is material; for a voluntary transfer at such a time is singularly inconsistent with the probability of good faith. On the whole, then, while several sorts of circumstances are significant, their weight may vary in each case, and no one of them is essential, except that of time, and here no fixed rule can be laid down.

But it is not necessary that the rigorous test of the System rule (*ante*, § 304) should be applied, *i.e.* that the other transfers should be so connected as to disclose a *general scheme* (though one or two Courts do go to this extent);[4] it is enough that the other transfers occurred under such circumstances as to tend to negative good faith in the transfer charged. Nor is it necessary to show the other transfers *fraudulent*,[5] it is enough that they were made under some of the above circumstances; for it is the mere recurrence

§ 333. [1] Howe *v.* Reed, Me.

[2] Nelms *v.* Steiner, Ala.; Piedmont Bank *v.* Hatcher, Va.; for examples of exclusion, see Hardy *v.* Moore, Ia.; Flagg *v.* Willington, Me.

[3] Lynde *v.* McGregor, Mass. For a discrimination of this point, see § 335.

[4] *E.g.* Massachusetts.

[5] In some opinions the language intimates such a requirement, *e.g.* Whittier *v.* Varney, N. H.; but it is usually not called for; see, in particular, Bottomley *v.* U. S., U. S.; M'Elwee *v.* Sutton, S. C.

of the similar transactions which by the strange coincidence raises the improbability of good faith (*ante*, § 302); to require a showing of fraud in each of the evidential instances is both unnecessary in principle and impracticable in application.

§ 334. **State of the Law in the Various Jurisdictions.** The precedents in the various jurisdictions illustrate the development of the foregoing principles with more or less consistency.[1]

§ 334. [1] CANADA: 1916, *Re* Goodman, 28 D. L. R. 197, 29 id. 725, Man. (extradition for defrauding creditors in the U. S.; other acts of fraud considered);

UNITED STATES: *Federal:* 1840, Story, J., in Bottomley *v.* U. S., 1 Story 145 (describes the question as "whether a particular voluntary conveyance was made in fraud of creditors", and would admit "like [*i.e.* voluntary] conveyances to other persons who are mere volunteers, made about the same time"); 1893, Kellogg *v.* Clyne, 4 C. C. A. 554, 54 Fed. 696, 12 U. S. App. 174, 183 (fraudulent mortgage; other transfers by debtor about the same time, admitted); 1904, Kaufman *v.* Tredway, 195 U. S. 271, 25 Sup. 33 (preference to a brother under the bankruptcy act; certain transactions six or seven months before, admitted to show knowledge);

Alabama: 1843, Cummings *v.* McCullough, 5 Ala. 324, 332 (another deed, two days before, while insolvent, to the same person, admitted to show a scheme to defraud); 1852, Dent *v.* Portwood, 21 Ala. 589 (a deed for land on the same day to the same person, admitted to show the intent of a deed of slaves); 1853, Benning *v.* Nelson, 23 Ala. 801, 804 (another deed on the same day, admitted); 1897, Nelms *v.* Steiner, 113 Ala. 562, 22 So. 435 (admitting "other transactions which are fraudulent and which are in point of time contemporaneous or nearly so"); 1898, Davidson *v.* Kahn, 119 Ala. 364, 24 So. 583 (other transfers about the same time to other persons admitted);

Illinois: 1905, Fabian *v.* Traeger, 215 Ill. 220, 74 N. E. 131 (sale in fraud of creditors; another sale at the same time, admitted to show the intent);

Iowa: 1883, Hardy *v.* Moore, 62 Ia. 65, 70, 17 N. W. 200 (conveyances to the same person and others, nearly two years before, excluded as evincing no common purpose); 1902, Kelliher *v.* Sutton, 115 Ia. 632, 89 N. W. 26 (fraudulent mortgage; "other acts of a similar character, about the same time", admitted to show a connected scheme;

Louisiana: 1851, Lockhart *v.* Harrell, 6 La. An. 530, 532 (other transactions between the same parties, admitted);

Maine: 1830, Flagg *v.* Willington, 6 Greenl. 386 (similar sale to another person five years before, not admitted to show present dishonest motives); 1834, Blake *v.* Howard, 11 Fairf. 202 (similar sale to another person eight months before, excluded; *semble* not admissible at all, even though known to the present grantee; weak opinion); 1835, Howe *v.* Reed, 12 Fairf. 515 (in effect overruling the preceding; admitting fraudulent conveyances to other persons about the same time, to show the grantor's intent; the present grantee's knowledge of that intent being a separate fact, to be proved by separate evidence);

Massachusetts: 1831, Foster *v.* Hall, 12 Pick. 99 (conveyance alleged to be in fraud of creditors; other fraudulent conveyances to the demandant, at the same time and previously, admitted); 1852, Long *v.* Lamkin, 9 Cush. 361 (prior sales, excluded because no question of fraudulent transfer was involved); 1853, Cook *v.* Moore, 11 Cush. 213, 216 (similar facts to Foster *v.* Hall; prior fraudulent conveyance, admitted); 1860, Williams *v.* Robbins, 5 Gray 590 (bill to set aside a transfer in fraud of creditors; the fact of two other fraudulent transfers, excluded, because belonging to "a distinct, separate, and independent negotiation, and one had therefore no tendency to characterize or to evince the purpose or design of the parties in the other"; such transactions "must be shown to be so connected with it as to make it apparent that the parties had a common purpose in both"); 1861, Taylor *v.* Robinson, 2 All. 562 (other fraudulent conveyances to other persons, made on the same day, admitted to show fraudulent intent; subsequent ones *semble* excluded, on an erroneous application of the principle that admissions after title divested do not bind); 1866, Lynde *v.* McGregor, 13 All. 172, 174 (similar facts; subsequent fraudulent conveyances, admitted to show a fraudulent purpose); 1867, Winchester *v.* Charter, 97 Mass. 143 (similar to Taylor *v.* Robinson); 1872, Jordan *v.* Osgood, 109 Mass. 457 (adopts the rule of Williams *v.* Robbins as to showing System; quoted *ante*, § 321); 1899, Brownell *v.* Briggs, 173 Mass. 529, 54 N. E. 251 (deed alleged to be void against the grantor's wife, as made with intent to defraud her of rights at his decease; similar transfers of personalty to relatives and friends, admitted to show a general plan to defeat the wife's interest);

Michigan: 1888, Ganong *v.* Green, 71 Mich. 1, 9, 38 N. W. 661 (fraudulent mortgage; other conduct, such as releases of other mortgages, admitted on cross-examination);

Minnesota: 1895, Nicolay *v.* Mallery, 62 Minn. 119, 64 N. W. 108 (that notes had been im-

§ 335. **Same: Other Kinds of Evidence.** The fraudulent intent of the tranferor may be indicated by other circumstances not of the above sort, — such as the debtor's remaining in possession after the mortgage or sale,[1] the pendency of suits at the time of the sale,[2] and other circumstances[3] suggesting their own significance and not raising any difficulty of principle.

§ 336. **Same: Other Principles, discriminated.** The doctrine about Admissions, when made by a predecessor in title, as to the nature of his ownership or possession, has the effect, in an action against a transferee claiming *bona fide* acquisition of property from a debtor, of excluding the *admissions of the debtor* made *subsequent to the transfer*. This rule was in some early cases thought to exclude evidence of subsequent transfers as bearing on the debtor's intent.[1] But it is clear that these are not used in any sense as admissions of his intent, either then or at the time charged; they are used simply as circumstances negativing his former innocent intent at the time charged, and are not justly obnoxious to the above doctrine.[2] The various

properly turned over by an insolvent about the same time to other creditors, to show a fraudulent plan to evade creditors, admitted); *Mississippi:* 1895, Uhler *v.* Adams, 73 Miss. 332, 18 So. 367, 654 (conveyances of lands between the same parties in other States, to show fraud against creditors in his conveyance; excluded on the facts);
New Hampshire: 1820, Lovell *v.* Briggs, 2 N. H. 223 ("it is established practice to admit evidence concerning different sales of a debtor's estate, made at or about the same time to show a fraudulent intent in the debtor to injure his creditors"); 1839, Whittier *v.* Varney, 10 N. H. 291, 294 (writ of entry by an attaching creditor to recover land transferred in alleged fraud of the creditors; fact admitted of other transfers of land by the debtor to the defendant about the same time and while insolvent; the other transfers must be shown fraudulent); 1852, Angier *v.* Ash, 26 N. H. 109 (affirming the doctrine); 1856, State *v.* Johnson, 33 N. H. 441, 456 (indictment for concealing the property of a debtor with intent to prevent its being taken by process; "evidence of other sales and dispositions of his property by the debtor to defraud his creditors, so connected in time and circumstances as to constitute parts of a general scheme of fraud", held admissible);
New York: 1833, Benham *v.* Cary, 11 Wend. 83 (like the next case); 1834, Jackson *v.* Timmerman, 12 Wend. 299 (transfer of land alleged to be in fraud of creditors; other contemporaneous transfers admitted to show intent);
North Carolina: 1855, Holmesly *v.* Hogue, 2 Jones L. 391 (fraudulent transfer of a slave; the fact of a sale by the debtor, six months before, of land which he did not own, rejected, as totally unconnected); 1895, State *v.* Jeffries, 117 N. C. 727, 23 S. E. 163 (transfer of a bicycle in fraud of creditors; pledge of a wagon, covered by the same mortgage, to another person five months later, held too remote in time);
Pennsylvania: 1851, Zerbe *v.* Miller, 16 Pa. 488, 495 (ejectment, the title depending on whether a conveyance by a father to his son was in fraud of creditors; other deeds and confessions of judgment by the father about the same time admitted to show intent); 1869, Heath *v.* Page, 63 Pa. 108, 125 (another deed, made five days before, admitted);
South Carolina: 1831, M'Elwee *v.* Sutton, 2 Bail. 128, 130 (trover; gifts about the same time to each of his other children, six or seven in number, admitted); 1831, Lowry *v.* Pinson, 2 Bail. 324, 328 (trespass to try title; another voluntary bill of sale about the same time, admitted);
Virginia: 1897, Piedmont Bank *v.* Hatcher, 94 Va. 229, 26 S. E. 505 ("other frauds of like character at or near the same time", admissible);
Wisconsin: 1894, Kaufer *v.* Walsh, 88 Wis. 63, 68, 59 N. W. 460 (purchase in fraud of creditors; other transactions of the sort by the buyer with other persons than this debtor, excluded).

§ 335. [1] 1846, Abney *v.* Kingsland, 10 Ala. 361 (with qualifications); 1831, Smith *v.* Henry, 2 Bail. S. C. 118, 123; 1833, s. c. 1 Hill S. C. 24; 1837, Reinhard *v.* Keenbartz, 6 Watts Pa. 94. This is the subject of a *presumption* (*post*, § 2515).
[2] 1831, Smith *v.* Henry, 2 Bail. S. C. 118, 123.
[3] 1864, Gray *v.* St. John, 35 Ill. 222 ("the manner in which he had recently obtained goods from his creditors", admitted).

§ 336. [1] In Foster *v.* Hall and Taylor *v.* Robinson, Mass., *ante*, § 334, believing the Admission doctrine, as laid down in Bridge *v.* Eggleston, 14 Mass. 249, to be applicable; traces of the same notion are also seen in the early Maine cases.
[2] As illustrated in Lynde *v.* McGregor, Mass., *ante*, § 334.

uses of a debtor's declarations, both as verbal acts and as admissions, in connection with fraudulent transfers, are dealt with elsewhere (*post*, §§ 1082–1086, 1727–1729, 1779–1780).

§ 337. **Fraudulent Purchase with Intent not to Pay.** The invalidity of a purchase made with intent not to pay rests on the *falsity of the implied representation* of an intent to pay; the transaction is so treated by the Courts, and the rulings are accordingly collected under that head (*ante*, § 321).

§ 338. **Other Fraudulent Transfers.** The principles of Knowledge and Intent (*ante*, §§ 301–304) may occasionally be applied to other kinds of transfers in which fraudulent intent is material.[1]

7. Sundry Frauds; and Fraud in General

§ 340. **False Claim of a Cause of Action; Fraudulent Insurance.** The bearing of former false claims of a similar sort may often be weighty. The exact principle of evidence applicable is perhaps not beyond doubt. The case is not the same as that of Extortion (*post*, § 352), because there the intent to be proved is not merely the intent to make a false claim, but to obtain money by making a false claim. Here the evidence seems to be sometimes in the nature of conduct exhibiting Guilty Consciousness (*ante*, § 280), or of an Admission (*post*, § 1060) or of the Self-Contradiction of a witness (*post*, § 1040) or his Corruption (*post*, §§ 956–964); yet the former false claims are hardly admissions of the falsity of the present claim. The truth seems to be that the recurrence of false claims of a similar sort tends to negative good faith in the present claim, and thus to show an intent to make a false claim; and it is this intent which is itself an Admission of the party inconsistent with the claim on the pleadings; if the Intent were declared in express words, this would be clear. In short, the former acts are not in themselves admissions, but are evidence of a lack of good faith which is equivalent to an admission.

§ **338.** [1] 1859, Castle *v.* Bullard, 23 How. U. S. 172 (fraudulent sale by an agent to an insolvent; other fraudulent sales to him before and after time in question, admitted to show intent; also other false representations by the defendant to other persons, about the same time, as to the solvency of the buyer); 1920, Jones *v.* U. S., 9th C. C. A., 265 Fed. 235, 241 (action to recover moneys obtained by fraudulent filing of entries for patents of U. S. land; defendant's contracts of entry with other non-bona-fide settlers, admitted to show intent); 1820, Somes *v.* Skinner, 16 Mass. 348, 358 (conveyance alleged to have been obtained by undue influence; a series of former similar transactions between the same parties, rejected for showing a plan or bad character; but admitted for showing the grantor's susceptibility to the grantee's influence); 1882, Porter *v.* Throop, 47 Mich. 313, 320, 11 N. W. 174 (that G. P.'s will was made by undue influence of A. P., not admissible to show the same for the will of G. P.'s mother, to whom G. P. had bequeathed his property; on this and the preceding case, compare the citations under § 1738, *post*); 1818, Farrington *v.* Sinclair, 15 Johns. (N. Y.) 428 (to show a prior levy of execution to be collusive and fraudulent, the officer having given the debtor permission to use the article, the fact was received that similar permission was given for other articles levied on at the same time); 1820, Lovell *v.* Briggs, 2 N. H. 218, 223 (fraudulent purchase by an administrator from the heirs; the facts about other purchases from the other heirs, admitted to show improper dealing, since "the whole intestate estate was probably managed with similar views"); 1912, Welch *v.* Barnett, 34 Okl. 166, 125 Pac. 472 (fraud and undue influence in persuading an Indian to execute his will in favor of the petitioner, a white man; similar transactions with four other Indians, admitted; sensible opinion by Ames, C.).

Of the two possible rules to be applied, that of Intent and that of System (*ante*, §§ 302, 304), it seems clear that the former suffices.[1] The issue concerns the intent accompanying the claim, and the purpose is to negative good faith; the other incorrect claims must be so similar as not to be consistent with casual error; but they need not be so connected as to indicate a system.

§ 341. **Sundry Frauds (Taxes, Mails, Measures, etc.).** The principles of Intent and of System (*ante*, §§ 302–304) are illustrated in many other situations in which a fraudulent intent is in issue, and other similar acts may be received to evidence it, — for example, in the *importation of goods* with intent to defraud the Government, by undervaluation or otherwise;[1] in the *falsification of documents* or books, with intent to conceal or misuse;[2] in

§ 340. [1] Besides the following cases, reference may be made to the cases under Extortion (*post*, § 352) and to some of those under False Pretences (*ante*, § 320), especially Rafferty *v.* State, Tenn.: *Federal:* 1902, Jack *v.* Mutual R. F. Life Ass'n, 51 C. C. A. 36, 113 Fed. 49 (fraudulent insurance; conduct showing a fraudulent scheme of insurance, admitted); *Iowa:* 1895, Hood *v.* R. Co., 95 Ia. 331, 64 N. W. 261 (the plaintiff's claim for an injured eye was alleged to be fraudulent; fraud in making a claim upon an insurance company for other injuries was excluded); *Kansas:* 1906, State Life Ins. Co. *v.* Johnson, 73 Kan. 567, 85 Pac. 597 (insurance fraud); *Massachusetts:* 1831, Bradford *v.* Ins. Co., 11 Pick. 161 (to prove that damaged blankets received were not damaged by sea-water in transit, but by wetting in the consignor's factory to increase the weight fraudulently, the fact was offered of the receipt of many similar goods, by other consignees in the same year from the same consignor but in different vessels, the damage being similar and of a kind indicating a wetting at the factory; admitted as indicating merely that the damage probably did not arise from sea-water, but not as showing a general plan of the consignor to export wetted blankets); 1893, Miller *v.* Curtis, 158 Mass. 127, 131, 32 N. E. 1039 (charge of indecent assault; other instances, many years before, of the plaintiff making similar false charges against other men, held competent, if they showed "a purpose to obtain money" in that way; but here held not open to that construction); *New York:* 1890, Smith *v.* Nat'l Ben. Soc'y, 123 N. Y. 85, 25 N. E. 197 (applications to thirty-six different insurance companies, and other acts, admitted to show a general scheme to defraud by insuring and committing suicide); *Pennsylvania:* 1897, Young *v.* Doherty, 183 Pa. 142, 38 Atl. 587 (action on a note, said by defendant to be forged; evidence of the plaintiff's habit "of endeavoring to enforce unjust claims", excluded); *Vermont:* 1883, Lewis *v.* Barker, 55 Vt. 23 (the plaintiff claimed that the defendant had caused his goods to be largely over-insured and then burned them; attempts to defraud the insurance companies by making claims for goods not destroyed were admitted, though made after the fire; "the attempt to defraud the company into paying him for the oil, and the owners of the oil into not collecting it of him, was so connected with the main transaction as to make any part of the attempt admissible whether made before or after the fire; it was evidence relative to the scheme," etc.)

Compare the citations *post*, §§ 956–964 (impeaching a witness by showing corruption).

§ 341. [1] 1840, Bottomley *v.* U. S., 1 Story 135 (importation of goods under fraudulently false invoices; the goods in question were seized in May, 1838; and evidence was received of twenty-three false entries between Aug. 5, 1837, and March 15, 1838, the goods being "broadcloths of a similar character and description" to those seized, and shipped from the same port and persons, and that after the seizure, but before news could have reached England, four other importations of "broadcloths of the same character, cost, and value" as those seized, shipped from the same port and persons, and contained in cases marked like those seized and in numerical sequence, arrived and were stored, and were afterwards entered at a much higher valuation than those seized and under a consignor's oath taken not at the time of shipment, but long after the seizure in question; quoted *ante*, § 302); 1842, Wood *v.* U. S., 16 Pet. 342, 346, 356, 360 (fraudulent undervaluation of imported goods; the defendant had entered twenty-nine importations of which the four charged were a part, during the years 1839–40, of which fifteen were before and ten after the four charged; all of these invoices were overvalued, and all asserted an exporter's discount which was not given; these were admitted on the same principle as in Bottomley *v.* U. S., Story, J., delivering the opinion, and admitting "other acts and doings of the party of a kindred character, in order to illustrate or establish his intent or motive in the particular act").

[2] *England:* 1833, Thompson *v.* Mosely, 5 C. & P. 501, Lyndhurst, L. C. B. (alteration of a bill; the fact excluded of alterations in ten

the substitution of *false articles or measures*, with the intent of cheating;[3] and in *sundry modes* of chicanery not coming under any general class.[4]

other unspecified bills; "it is trying other issues, which the opposite party are not prepared to meet"; here the System rule was applicable); *United States:* 1913, Kettenbach, U. S., 9th C. C. A., 202 Fed. 377 (false entry by bank officer; false reports to the U. S. Comptroller, several years prior, admitted); 1904, Howard *v.* State, 72 Ark. 586, 82 S. W. 196 (false warrants by a county clerk; similar warrants to other persons, admitted to show intent); 1910, People *v.* Tomalty, 14 Cal. App. 224, 111 Pac. 513 (falsification of accounts; other similar offences, admitted); 1913, State *v.* O'Neil, 24 Ida. 582, 135 Pac. 60 (false report by a bank officer; other false reports admitted); 1857, Gardner *v.* Way, 8 Gray Mass. 189 (party's book of accounts offered to show a debt; to impeach its correctness, the fact that some years before this the plaintiff had kept two books of original entries so as to falsify his accounts, was excluded, because the former transactions were "remote and different"); 1912, People *v.* Marrin, 205 N. Y. 275, 98 N. E. 474 (notary charged with knowingly making a false certificate of acknowledgment of mortgage by J. C.; to show that J. C. was a myth, or to show knowledge by defendant of the false personation by the acknowledger, eight other instances were admitted of false certificates by defendant of acknowledgments by different other persons; three judges dissenting).

Compare the precedents under Embezzlement (*ante*, § 331) and Forgery (*ante*, § 318), crimes often committed by alteration of books or documents.

[3] 1920, Sears *v.* U. S., 1st C. C. A., 264 Fed. 257 (fraud and bribery of inspectors in performing a government contract for army shoes; the indictment charged conspiracy to buy and use outer and inner soles inferior to the contract requirements; evidence of using inferior middle soles was admitted to show intent; it is plain that this Court in its search for truth is not to be turned aside by the distinction between a hawk and a handsaw); 1920, Macdonald *v.* U. S., 1st C. C. A., 264 Fed. 733 (conspiracy to defraud the U. S. by counterfeit stamps on shoes made by defendant; evidence of corrupt transaction for inspection of other shoes for the U. S. made in the same factory under a separate contract, excluded; Anderson, J., diss., who is entirely right in declaring that "I can find no case in which the old technical rule has been given so wide an extension as in the majority opinion in the case at bar"); 1900, State *v.* Jamison, 110 Ia. 337, 81 N. W. 594 (using false weights; falsity of weights "at other times", admitted to show knowledge); 1882, Dibble *v.* Nash, 47 Mich. 589, 11 N. W. 399 (fraudulent substitution of other land; the defendant's offer to sell the original land to a third person, admitted to negative mistake); 1887, Reid *v.* Ladue, 66 Mich. 22, 25, 32 N. W. 916 (two or three false weighings in 1885, in a general course of dealing, held not sufficient to establish fraudulent weighing in 1877); 1876, Bainbridge *v.* State, 30 Oh. St. 264, 274 (knowingly delivering skimmed milk to a factory for cheese, with intent to defraud repeated deliveries to the same factory about the same time, admitted); 1832, Townsend *v.* Graves, 3 Paige Ch. N. Y. 453 (fraudulent drawing of a lottery; the defendant's fraudulent alteration of his account-book in a lodge a year before, excluded); 1905, Yakima V. Bank *v.* McAllister, 37 Wash. 566, 79 Pac. 1119 (action on a note; defence, that the signature was made by signing another document under which the defendants had fraudulently placed the note; other similar frauds by the defendants upon other persons, admitted to show a general scheme).

Compare the precedents under False Pretences (*ante*, § 321).

[4] *Canada:* R. S. 1906, c. 146, Crim. C. § 981, (advertising counterfeit money, etc.; any letter etc. concerning "any similar scheme or device to defraud the public" is 'prima facie' evidence of the "fraudulent character of such scheme or device"); *United States:* 1892, Continental Ins. Co. *v.* Ins. Co., 2 C. C. A. 535, 51 Fed. 884 (action to recover reinsurance moneys paid out by the plaintiff to third persons, a common agent of plaintiff and defendant having apportioned the reinsurance not according to good judgment or chance, as authorized, but through a fraudulent scheme in general to relieve the defendant from loss and throw it upon others; evidence of similar shiftings of loss by the agent upon other companies, admitted to show this scheme); 1901, Packer *v.* U. S., 46 C. C. A. 35, 106 Fed. 906 (using the mails to defraud by investment-circulars; other solicitations of a similar sort, admitted); 1904, Balliet *v.* U. S., 129 Fed. 689, 693, 64 C. C. A. 201 (fraudulent use of the mails; sundry reports, etc. of defendant, admitted); 1908, Jones *v.* U. S., 9th C. C. A., 162 Fed. 417, 427 (conspiracy to obtain land-grants by fraudulent homestead claims; other instances of similar fraudulent claims by defendants in connivance with other persons, admitted); 1910, Jones *v.* U. S., 9th C. C. A., 179 Fed. 584, 610 (fraudulent acquisition of public lands; similar transactions in another part of the State and by a different method, admitted); 1912, Marshall *v.* U. S., C. C. A., 197 Fed. 511 (fraudulent use of the mails in connection with a fraudulent society; the defendant's fraud in another like scheme at the same time, excluded, on not very intelligible grounds); 1914, Lueders *v.* U. S., 9th C. C. A., 210 Fed. 419 (concealment of bankrupt's estate; concealment of other property, admitted); 1914, Houston

§ 342. **Perjury.** On the analogy of the principles for False Representations (*ante*, § 309), a prior misstatement in the nature of perjury may have value as negativing mistake or 'bona fides' on the occasion charged.[1]

§ 343. **Bribery.** On a charge of bribery, any of the three general principles (*ante*, §§ 301–304) — Knowledge, Intent, and Design — may come into play. To show Knowledge of the nature of the transaction, a former transaction of the sort may serve, as indicating an understanding of the particular transaction.[1] To show Intent, another transaction of the sort may serve to negative good faith.[2] To show general Design, former attempts towards the same general end may be significant.[3]

v. U. S., 9th C. C. A., 217 Fed. 852 (conspiracy to defraud by collusive bids; prior overt acts not charged in the indictment, admitted); 1916, Samuels *v.* U. S., 8th C. C. A., 232 Fed. 536 (fraudulent use of the mails for sending a pretended remedy for disease; "evidence of other and similar ventures by the accused", admitted to show intent); 1918, Hallowell *v.* U. S., 9th C. C. A., 253 Fed. 865 (using the mails to defraud; similar letters to other persons, admitted); 1922, Jones *v.* U. S., 258 U. S. 40, 42 Sup. 218 (fraudulent entry of homestead land on old soldiers' rights; similar arrangements with soldiers' widows, held not improperly admitted in the trial Court's discretion, to show knowledge and intent); 1918, State *v.* Stiegler, 7 Boyce, 30 Del. 236, 105 Atl. 667 (conspiracy to cheat); 1914, People *v.* Strosnider, 264 Ill. 434, 106 N. E. 229 (confidence game; another instance of the same trick used on another person by the defendant, admitted); 1906, Packham *v.* Glendmeyer, 103 Md. 416, 63 Atl. 1048 (the testatrix left three wills; on an issue of fraud as to one of them, fraud as to another by the same parties was not admitted on the facts); 1909, Harris *v.* Delaware L. & W. R. Co., 77 N. J. L. 278, 72 Atl. 50 (forfeiture of a personal ticket for knowing misuse; the misuse on other occasions, admitted); 1905, Murray *v.* Moore, 104 Va. 707, 52 S. E. 381 (conspiracy to defraud; certain letters as to other fraudulent devices, excluded); 1920, State *v.* Williams, 94 Vt. 423, 111 Atl. 701 (State bank examiner's wilful neglect to report defalcation of State auditor; shortages in auditor's accounts more than three years previous during defendant's term of office, and at a period beyond the statutory bar, admitted, because "the longer such books and papers disclosed a shortage in the auditor's account, the greater the probability that the respondent knew of such shortage"); 1922, State *v.* Larson, — Wash. —, 204 Pac. 1041 (loaning money to a bank officer without authority; other loans, excluded on the facts).

§ 342. [1] *Federal:* 1840, U. S. *v.* Wood, 14 Pet. 430, 432, 437, 443 (perjury by falsely valuing imported goods; thirty-five letters indicating a general design of the sort, covering more than three years, admitted as showing a false swearing with intent to defraud); 1908, Williamson *v.* U. S., 207 U. S. 425, 28 Sup. 163 (conspiracy to suborn perjury in proceeding for the purchase of U. S. public lands; acquisition of State school lands by similar methods, admitted to show motive or intent); *Georgia:* 1903, Stone *v.* State, 118 Ga. 705, 45 S. E. 630 (subornation of perjury; other preparatory efforts to coach the false witnesses, admitted); *Iowa:* 1866, State *v.* Raymond, 20 Ia. 582, 588 (another perjury "relating to the same oath and subject-matter", allowed to evidence intent); 1916, State *v.* Lyon, 176 Ia. 171, 157 N. W. 742 (perjury in testifying that he did not sell liquor to H. on Aug. 25; other sales to H., admitted); *Nevada:* 1922, State *v.* Cerfoglio, — Nev. —, 205 Pac. 791 (perjury; three other criminal facts, admitted to show corrupt intent); *New York:* 1890, People *v.* Van Tassel, 156 N. Y. 561, 51 N. E. 274 (subornation of perjury; attempts to suborn for the same trial other persons not called as witnesses, admitted); 1902, People *v.* Doody, 172 N. Y. 165, 64 N. E. 807 (perjury in falsely testifying that he did not remember certain criminal acts; his prior testimony asserting and admitting those acts, here received to show that he did know and remember them).

Compare the cases cited *post*, § 963 (impeachment of a witness by other perjuries or admissions of perjury).

§ 343. [1] 1838, Webb *v.* Smith, 4 Bing. N. C. 373, 379 (bribery; the defendant stood in the front room of the house receiving voters, and gave a card to many; those receiving cards went to an adjoining room and received from another person £10 for each card; to show the defendant's knowledge of this handling of the money, the fact was received of his giving cards to other voters than the three charged, and of their receiving the money; Bosanquet, J.: "To show that he knew such cards would produce money, it was very important to prove that on the same day and in the same place he was cognizant of what passed in the inner room").

[2] *California:* 1899, People *v.* Hurley, 126 Cal. 351, 58 Pac. 814 (offering to accept a bribe, the defendant being a delegate to a nominating convention; similar solicitations to another

§ 344. **Fraud in General; Latitude of Investigation.** It is often said that, in evidencing fraud, a broad scope of investigation must be allowed,[1] and, in

candidate for the same office about the same time, excluded; a ruling that wrongs the law and protects a rank crime); *Indiana:* 1901, Higgins *v.* State, 157 Ind. 57, 60 N. E. 685 (common councilman soliciting a bribe for the passing of an ordinance; solicitation about the same time of a bribe for another pending ordinance, admitted); 1919, Clevenger *v.* State, 188 Ind. 592, 125 N. E. 41 (bribery; other payments to the same person, admitted to show intent); *Kentucky:* 1915, Romes *v.* Com., 164 Ky. 334, 175 S. W. 669 (receiving a bribe to vote; receipt of bribes at former elections, excluded); *Minnesota:* 1898, State *v.* Durnam, 73 Minn. 150, 75 N. W. 1127 (demanding a bribe by a city councillor; similar demand of another member of the same firm about the same subject, admissible); 1903, State *v.* Fitchette, 88 Minn. 145, 92 N. W. 527 (taking money for appointment to office; similar transaction six months before, excluded; the opinion is over-scrupulous, and is of the sort that helps to create immunity for rascals); 1903, State *v.* Ames, 90 Minn. 183, 96 N. W. 330 (bribery; payment to defendant's agent by other persons, admitted on the facts; State *v.* Fitchette distinguished); *Virginia:* 1905, Haynes *v.* Com., 104 Va. 854, 52 S. E. 358 (bribery of an officer while under arrest on a charge of keeping a disorderly house; the defendant's acts of prostitution of little girls in the house, excluded); *Washington:* 1912, State *v.* Wappenstein, 67 Wash. 502, 121 Pac. 989 (bribe-taking, to abstain from enforcing the law against houses of ill-fame; receipt of bribes as to houses other than the two charged, admitted).

[1] CANADA: 1906, Shelburne and Queen's Election Case, Cowie *v.* Fielding, 37 Can. Sup. 604 (avoidance of election in 1904 for corrupt practices of agents; the agents' corrupt acts at a 1900 election, adopted by the respondent, not admitted to show their agency for him in 1904, or as evidence of system).

UNITED STATES: *California:* 1910, People *v.* Ruef, 14 Cal. App. 576, 114 Pac. 54 (bribery of a supervisor; other bribes admitted as a part of the same plan); 1910, People *v.* Glass, 158 Cal. 650, 112 Pac. 281 (bribery of supervisors in San Francisco; operations of the defendant company in Oakland, an adjacent city, excluded, on the ground that the transactions were offered only "to besmirch and degrade the defendant", and not to evidence motive, plan, or the like; as a sample of the unconscious inconsistency of the Court's attitude may be noted its asseveration that "it was not offered to show motive", followed in a few sentences by the assertion that it was offered to show that the defendant "had gone to the borderline of crime in the Oakland transaction and found that stopping there his efforts to prevent competition were without success", and hence "when the same problem arose in San Francisco . . . he became a lawbreaker and a criminal"; obviously, as the Court thus puts it, the failure in the Oakland transaction furnished a reason and motive in the choice of measures to be used in San Francisco; so that, by the Court's own way of putting it, the evidence clearly was admissible; two judges diss. on one or more points; the opinion of the majority exhibits signs of puffing and hard breathing in its labored efforts to state their case for reversal; it is unfortunate that this Supreme Court and others have at various times been so tender on behalf of persons charged with bribery that the inherent difficulties of conviction thus become almost insuperable; this tendency of Courts to construe narrowly the present principle is noticeable throughout the decisions here collected; the spot has been a putrid one in the law of evidence); *Minnesota:* 1920, *Re* Mason, *Re* Nash, 147 Minn. 383, 181 N. W. 570 (malfeasance in office by receipt of bribes; other similar offences, admitted to show a general scheme); *Missouri:* 1896, State *v.* Williams, 136 Mo. 293, 38 S. W. 75 (embracery; attempts to corrupt other jurors on the same panel about the same case, admitted to show intent); 1904, State *v.* Schnettler, 181 Mo. 173, 79 S. W. 1123 (municipal officer receiving a bribe for a street railway bill; receipt of another bribe for a lighting bill, admitted, as part of a general scheme); *New York:* 1887, People *v.* Sharp, 107 N. Y. 427, 456, 470, 14 N. E. 319 (indictment for offering a bribe in 1886 to a member of the Common Council of the City of New York, to influence his consent to a franchise for a surface railway on Broadway; the fact of the offer of a bribe in 1883 to the engrossing-clerk of the State Assembly to alter a bill so as to allow the construction of the same railway was rejected; the present principle and precedents were not considered, except by Peckham, J.; there is nothing to be said in support of this ruling; it is of the kind that breeds defiance of the law and encourages criminals in gambling on the result of judicial quibbles); 1914, People *v.* Duffy, 212 N. Y. 57, 105 N. E. 839 (bribery by a police sergeant; other collections of money from other persons for the same purpose, admitted); *Ohio:* 1914, State *v.* Davis, 90 Oh. 100, 106 N. E. 770 (soliciting a bribe for selection of a roadmaking machine; solicitation of other bribes from the same person and from another person, for similar purposes, admitted).

Compare the cases *post*, §§ 956–964 (impeaching a witness by showing bribery).

§ 344. [1] 1897, Nelms *v.* Steiner, 113 Ala. 562, 22 So. 435; 1870, Comstock *v.* Smith, 20 Mich. 345; 1860, Filley *v.* Register, 4 Minn. 391, 405 (grant in fraud of creditors); 1865,

particular, that the range of cross-examination of the party charged must be liberal.[2] It is not easy to understand the exact significance of such statements. Apart from a ruling upon a concrete piece of evidence, they cannot mean much. If they mean that the principles of evidence are to be relaxed or abandoned, they are unsound. If they mean that evidence of System or of Intent is to take a wide range, they are useless except so far as they are reducible to some definite principle, such as those here involved (§§ 301–304, *ante*). Perhaps they are usually intended to suggest that many apparently innocent parts of a fraudulent scheme must be evidenced before the fraudulent significance of the whole can appear.[3] As to any particular liberty on cross-examination, nothing can be claimed for that situation beyond the general principle applicable to all witnesses (*post*, § 946).

8. Larceny and Kidnapping

§ 346. **Larceny; General Principle.** (1) The *Knowledge* principle (*ante*, § 301) may occasionally come into application, where the purpose is to show specifically that the defendant was aware that the property was not his own, by showing former acts which must naturally have led to a warning.[1] (2) The *Intent* principle (*ante*, § 302) is the one of most frequent application; for the recurrence of similar takings may serve to negative mistake, inadvertance, or good faith at the time charged, because this recurrence cannot be accounted for by the ordinary chances of innocent taking.[2] In this view the other instances offered may be subsequent as well as prior to the time charged.[3] They must occur under circumstances more or less similar, that is, so similar that the chance of innocent recurrence in the same way is lessened.[4] It is in such a case assumed that the act of taking is otherwise proved, and that the Intent is alone aimed at by such evidence. The theory of Anonymous Intent (*ante*, § 303) is also occasionally applicable; for mistake may be negatived by other instances of the same sort, even though the other instances cannot be connected with the defendant.[5] (3) The *System* principle (*ante*, § 304) is applicable where the act of taking is to be proved, and a general system leading up to the act is offered as the basis of infer-

Smalley *v.* Hale, 37 Mo. 103 ("to disclose its [the transaction's] true character, explain the acts of the parties, and throw light on their objects and intentions"); 1880, Massey *v.* Young, 73 Mo. 260, 273; 1898, Armagost *v.* Rising, 54 Nebr. 763, 75 N. W. 534; 1847, Kauffman *v.* Swars, 5 Pa. St. 31 ("No case of this sort could be made out if it were necessary to dissect the evidence, and show that every part of it was immediately connected with the party to be affected by it"); 1922, Colt & Co. *v.* Brown, — S. C. —, 110 S. E. 402 (fraud in making a contract); 1895, Leedom *v.* E. F. & C. Co., 12 Utah 172, 42 Pac. 208.

[2] 1876, Jacobsen *v.* Metzger, 35 Mich. 103; 1896, Cohen *v.* Goldberg, 65 Minn. 473, 67 N. W. 1149; 1897, Pincus *v.* Reynolds, 19 Mont. 564, 49 Pac. 145; 1897, Bennett *v.* McDonald, 52 Nebr. 278, 72 N. W. 268.

[3] 1861, Woodward, J., in Stauffer *v.* Young, 39 Pa. 455, 460, suggests that the ordinary doctrines of relevancy are not intended to be varied by such statements.

§ **346.** [1] R. *v.* Bleasdale, Eng.

[2] Compare the quotations *ante*, § 302.

[3] R. *v.* May, Eng.

[4] R. *v.* Ellis, Eng., Dove *v.* State, Ark., People *v.* Cunningham, People *v.* Robles, People *v.* Lopez, Cal., Williams *v.* People, Ill., Barton *v.* People, Oh.

[5] State *v.* Van Winkle, Ia.

ence; here the other acts should be so connected by common features as to indicate a general plan. Such requisites are seldom fulfilled; and in most of the rulings the prior similar acts are excluded because their sole purpose is to show the doing of the act, and yet they do not fulfil the requirements of the System principle.[6] So far, however, as the object is merely to negative the innocent intent accompanying a proved act, the question should be governed by the Intent principle.

§ 347. **Same: State of the Law in the Various Jurisdictions.** The precedents in the various jurisdictions illustrate the development of the foregoing principles with more or less consistency.[1]

[6] Lewis *v.* State, Kan., Shears *v.* State, Ind., People *v.* Schweitzer, Mich., State *v.* Goetz, State *v.* Reavis, Mo., Cheny *v.* State, Oh., Walker's Case, Va., Schaser *v.* State, Wis.

§ 347. [1] ENGLAND: 1826, R. *v.* Ellis, 6 B. & C. 145 (larceny by a clerk; marked shillings were put into the till; the fact of several successive takings from the till on the same day was admitted "to show the character" of the act); 1845, R. *v.* May, 1 Cox Cr. 236 (larceny of money on the 9th by a servant in a shop; a larceny from the same till on the 13th was admitted, apparently to negative the idea of the money being placed on the defendant's person by others); 1848, R. *v.* Bleasdale, 2 C. & K. 765 (larceny of coal by cutting beyond the boundary-line beneath the surface; to show that the trespass was knowing, the fact was received of similar cuttings into the land of 30 other proprietors); 1858, R. *v.* Southwood, 1 F. & F. 356 (to show the stealing of three books of account, the fact of the destruction of another was held not "material"; "it would be merely bad conduct in one instance inducing a probability of bad conduct in another"); 1864, R. *v.* Reardon, 4 F. & F. 79 (other larcenies, admitted to negative mistake); 1911, Adamson's Case, 6 Cr. App. 205 (larceny by trick; similar offence a week later, admitted).

CANADA: 1897, R. *v.* McBerny, 29 N. Sc. 327, 328 (larceny by trick; other similar acts, admitted); 1916, R. *v.* Doyle, 28 D. L. R. 649, N. Sc. (stealing; questions to a witness about another and later theft by the accused, not connected with the offence charged, held improper, though no objection was made by accused's counsel; a new trial was ordered); 1916, Rivet *v.* The King, 27 D. L. R. 695, Que. (theft; other thefts admitted, on the facts); 1921, R. *v.* Doughty, 64 D. L. R. 423, Ont. (theft of bonds of S.; a former plan to extort money from S., admitted to evidence intent).

UNITED STATES: *Federal:* 1907, Chitwood *v.* U. S., 8th C. C. A., 153 Fed. 551 (secreting and stealing mail contents; defendant's destruction of mail by burning shortly before, admitted to evidence intent);
Alabama: 1839, State *v.* Wisdom, 8 Port. 511, 516 (negro-stealing; that the defendant was seen talking with other slaves shortly before, excluded); 1921, Dennison *v.* State, 17 Ala. App. 674, 88 So. 211 (larceny of an automobile; larceny of another automobile several months before and at a different place, excluded);
Arkansas: 1881, Dove *v.* State, 37 Ark. 261, 263 (larceny of a horse by a boy, who claimed that he had merely jumped on the horse and run away to escape a whipping from his father; evidence that the defendant had taken a bridle from another person, at an unspecified time and place, excluded); 1881, Endaily *v.* State, 39 Ark. 278, 280 (larceny of horses; larceny at the same time of a saddle and a bridle, taken from other persons and put on the horses, not admitted to show intent); 1920, Pearrow *v.* State, 146 Ark. 201, 225 S. W. 308 (larceny; similar crimes at same place, admitted to test credibility);
California: 1868, People *v.* Robles, 34 Cal. 591, 593 (larceny of sheep of R.; the fact of the theft of W.'s sheep, which were herded with R.'s, driven off and sold by the same persons, admitted as indicating intent); 1881, People *v.* Lopez, 59 Cal. 362 (finding of other horses, disappearing at the same time, in the defendant's possession, admitted); 1885, People *v.* Cunningham, 66 Cal. 668, 4 Pac. 1144, 6 Pac. 700, 846 (larceny of cattle; the defence being innocent purchase from a third person, the fact was admitted in rebuttal that cattle of another person were stolen from the same premises at the same time and found in the defendant's possession; Thornton, J., diss.); 1894, People *v.* Fehrenbach, 102 Cal. 394, 36 Pac. 678 (taking money deposited with a confederate; defendant's attempts to induce another to deposit in the same way, admitted);
Colorado: 1897, Housh *v.* People, 24 Colo. 262, 50 Pac. 1036 (larceny of sheep by fraud; similar transaction with another person at the same time, admitted to show intent);
Columbia (Dist.): 1905, Ryan *v.* U. S., 26 D. C. App. 74, 83 (larceny of a trunk; possession of a forged letter, held inadmissible);
Delaware: 1910, State *v.* Effler, 25 Del. 92, 78 Atl. 411 (larceny by trick; similar tricks with other persons about the same time, admitted); 1913, Effler *v.* State, 27 Del. 62, 85 Atl. 731 (conspiracy to steal by trick; similar trick

three months later, done upon another person, excluded; clearly unsound; the opinion misconceives the distinction between intent and identity);
Florida: 1903, Baldwin *v.* State, 46 Fla. 115, 35 So. 220 (larceny of grain; other acts forming part of a plan, admitted);
Illinois: 1897, Williams *v.* People, 166 Ill. 132, 46 N. E. 749 (assault with intent to steal; previous larcenies about the same place and time, admitted to show a general plan of picking pockets during the presence of a circus); 1902, Bishop *v.* People, 194 Ill. 365, 62 N. E. 785 (larceny of wire; defendant's stealing of another lot of wire, shortly before, excluded);
Indiana: 1871, Bonsall *v.* State, 35 Ind. 461 (larceny; robbery of the same person on the next day, excluded); 1897, Shears *v.* State, 147 Ind. 51, 46 N. E. 331 (other larcenies, not admissible to show the fact of commission of the larceny charged; nor even to show intent where as here "proof of the commission as charged carries with it the evident implication of a criminal intent"; wrong on both points, and of no value); 1916, Hawkins *v.* State, 185 Ind. 147, 113 N. E. 232 (conspiracy to commit larceny); 1921, Zimmerman *v.* State, — Ind. —, 130 N. E. 235 (larceny of automobile; another offence of the kind, admitted);
Indian Territory: 1905, Clampitt *v.* U. S., 6 Ind. T. 92, 89 S. W. 666 (larceny; possession of other similar stolen property, admissible);
Iowa: 1890, State *v.* Van Winkle, 80 Ia. 15, 18, 45 N. W. 388 (larceny of cattle; the stealing of other cattle from the owner in question at the same time, admitted as indicating that the cattle charged to have been stolen had not strayed but had been stolen); 1902, State *v.* Wackernagel, 118 Ia. 12, 91 N. W. 761 (larceny of hogs; larceny of harness, excluded on the facts); 1905, Bank of Irwin *v.* American Exp. Co., 127 Ia. 1, 102 N. W. 107 (loss of a package of money; that the bank had suffered recently from thefts of an unknown employee, excluded); 1906, Mier *v.* Phillips F. Co., 130 Ia. 570, 107 N. W. 621 (action for coal mined by the defendant underneath the plaintiff's land by crossing the boundary of the defendant's land; the fact that defendant had also mined under H.'s land adjacent was excluded; the present principles are ignored; R. *v.* Bleasdale, *supra*, not cited);
Kansas: 1868, Lewis *v.* State, 4 Kan. 306 (larceny; the fact admitted of the careful arrangement of the premises for concealing goods, the finding of many stolen articles secreted, etc., as showing "a combination between the appellant and the others to carry on a general stealing business"); 1883, State *v.* Thurtell, 29 Kan. 148 (larceny; the defendant's belonging to a gang of horse-thieves, excluded, because shown by reputation only, but also — this seems incorrect — irrespective of the mode of proof);
Louisiana: 1894, State *v.* Bates, 46 La. An. 849, 15 So. 204 (another larceny at a different time and place, excluded); 1898, State *v.* Marceaux, 50 La. An. 1137, 24 So. 611 (defendant's admissions of former similar larcenies and of a plan to continue them, admitted);
Maine: 1855, Pike *v.* Crehore, 40 Me. 503, 511 (to disprove the receipt of money sent by mail in September, 1834, the fact was offered of the finding in 1836, in the house inhabited in September, 1834, by the letter-carrier delivering letters at the alleged payee's town, of secreted letters, dated 1834, directed to persons in that town, and opened; excluded);
Maryland: 1921, McClelland *v.* State, 138 Md. 533, 114 Atl. 584 (jewelry; other larcenies by defendant from the same store in a series of visits, admitted to show "a common design or system");
Michigan: 1871, People *v.* Schweitzer, 23 Mich. 301 (prior larceny of other articles from the same person, excluded); 1894, People *v.* Machen, 101 Mich. 401, 404, 59 N. W. 664 (pocket-larceny; that the defendant shortly before was seen feeling in other persons' pockets, admitted to show intent); 1905, Seymour *v.* Bruske, 140 Mich. 244, 103 N. W. 613 (conversion of logs; defendant's "general business of converting the logs of other people in this lake", excluded; erroneous); 1921, People *v.* Di Pietro, 214 Mich. 507, 183 N. W. 22 (larceny of automobile; sale of other cars by defendant, admitted to show a scheme, etc.);
Minnesota: 1919, State *v.* Monroe, 142 Minn. 394, 172 N. W. 313 (larceny of an automobile; other similar acts showing system, admitted);
Missouri: 1863, State *v.* Goetz, 34 Mo. 85, 90 (larceny; other larcenies on the same day, about the same hour, and in stores near by, excluded, no connection being shown between the different felonies); 1880, State *v.* Reavis, 71 Mo. 421 (larceny of cattle; other larcenies of cattle excluded); 1922, State *v.* Kolafa, — Mo. —, 236 S. W. 303 (larceny of automobiles);
Montana: 1906, State *v.* Allen, Mont. 503, 87 Pac. 177 (larceny of horses; other larcenies of horses about the same time, admitted);
Nebraska: 1898, Davis *v.* State, 54 Nebr. 177, 74 N. W. 599 (larceny by bailee; fraudulent borrowing from a third person while using the horse taken, not received to show intent);
New Mexico: 1909, Terr. *v.* West, 14 N. Mex. 546, 99 Pac. 343 (larceny of a horse; stealing and selling of other horses, admitted); 1916, State *v.* Pino, 21 N. M. 660, 158 Pac. 131 (larceny; stealing of other cattle in the same herd, admitted; it was "but one single transaction");
New York: 1913, People *v.* Katz, 209 N. Y. 311, 103 N. E. 305 (larceny by manipulation of stocks; similar proposal made about the same time, admitted to show intent);
North Carolina: 1919, State *v.* Stancill, 178 N. C. 683, 100 S. E. 241 (larceny of tobacco from L.; larceny of tobacco from W., admitted as part of a series of transactions showing a general design); 1919, State *v.* Mincher, 178 N. C. 698, 100 S. E. 339 (larceny of a watch and money; State *v.* Stancill followed);

§ 348. **Same: Sundry Limitations.** (1) Throughout the preceding topics it has been seen that under the Intent theory the purpose was to negative innocent intent; if the jury find the act proved, they are to use the evidence in question to determine the Intent. It is immaterial that mistake or inadvertence has not been expressly set up by the defendant; for the prosecution is bound as a part of its case to prove the criminal intent and therefore to negative innocent intent; for example, if the jury on retiring agreed that the taking had been proved, and then proceeded to determine the intent, they might find themselves without sufficient evidence, if these former acts were not before them as a part of the evidence. It is therefore an error to suppose that the evidence under the Intent principle is only available *after the defendant has expressly suggested* mistake or inadvertence as his exoneration.[1]

No doubt it would be fairer to the cause of the defendant to exclude the evidence, if he *does not propose to make any issue* as to intent or inadvertence.

Ohio: 1833, Cheny v. State, 7 Oh., Pt. 1, 222 (larceny of a horse; subsequent engagement of the defendant with others "in one line as horse-thieves", excluded); 1849, Barton v. State, 18 Oh. 221 (a larceny of money from E., on the night before the alleged stealing of a horse from T., not admitted to show intent);
Oklahoma: 1899, Beberstein v. Terr., 8 Okl. 467, 58 Pac. 641 (larceny; other larcenies forming part of a general plan, admitted); 1921, Williamson v. State, — Okl. Cr. —, 200 Pac. 462 (larceny of meat; a "series of other similar larcenies" by defendant in the neighborhood, excluded on the facts);
Oregon: 1888, State v. Harding, 16 Or. 493 (larceny: that the defendant, while going to the place, assaulted a co-conspirator, admitted); 1900, State v. Savage, 36 Or. 191, 60 Pac. 610 (larceny from an express company; instances of a former plan to rob an express car of the same company, admitted);
Tennessee: 1884, Links v. State, 9 Lea 701, 712 (larceny by substituting a cheap ring for a valuable one in a jeweller's tray, while the jeweller was attending to another matter, the defendant having at the time purchased another cheap ring and left it for engraving; the fact of two similar acts in other stores, one in another State, admitted to negative mistake; compare State v. Defreese, *ante*, § 321);
Texas: Gilbrait v. State, 41 Tex. 567 (larceny of a bull; larceny of a steer belonging to another person, excluded, chiefly because the record showed the conditions and purpose of its use too imperfectly); 1892, Nixon v. State, 31 Tex. Cr. 205, 208, 20 S. W. 364 (larceny of a horse; prior possession and sale of other horses stolen from another place, excluded); 1898, Unsell v. State, 39 Tex. Cr. 330, 45 S. W. 1022 (theft of cattle; prior thefts of cattle, excluded on the facts); 1898, Holt v. State, 39 Tex. Cr. 282, 46 S. W. 829 (larceny; another larceny admitted on the facts); 1919, Mueller v. State, 85 Tex. Cr. App. 346, 215 S. W. 93 (larceny of cattle; theft of other cattle at the same time, admitted); 1921, Hunt v. State, 89 Tex. Cr. 89, 229 S. W. 870 (larceny of automobile; theft of other automobiles, not admitted on the facts);
Utah: 1913, State v. Bowen, 43 Utah 111, 134 Pac. 623 (larceny of a cow from B.; theft of five other cattle and a horse, as shown by the defendant's possession of their hides, without showing that any of them were stolen, held inadmissible; the opinion carelessly fails to make clear whether the other thefts, if duly evidenced, would have been admissible);
Vermont: 1892, State v. Kelley, 65 Vt. 531, 27 Atl. 203 (larceny; other stealings on the same trip of a wagon, admitted);
Virginia: 1829, Walker's Case, 1 Leigh 574 (larceny of a watch, chain, and key from T.'s house; the fact of the defendant's stealing on the same day a cloak from T.'s house, rejected);
Washington: 1901, State v. Gottfreedson, 24 Wash. 398, 64 Pac. 523 (larceny of a horse; defendant's larceny of another horse turned on the range with the former, excluded; unsound);
Wisconsin: 1874, Schaser v. State, 36 Wis. 429 (a former larceny from another person, excluded);
Wyoming: 1920, State v. Jones, 27 Wyo. 46, 191 Pac. 1075 (larceny; possession of other goods not shown to have been stolen, not admitted);

For other instances, compare the citations of larceny by trick, under false pretences (*ante*, § 321), of larcenies forming inseparable parts of an act (*ante*, § 218), and of larcenies identifying the goods taken (*post*, § 415).

§ 348. [1] 1894, People v. Tucker, 104 Cal. 449, 38 Pac. 195 (larceny of money from L. on Jan. 18; another larceny of money from L. on Jan. 17, offered to negative a defence that the taking on Jan. 18 was done to preserve L.'s money as a friend; excluded because no such defence was made).

But if the State should therefore wait till the defendant's case was put in, so as to find out whether such an issue is to be met by him, the State would then presumably be met by his objection that new matter cannot be first introduced on rebuttal (*post*, § 1873), and would thus be prevented from using the evidence at all. Either, then, (a) the rule for the scope of rebuttal must be liberally construed for the State in such cases; or (b) the accused must be required to announce, before the State closes, whether he will make an issue on the point of Intent (both of which alternatives seem improbable of acceptance); or (c) the rule must stand as stated above.[2]

(2) The defendant may equally resort to former acts as indicating a general honest purpose, provided there is similarity enough in the occasions to make the former acts relevant by the general principle.[3]

§ 349. **Kidnapping and Enticement.** On a charge of *kidnapping*, *enticement to escape*, or the like, the analogies of proof of larceny are applicable.[1]

9. Robbery, Burglary, and Extortion

§ 351. **Robbery and Burglary; General Principle.** (1) No opportunity seems here to arise for the application of the *Knowledge* principle (*ante*, § 301). (2) The *Intent* principle (*ante*, § 302) allows the use of another similar act wherever, assuming the act to be otherwise proved and the intent to be in issue, the recurrence of the act negatives the possibility of mistake or good faith.[1] (3) The *System* principle (*ante*, § 304) assumes that the act itself is to be proved and purposes to infer its probability from the existence of a general design or system; the other acts offered to show this should be so connected as to indicate a common design; but this requirement is often not met.[2]

[2] The above qualification was called forth by comments by H. H. Coleman, Esq., of Vicksburg, Miss.

[3] 1897, Hendry *v.* State, 39 Fla. 235, 22 So. 647 (larceny of cattle; a custom of cattle-owners to drive off and sell friends' cattle with their own, not admitted, where the defendant was not a friend of the owner of the cattle taken); 1869, Foster *v.* People, 18 Mich. 266, 277 (larceny of a horse; an attempt by the defendant, within six months before, to purchase a horse, not admitted to show honest intent, the defence being that the horse was purchased, not stolen).

§ 349. [1] 1849, Taylor *v.* Horsey, 5 Harringt. Del. 131 (business as a negro trader, admitted to show the intent of purchase, under a statute forbidding purchase with intent to export); 1841, Com. *v.* Turner, 3 Metc. Mass. 19 (kidnapping with intent to transport, the taking of the child not being disputed; the fact of the defendant's attempt on the previous day to get possession of another child, admitted to show his intent); 1913, People *v.* Pettanza, 207 N. Y. 560, 101 N. E. 428 (kidnapping; kidnapping of another boy, not admitted, on the facts); 1839, State *v.* Ford, 3 Strobh. S. C. 517 (indictment for stealing slaves; the fact received of an unsuccessful solicitation by the defendant to the witness, two years before, to undertake such work; O'Neall, J.; "Remoteness of time, where the party made declarations pointing to this corrupt intention, cannot render the evidence incompetent. . . . If it could be shown that he had thrown out dark hints to others who had declined, might it not be considered as the natural consequence that his solicitations would be followed up until he found his man?"); 1848, Cole *v.* Com., 5 Gratt. Va. 696 (advising slaves belonging to E. L. to escape; evidence of a similar advising of slaves belonging to other persons, excluded).

For *enticement to prostitution*, see *post*, §§ 357, 401.

§ 351. [1] Kidd's Trial, R. *v.* Briggs, Eng., People *v.* McGilver, Cal., State *v.* Cowell, Nev., State *v.* Desroches, La.

[2] Mason *v.* State, Ala., Ford *v.* State, Ark., Com. *v.* Scott, Mass., Lightfoot *v.* People, Mich., State *v.* Greenwade, Mo., Swan *v.* Com., Pa.

(4) The principle of Inseparableness (*ante*, § 218) will sometimes admit evidence of other offences inseparable from the narrative of the substantive act charged.[3]

In general the considerations applicable to the preceding topic (Larceny) are also here applicable.[4]

[3] 1849, Com. *v.* Williams, 2 Cush. Mass. 584 (burglary; the possession of a large number of burglar's tools was shown, but some of them were not fitted to the commission of the particular offence; admitted, because they were part of the mass or parcel, "without sanctioning the admission of evidence merely tending to show that the defendant had in his possession instruments adapted to the commission of other crimes"); 1905, State *v.* Rudolph, 187 Mo. 67, 85 S. W. 584 (murder during robbery; the deceased's presence under a warrant for the accused for another robbery, admitted).

[4] ENGLAND: 1696, Captain Vaughan's Trial, 13 How. St. Tr. 499 (treason by cruising under the French flag in the "Loyal Clencarty", with intent to capture English subjects and vessels; after proving the cruising in that vessel, the prosecution offered to show "that during this war, before and after the treason laid in the indictment, he was a cruiser upon and taker of the king's ships, and this fortifies the direct proof given of the intention; . . . we would produce collateral evidence, to induce a firmer belief of that special overt act, by showing you that he hath made it his practice during the war to aid and assist the king's enemies"; L. C. J. Holt: "I cannot agree to that . . . ; because a man has a design to commit depredation on the king's subjects in one ship, does that prove that he had an intention to do it in another?"; this ruling is clearly wrong, and is entirely inconsistent with the next one); 1701, Captain Kidd's Trial, 14 How. St. Tr. 154, 182 (piracy; the defendant was commissioned by the king in 1696 to destroy the pirates in the Indian seas, but was now charged with piracy in those regions; he admitted the capture of the ship as charged, but pleaded that it was done under his commission; to disprove this lawful intent, evidence was given of a series of previous and subsequent maraudings on the same voyage; L. C. B. Ward: "The seeming justification he depends on is his commissions. Now it must be observed how he acted with relation to them, and what irregularities he went by; . . . what he did before shows his mind and intention not to act by his commissions, which warrant no such things. . . . Now no man knows the mind and intention of another but as it may be discovered by his actions"); 1796, R. *v.* Vandercomb, 2 Leach 4th ed. 708 (burglary; a previous larceny from the same house, rejected); 1839, R. *v.* Briggs, 2 Moo. & Rob. 199, Alderson, B. (robbery; the fact received of the robbery by the defendant of another person at the same place a short time in hours before).

UNITED STATES: *Alabama:* 1868, Mason *v.* State, 42 Ala. 532 (the fact admitted of a series of other burglaries by the defendant and others under similar conditions, during the same week, and in the same region); 1921, Weathers *v.* U. S., 9th C. C. A., 112 Atl. 254) assault with intent to rob; other similar prior assaults, admitted to show intent);
Arkansas: 1879, Ford *v.* State, 34 Ark. 649 (murder committed during a robbery of B.; the fact received of a general plan to rob the stores of B., C., and J.); 1915, Davis *v.* State, 117 Ark. 296, 174 S. W. 567 (burglary; other burglaries the same night by the same persons in the same town, admitted);
California: 1874, People *v.* Dubois, 48 Cal. 551 (burglary; another burglary of the same room on the night before, excluded); 1885, People *v.* McGilver, 67 Cal. 55, 56, 7 Pac. 49 (burglary; that the defendant was arrested while breaking into another store and that burglar's tools were found upon him, admitted);
Illinois: 1921, People *v.* Armstrong, 299 Ill. 349, 132 N. E. 547 (burglary; other burglaries, by deft and a co-indictee, admitted on the facts);
Indiana: 1893, Frazier *v.* State, 135 Ind. 38, 41, 34 N. E. 817 (other burglaries by the defendant on the same night, admitted to show that he "was out on a mission of burglary");
Iowa: 1903, State *v.* Berger, 121 Ia. 581, 96 N. W. 1094 (burglary of a railroad car; sundry prior misdoings, excluded); 1904, State *v.* Donavan, 125 Ia. 239, 101 N. W. 122 (burglary; the finding of goods stolen from other parties, admitted);
Kansas: 1913, State *v.* Wheeler, 89 Kan. 160, 130 Pac. 656 (burglary; other burglaries, with which the defendant was not shown to be associated, held improperly admitted);
Louisiana: 1896, State *v.* Desroches, 48 La. An. 428, 19 So. 250 (breaking and entering with intent to rob; a shooting at the same time, admitted to show intent);
Massachusetts: 1877, Com. *v.* Scott, 123 Mass. 225, 234 (robbery of the Northampton Bank; the fact received of various criminal doings showing a general plan to rob banks, and in particular the one in question);
Michigan: 1868, Lightfoot *v.* People, 16 Mich. 507, 510 (burglary; a former burglary of the same house within a year, excluded); 1901, People *v.* Henry, 129 Mich. 100, 88 N. W. 77 (breaking and entering; convictions of larceny on two former unconnected occasions, excluded); 1909, People *v.* Burke, 157 Mich. 108, 121 N. W. 282 (blowing up a bank; conviction for a similar crime in 1904 in Indiana, excluded);

§ 352. **Extortion and Blackmail (Robbery by Threatening Demands).** The principles that here apply are those of Knowledge and of Intent. (1) It may be argued that the successful obtaining of money on a former occasion by similar means tends to show the acquisition of knowledge that money can be obtained in this way (*ante*, § 301). This argument, however, as here applied,[1] seems somewhat forced; such knowledge being a matter of common understanding and not needing to be proved. (2) It is clear, however, that the Intent argument is entirely applicable, *i.e.* the doing of similar acts at other times tends to negative the supposition that the demand on the occasion charged was made in good faith (for example, with a genuine desire to obtain compensation for supposed injuries). This use of such evidence is generally sanctioned.[2]

Mississippi: 1898, McGee *v.* State, — Miss. —, 22 So. 890 (robbery; independent assault committed at the same time and place by the defendant's employer upon another person, excluded);
Missouri: 1880, State *v.* Greenwade, 72 Mo. 300 (the robbery of H. was planned, and L. being mistaken for H. was first robbed; the fact of the plan and the robbery of H., admitted on the charge of robbing L.); 1903, State *v.* Spray, 174 Mo. 569, 74 S. W. 846 (robbery; another robbery near by and about the same time of night, excluded); 1907, State *v.* Toohey, 203 Mo. 674, 102 S. W. 530 (burglary of a sleeping-car; burglary of another car, coupled to the former, at the same time, admitted); 1919, State *v.* Cummins, 279 Mo. 192, 213 S. W. 969 (other burglaries of a co-conspirator admitted, on the facts); 1917, State *v.* Patterson, 271 Mo. 99, 196 S. W. 3 (robbery; attempt at extortion from B. in a similar manner, admitted);
Nevada: 1877, State *v.* Cowell, 12 Nev. 337 (burglary of A.'s house; the fact admitted, to show intent, that a few days beforehand the defendant had planned with others to rob A. on the street and desisted only because they learned that he had no money about him);
New Jersey: 1898, Leonard *v.* State, 60 N. J. L. 8, 41 Atl. 561 (possession of burglar's tools; conviction of larceny, and suspicious conduct near a dwelling, excluded);
New York: 1880, Hope *v.* People, 83 N. Y. 419, 423, 428 (robbery of the key of a bank; evidence admitted of two prior unsuccessful attempts by the defendant to rob the same bank, as indicating with other facts a general plan with other persons to rob the bank, the latter robbery being shown to have been committed by the key-robbers); 1904, People *v.* Loomis, 178 N. Y. 400, 70 N. E. 919 (confession of another burglary, not admitted on the facts); 1921, People *v.* Hassan, Sup. App. Div., 187 N. Y. Suppl. 115 (larceny and burglary; other prior crimes excluded, on the facts);
North Carolina: 1916, State *v.* Fowler, 172 N. C. 905, 90 S. E. 408 (burglary; other recent house-breakings, excluded on the facts);
Ohio: Coble *v.* State, 31 Oh. St. 100 (assault with intent to rob; an assault upon another person in the same vicinity about five minutes later, not admitted to show intent);
Oklahoma: 1917, Miller *v.* State, 13 Okl. Cr. 176, 163 Pac. 131 (robbery; another robbery the night before, excluded);
Pennsylvania: 1883, Swan *v.* Com., 104 Pa. 218 (robbery of a store of B. on the night of September 13; the fact of the defendant's complicity in a robbery of the house of R., "about the same time", in the same township, rejected, because there was no "system established between the offence on trial and that introduced, to connect it with the defendant");
Texas: 1894, Dawson *v.* State, 32 Tex. Cr. 535, 552, 25 S. W. 21 (prior and subsequent burglaries, admitted on the facts); 1898, Long *v.* State, 39 Tex. Cr. 537, 47 S. W. 363 (other burglaries in the neighborhood about the same time, excluded); 1903, Glenn *v.* State, — Tex. Cr. —, 76 S. W. 757 (burglary; other anonymous burglaries of the same house, excluded); 1907, Herndon *v.* State, 50 Tex. Cr. 552, 99 S. W. 558 (burglary; possession of goods stolen from another house, excluded on the facts);
Washington: 1902, State *v.* Norris, 27 Wash. 453, 67 Par. 983 (burglary of an adjacent house on the same night, admitted);
Wisconsin: 1881, Neubrandt *v.* State, 53 Wis. 89, 91, 9 N. W. 824 (breaking with intent to steal B.'s goods; the taking of goods of other persons from the same house at the same time, admitted to show the intent).

§ 352. [1] In R. *v.* Cooper, Eng., *infra*; quoted *ante*, § 301.

[2] ENGLAND: 1758, Barnard's Trial, 19 How. St. Tr. 825 (charge of sending threatening letters; a series of them offered; objection, not passed on, that "one felony, whoever it may affect, cannot be evidence of another felony"); 1830, R. *v.* Winkworth, 4 C. & P. 444, Parke, J. (robbery by demanding money under threats of violence; the accused, one of a mob in front of the prosecutor's house, came up and civilly advised him to give them money to get rid of them; to show that this was not *bona fide*

10. Arson

§ 354. **General Principle; State of the Law in the Various Jurisdictions.** (1) The *Knowledge* principle (*ante*, § 301) has here usually no scope for application.[1] (2) The *Intent* principle (*ante*, § 302) is constantly applied. Where the act itself is conceded or otherwise proved, and the subject is to negative inadvertence or accident, the recurrence of similar acts of firing by the defendant tends to diminish the possibility of an innocent explanation.[2] Moreover, the principle of *Anonymous Intent* (*ante*, § 303) is recognized as being here occasionally of peculiar utility; *i.e.* the recurrence of a similar fire may tend decidedly to negative innocent intent, even though the author of the other fires is not shown; thus, the prosecution having negatived innocent intent in the present fire by whomsoever set, the defendant may be

advice, the fact was received of similar demands made at other houses on the same day by the same mob when the defendant was with it); 1819, R. *v.* Egerton, R. & R. 375, by all the Judges (robbery by threats of charging the prosecutor with sodomy; the fact of another attempt by the same threats on the next evening to rob the prosecutor was admitted "as confirmatory of the truth of the prosecutor's evidence, as to the transaction of the former day and as to the nature of those transactions"); 1849, R. *v.* Cooper, 3 Cox Cr. 547, Cresswell, J. (charge of feloniously accusing a person of an unnatural crime with intent to extort money; the fact offered of former obtaining of money by similar methods, as told by the accused to a comrade; admitted, to show knowledge of the likelihood of money being offered); 1855, R. *v.* McDonnell, 5 Cox Cr. 153, Erle, J. (excluding a former instance of a similar charge because the intent was clear here, if the prosecutor was to be believed at all); 1914, Boyle's and Merchant's Case, 10 Cr. App. 180 (blackmail by a newspaper editor; a similar transaction within a year, threatening another person, admitted, to negative "mistake or accident or absence of criminal intent"); 1914, R. *v.* Boyle and Merchant, 3 K. B. 339 (demanding money by threats; similar act two months previous, done to another person, held admissible to show intent);

UNITED STATES: *California:* 1898, People *v.* Lambert, 120 Cal. 170, 52 Pac. 307 (prosecutrix for rape by her father, allowed to be asked whether she had not planned to "put up jobs" on him to get him into prison and thus be free from control); *Florida:* 1899, Wallace *v.* State, 41 Fla. 547, 26 So. 713 (blackmail by threatening to accuse A. of keeping a bawdy-house; similar threats to other similar women, admitted to show intent); *Illinois:* 1903, Glover *v.* People, 204 Ill. 170, 68 N. E. 464 (maliciously threatening to kill, with intent to extort money, defendant's prior arrest, etc., of the person threatened, and his demand for money, admitted, as showing the parties' "previous relations"); *Indiana:* 1907, Eacock *v.* State, 169 Ind. 488, 82 N. E. 1039 (conspiracy to blackmail K.; other conspiracies to blackmail, admitted); *Iowa:* 1895, State *v.* Lewis, 96 Ia. 286, 65 N. W. 295 (extortion of money by a newspaper publisher; previous instances of extortion from other persons, admitted merely to show guilty intent); *Massachusetts:* 1893, Miller *v.* Curtis, 158 Mass. 127, 131, 32 N. E. 1039 (stated *ante*, § 340); *Nebraska:* 1908, State *v.* Routzahn, 81 Nebr. 133, 115 N. W. 759 (blackmail, by a chief of police, levied on a prostitute; the payment of such sums to the defendants by other prostitutes, held admissible); *New York:* 1921, People *v.* Ryan, 232 N. Y. 234, 133 N. E. 572 (blackmail by letters; sending of similar letters to other persons about the same time, admitted, but not the burning of another store, on the facts); *Pennsylvania:* 1893, Com. *v.* Saulsbury, 152 Pa. 554, 558, 25 Atl. 610 (extortion by a constable; similar obtaining of money from another person, excluded; clearly erroneous); *Tennessee:* 1848, Britt *v.* State, 9 Humph. 31 (the prosecutor was a stranger and the defendant was charged with obtaining money from him by false pretences that the prosecutor had passed counterfeit money and false pretences of having a warrant against him; to negative good faith, the fact was received of the defendant's having followed the prosecutor the next day into the adjoining country and extorted other money, etc., by falsely claiming that the latter had stolen his overcoat; citing R. *v.* Winkworth and R. *v.* Egerton); *Washington:* 1915, State *v.* Schuman, 89 Wash. 9, 153 Pac. 1084 (policeman accepting hush-money from prostitute; receipt of money from other prostitutes, admitted);

For some analogous cases, see the citations under False Claims, *ante*, § 340, and Impeachment of Witnesses, *post*, § 963.

§ 354. [1] It may have, where knowledge of the nature of combustible materials is to be shown.

[2] R. *v.* Dosset, Eng., Com. *v.* McCarthy, Com. *v.* Bradford, Mass.

shown to have kindled it.[3] (3) The *System* principle (*ante*, § 304) supposes the act itself of setting the fire to be desired to be proved, and accepts former acts of the kind as admissible to show a design or system from which the setting of the fire charged may be inferred, provided the other acts have common features indicating a common plan.[4] For this purpose, however (*ante*, § 304), the defendant's connection with the previous fires must be shown.[5] The disinclination of the Courts to resort to this System principle, and their aptness, when using its rigorous test, to misapply it to evidence of mere Intent, have been already spoken of (*ante*, § 304), and are to be disapproved.[6]

[3] R. *v.* Bailey, R. *v.* Gray, R. *v.* Nattrass, Eng., Faucett *v.* Nicholls, People *v.* Murphy, N. Y., State *v.* Thompson, N. C.

[4] R. *v.* Taylor, Eng., Martin *v.* State, Ala., State *v.* Raymond, N. J., Kramer *v.* Com., Pa., State *v.* Ward, Vt., State *v.* Miller, Wis.

[5] R. *v.* Reagan, Eng., People *v.* Kennedy, N. Y., State *v.* Freeman, N. C.

[6] The precedents are as follows: ENGLAND: 1839, R. *v.* Howell, 3 State Tr. N. S. 1087, 1098 (felonious burning at a riot; preceding burning of another house, admitted as evidence of a riot but not of design to burn the house charged); 1846, R. *v.* Dosset, 2 Cox Cr. 243, 2 C. & K. 306 (a hayrick had been fired by the discharge of a gun in the prisoner's hand; the facts of the rick having been fired the day before and the prisoner being seen near it with a gun were admitted; Maule, J.: "It is only by the conduct of the prisoner that a judgment can be formed whether the act was accidental or intentional"); 1850, R. *v.* Regan, 4 Cox Cr. 335 (the fact that the accused had given notice of other fires and claimed the rewards in the present case was apparently rejected as not strong enough); 1851, R. *v.* Taylor, 5 Cox Cr. 138 (evidence tending to show the accused's share in other rick-fires of the same night, excluded, except as bearing on his conduct as to the fire in question; the ruling seems erroneous, for part of the evidence was a threat "to light B. from end to end", and thus a general connection between the fires was supplied); 1866, R. *v.* Gray, 4 F. & F. 1102 (indictment for setting fire to the defendant's own house, with intent to obtain insurance-money; the fact was received, to negative accident, of the occurrence of fires in two of the defendant's former houses and of his claiming and receiving the insurance-money on both, though no evidence of the cause of these fires or of the defendant's connection with them was offered); 1882, R. *v.* Nattrass, 15 Cox Cr. 73 (charge of attempt to burn the house by setting fire to articles so that the house would catch fire; the fact was received that on the same day articles were found on fire at four different times in different parts of the house.

CANADA: 1911, R. *v.* Wilson, 4 Alta. 35 (arson to defraud; proposal to lure a third person, nine months before, to burn a building of the defendant, admitted).

UNITED STATES: *Federal:* 1914, Fish *v.* U. S., 1st C. C. A., 215 Fed. 545 (arson of a yacht for insurance, in October, 1910; the burning of another yacht by the defendant in October, 1909, and of an automobile in September, 1910, under similar circumstances as to insurance, etc., not admitted); *Alabama:* 1855, Brock *v.* State, 26 Ala. 104 (a subsequent firing of the same person's property, excluded; the point not raised); 1856, Martin *v.* State, 28 Ala. 71, 82 (arson with intent to defraud; a previous attempt to hire some one to burn the same house, admitted); 1904, Mitchell *v.* State, 140 Ala. 118, 37 So. 76 (arson of H.'s house; the arson of the house of H.'s brother on the same night, admitted); *Arkansas:* 1915, Shuffield *v.* State, 120 Ark. 458, 179 S. W. 650 (arson; defendant's burning of other premises the same night, admitted, but not his prior conviction for stealing chickens); *Hawaii:* 1900, Merricourt *v.* Norwalk F. Ins. Co., 13 Haw. 218, 224 (arson of one's own house in fraud of insurance; questions as to prior fire-losses of the plaintiff, excluded; no rule defined); *Indiana:* 1914, Kahn *v.* State, 182 Ind. 1, 105 N. E. 385 (arson; another fire in defendant's premises, five years before, excluded); *Kentucky:* 1906, Raymond *v.* Com., 123 Ky. 368, 96 S. W. 515 (arson of the barn of V., landlord of R.; the defendant was subtenant of R., and had been evicted by R. at the instigation of V.; the burning of R.'s barn four weeks before, excluded; flagrantly erroneous, the defendant having threatened to get even with both R. and V.; Hobson, C. J., diss.); 1917, Allen *v.* Com., 176 Ky. 475, 196 S. W. 160 (arson of tobacco barn; arson of other tobacco barns, admitted); *Maryland:* 1917, Freud *v.* State, 129 Md. 636, 99 Atl. 934 (fraudulent arson; plans for setting other fires, admitted); *Massachusetts:* 1876, Com. *v.* McCarthy, 119 Mass. 355 (arson on Sept. 10; to show intent only, the fact was admitted of a setting fire by the defendant on Aug. 24 and Sept. 6 to a shed ten feet distant from but connected with the building in question); 1878, Com. *v.* Bradford, 126 Mass. 42 (arson; the fact of the defend-

11. Rape, Abortion, and other Sexual Offences

§ 357. **Rape; General Principle.** (1) Here the *Knowledge* principle (*ante*, § 301) has no opportunity for application.

ant's setting fire to the same mill a few nights before, admitted to show wilfulness and to negative accident or negligence; the Court apparently had in mind the stricter System rule, however, for they say that the evidence indicated "that the defendant then had a settled purpose in regard to it", and that such evidence must be near enough to "afford a presumption" that the design continues; compare this Massachusetts peculiarity, *ante*, § 321); 1920, Com. *v.* Leventhal, 236 Mass. 516, 128 N. E. 864 (arson; other burnings a few months before, admitted to show fraudulent intent); *Missouri:* 1903, State *v.* Jones, 171 Mo. 401, 71 S. W. 680 (burning of another house, and stealing of a horse, on the same night, admitted); 1918, State *v.* Bersch, 276 Mo. 397, 207 S. W. 809 (arson; other fires by the same parties, admitted); *Nebraska:* 1899, Knights *v.* State, 58 Nebr. 225, 78 N. W. 508 (arson; defendant's setting of other fires in adjacent buildings on the same night, admitted); *New Jersey:* 1891, State *v.* Raymond, 53 N. J. L. 260, 264, 21 Atl. 328 (arson in 1888 with intent to defraud; the occurrence of six fires between 1877 and 1883, in buildings in which the defendant was interested, excluded, even as negativing accident, because there was "not the slightest connection between it and them"; wrong application of the System theory); *New Mexico:* 1905, Palatine Ins. Co. *v.* Santa Fé M. Co., 13 N. M. 241, 82 Pac. 363 (fraudulent arson; former burning of the plaintiff's goods after increase of insurance, one year and a half before, excluded); *New York:* 1865, People *v.* Kennedy, 32 N. Y. 141 (burning of a barn; the defendant was a discharged employee living near by; the fact of an attempt by him to burn the employer's house about the same time was rejected, partly because the defendant was not sufficiently connected with it, partly because "we cannot presume that he burned the barn because we presume that he attempted to burn the house"; no authorities cited); 1876, Faucett *v.* Nichols, 64 N. Y. 377 (action against an innkeeper for goods lost negligently by fire; defence, that the fire was set by a third person wilfully; to negative the theory of carelessness in the defendant's household and show deliberateness by some one else, the fact was held admissible that on the same night an attempt was made to fire another building, near by, with kerosene, etc., as in the case of the defendant's building; but the Court say, *obiter*, without citing authorities, that such evidence could not have been admitted in a criminal charge against the defendant); 1892, People *v.* Murphy, 135 N. Y. 450, 456, 32 N. E. 138 (arson of a barn; the poisoning of the owner's horses, and the mutilation of his carriages, on the same night, where another's were untouched, admitted to show a general though anonymous scheme of destruction, including the barn); 1898, People *v.* Fitzgerald, 156 N.Y. 253, 50 N. E. 846 (defendant, a trustee of corporate property, was charged with arson of it; the burning of other corporate property and the defendant's private property, more than two years before, not shown to be incendiary, excluded); 1914, People *v.* Grutz, 212 N. Y. 72, 105 N. E. 843 (arson to obtain insurance-money; complicity in nine other arsons for the same purpose, not admitted on the facts; three judges diss.); *North Carolina:* 1856, State *v.* Freeman, 4 Jones L. 5 (two former attempts by the same servant, within a month or so, by setting fire to the same premises, here rejected, because the defendant was not connected with them); 1887, State *v.* Thompson, 97 N. C. 496, 1 S. E. 921 (arson of an outhouse; attempted burning of the dwelling itself at the same time, admitted as showing that the same person had fired both); 1897, State *v.* Graham, 121 N. C. 623, 28 S. E. 409 (burning of a landlord's dwelling; the defendant's burning of his former landlord's dwelling, ten months before, excluded); 1902, State *v.* McCall, 131 N. C. 798, 42 S. E. 894 (arson of a church; arson of a mill shortly before, excluded); *Pennsylvania:* 1878, Kramer *v.* Com., 87 Pa. 299 (setting fire to a hotel on May 23; the fires were put out; the fact admitted that on the 25th, the defendant, who was a resident of the hotel at both times, attempted to set fire to the hotel; "the purpose of the first attempt . . . was not complete, for that was to consume the building entirely; being saved, it was clearly the subject of a renewed purpose; and the evidence of this renewed purpose tended strongly to show that the person was the same who had made both attempts"); *Philippine Islands:* 1913, U. S. *v.* Evangelista, 24 P. I. 453 (arson; prior setting of another fire, admitted); *Vermont:* 1878, State *v.* Smalley, 50 Vt. 738, 750 (other burnings, not passed upon); 1888, State *v.* Ward, 61 Vt. 181, 17 Atl. 483 (an attempt by the defendant, four weeks previous, to burn the same barn, admitted); 1898, State *v.* Hallock, 70 Vt. 159, 40 Atl. 51 (arson of L.'s barn by defendant's procurement; an incendiary firing of L.'s dwelling-house six weeks before, admitted, to negative accident, and also to show, with other evidence, the defendant's plan to burn L.'s buildings); *Wisconsin:* 1879, State *v.* Miller, 47 Wis. 530, 3 N. W. 31 (forgery and larceny, not admitted on the facts as so intimately connected with the arson charged as to indicate a common purpose in all).

(2) The *Intent* principle (*ante*, § 302) clearly applies where the act is assumed as otherwise proved and the intent is in issue; *i.e.* in such cases, former acts of the kind are relevant to negative the intent as being of any other kind than to commit rape. (*a*) Where the charge is of *assault with intent*, the propriety of such evidence cannot be doubted. There should be some limitation of time, but merely to avoid the objection of unfair surprise (*ante*, § 194). There need be no limitation as to the person assaulted, because the only purpose is to negative any other than the rape-intent, and a previous rape-assault on another woman has equal probative value for that purpose, for it is the general desire to satisfy lust that is involved in this crime, and no particular woman is essential for this. Accordingly, where the charge is assault with intent, former acts of the sort should be received without any limitation except as to time; though the Courts can hardly be said to have accepted this result fully. (*b*) Where the charge is of *rape*, the doing of the act being disputed, it is perhaps still theoretically possible that the intent should be in issue; but practically, if the act is proved, there can be no real question as to intent; and therefore the Intent principle has no necessary application. The former acts, if available at all, must be available under the Design principle.

(3) The *Design* or *Plan* principle (*ante*, § 304) requires that the former act or acts should indicate, by common features, a plan or design which tends to show that it was carried out by doing the act charged. Here it is obvious that there is much room for difference of opinion in a given case. The committing of a single previous rape, or rape-attempt, upon another woman may not in itself indicate such a design, — a view carefully examined in the following leading case:

1876, *State* v. *Lapage*, 57 N. H. 289, 295, 299, 303. CUSHING, C. J.: "I think we may state the law in the following propositions: (1) It is not permitted to the prosecution to attack the character of the prisoner, unless he first puts that in issue by offering evidence of his good character. (2) It is not permitted to show the defendant's bad character by showing particular acts. (3) It is not permitted to show in the prisoner a tendency or disposition to commit the crime with which he is charged. (4) It is not permitted to give in evidence other crimes of the prisoner, unless they are so connected by circumstances with the particular crime in issue as that the proof of one fact with its circumstances has some bearing upon the issue on trial other than such as is expressed in the foregoing three propositions. . . . It should also be remarked that this being a matter of judgment, it is quite likely that Courts would not always agree, and that some Courts might see a logical connection where others could not. But however extreme the case may be, I think it will be found that the Courts have always professed to put the admission of the testimony on the ground that there was some logical connection between the crime proposed to be proved other than the tendency to commit one crime as manifested by the tendency to commit the other. In the case under consideration, I cannot see any such logical connection, between the commission of the rape upon Julienne Rousse and the murder of Josephine Langmaid, as the law requires. I am unable to see any connection by which from the first crime can be inferred that the respondent was attempting the commission of a rape when he committed the murder, if he did it, other than such inference as I understand the law expressly to exclude." SMITH, J.: "Proof that he committed a rape in Canada, four years previously, upon Julienne Rousse, shows what?

Not that he then had any design or intent to perpetrate a rape four years afterwards upon another woman whom he had never seen or heard of, or in a place two hundred miles distant where he had never been; not that he had then formed a design to rape and murder women whenever he might have opportunity; not that he had ever before or since committed that crime, — but that the defendant had a disposition to commit the crime of rape four years previously. No one will pretend that evidence that the prisoner had committed another murder, in Canada, or Texas, or Europe, could be shown on this trial. One cannot be convicted of murder, by showing that he has at some time and somewhere else committed another murder; or of larceny, by showing that he has committed the crime before, and therefore has an evil disposition inclining him towards that particular crime."

Nevertheless, a single previous act, even upon another woman, *may*, with other circumstances, give strong indication of a design (not a disposition) to rape; and a previous act of the sort upon the same woman ought in itself usually to be regarded as indicating such a design.

Courts have shown altogether too much hesitation in receiving such evidence.[1] Even when rigorously excluded from any bearing it may have upon

§ 357. [1] **Assault with Intent:** ENGLAND: 1913, Rodley's Case, 9 Cr. App. 69, 3 K. B. 468 (burglary with intent to rape; defendant's entry of another house on the same night and having intercourse with a woman, not admitted under the circumstances).

UNITED STATES: *Federal:* 1916, Hall *v.* U. S., 9th C. C. A., 235 Fed. 869 (assault upon a female child by her physician; a former similar instance with another child, nearly 3 years before, held inadmissible); *California:* 1875, People *v.* Bowen, 49 Cal. 654 (assault with intent to rape a child under ten; intercourse with other children under ten, excluded); *Iowa:* 1877, State *v.* Walters, 45 Ia. 389 (assault with intent to rape; other similar assaults upon the same person admitted, but not other similar assaults upon another person); 1899, State *v.* Desmond, 109 Ia. 72, 80 N. W. 214 (assault with intent to rape; defendant, giving a stage-entertainment, invited the complaining witness and other young girls separately behind the curtain; the facts of rape and other indecencies upon the others at that time, admitted to show intent); *Kansas:* 1880, State *v.* Boyland and McCurty, 24 Kan. 186 (assault on B. with intent to rape, by B's husband and a friend M., the husband helping M. violate A.; conduct and expressions of the husband, a few days later, in the presence of B. and M., rejected, though the Court conceded that it showed "a willingness on the part of the husband that the wife might be debauched by the other defendant"; an example of gross failure of justice through misapplication of the legal principles in favor of crime); 1896, State *v.* Stevens, 56 Kan. 720, 44 Pac. 992 (attempt to rape; evidence of an indecent assault upon the same person two years later, excluded); *Wisconsin:* 1901, McAllister *v.* State, 112 Wis. 496, 88 N. W. 212 (assault with intent to rape; similar assault on another woman living three blocks away, one hour before, excluded; unsound); 1903, Barton *v.* Bruley, 119 Wis. 326, 96 N. W. 815 (indecent assault; defendant's prior similar misconduct, excluded).

Rape: ENGLAND: 1836, R. *v.* Lloyd, 7 C. & P. 318 (liberties taken by the defendant with the prosecutrix, not admitted to show lustful intent); 1848, R. *v.* Chambers, 3 Cox Cr. 92 (former rape upon the prosecutrix, his granddaughter; here admitted to explain the child's condition); 1864, R. *v.* Reardon, 4 F. & F. 76 (carnal knowledge of a female child, the defendant lodging in the same house; the fact admitted of subsequent perpetrations of the same act two and four days later; Willes, J.: "I shall allow all the matters to be proved, in order to show the real nature of the case. . . . It has repeatedly appeared to me in cases of this sort that the man by a threat of violence deters the child from complaining, and thus acquires a species of influence over her by terror, which enables him to repeat the offence on subsequent occasions; and this seems to me to give a continuity to the transaction which makes such evidence properly admissible").

CANADA: 1912, R. *v.* Paul, Alta. S. C., 5 D. L. R. 347 (rape; similar act done by defendant to the prosecutrix' sister, a few minutes before, excluded).

UNITED STATES: *Alabama:* 1905, Funderburk *v.* State, 145 Ala. 661, 39 So. 672 (rape; subsequent intercourse with the woman's consent, on the same evening, not admissible for the State); *California:* 1895, People *v.* Fultz, 109 Cal. 258, 41 Pac. 1040 (on a charge of rape of his daughter, other rapes upon her by the defendant were admitted to explain the absence of signs of rape); *Colorado:* 1902, Bigcraft *v.* People, 30 Colo. 298, 70 Pac. 417 (rape upon defendant's daughter; other acts of intercourse excluded because not expressly offered in corroboration only); *Delaware:* 1921, State

character (*ante*, § 194), it may carry with it great significance as to a specific design or plan of rape. There is no reason why it should not be received when it does convey to the mind, according to the ordinary logical instincts, a clear

v. Brewer, — Del. —, 114 Atl. 604 (assault with intent to commit rape; similar conduct to another girl 8 or 9 months before, excluded); *Illinois:* 1890, Parkinson v. People, 135 Ill. 401, 25 N. E. 764 (a preceding rape on the prosecutrix, held inadmissible; here, however, admitted as necessarily mentioned in describing the offence charged); 1896, Janzen v. People, 159 Ill. 440, 42 N. E. 862 (rape on May 1 on defendant's daughter M.; a rape on May 15 on another daughter Y., excluded); 1901, Addison v. People, 193 Ill. 405, 62 N. E. 235 (rape; defendant's conduct that day in becoming intoxicated and in treating a boy to beer, excluded); 1922, People v. Mason, 301 Ill. 370, 133 N. E. 767 (assault with intent to commit rape; the female was in fact under the age of consent, but the proof showed force; there were courts both charging and not charging force; prior and subsequent acts of lewdness, etc., with the same female, admitted); *Iowa:* 1904, State v. Trusty, 122 Ia. 82, 97 N. W. 989 (rape; prior intercourse, etc., admitted); 1904, State v. Carpenter, 124 Ia. 5, 98 N. W. 775 (similar); 1906, State v. Crouch, 130 Ia. 478, 107 N. W. 173 (rape of an imbecile; defendant's prior lascivious conduct towards the prosecutrix, admitted); 1910, Smith v. Hendrix, 149 Ia. 255, 128 N. W. 360 (civil action for rape; former assault on the woman admitted); 1915, State v. Robinson, 170 Ia. 267, 152 N. W. 590 (rape; other rapes of the same woman about the same time by the defendant's companions, admitted); *Kansas:* 1892, State v. Bonsor, 49 Kan. 758, 31 Pac. 736 (rape in July; the fact of previous intercourse by the defendant in June, and of efforts to conceal its resulting pregnancy, rejected; clearly unsound); *Louisiana:* 1904, State v. Johnson, 111 La. 935, 36 So. 30 (rape; that the defendants broke and entered another house near by on the same night, admitted, to show proximity and intent); 1904, State v. Lewis, 112 La. 872, 36 So. 788 (former rapes and threats of rape upon the same woman, offered to show her state of fear and submission; not expressly ruled upon); *Maryland:* 1898, Legore v. State, 87 Md. 735, 41 Atl. 60 (rape; prior indecent proposal of defendant to prosecutrix, excluded; no authority cited); *Michigan:* 1895, People v. Burwell, 106 Mich. 27, 63 N. W. 986 (where the woman's consent was alleged to have been forced, the fact that the defendant "had abused and beaten her [his daughter] before", and that he "was abusive to his wife and other children", was admitted); *Mississippi:* 1903, Dabney v. State, 82 Miss. 252, 33 So. 973 (rape; larceny in an adjoining room the same night, excluded); *Missouri:* 1903, State v. Scott, 172 Mo. 536, 72 S. W. 897 (prior attempts to rape the same woman, admitted); *Nebraska:* 1901, Reinoehl v. State, 62 Nebr. 619, 87 N. W. 355 (prior indecent language to the complainant, admissible); *New Jersey:* 1905, State v. Hummer, 72 N. J. L. 328, 62 Atl. 388 (carnal abuse; charges by other girls against the defendant, here admitted merely to explain away the impeachment of the police officer's testimony); 1916, State v. Boom, 89 N. J. L. 418, 99 Atl. 125 (carnal abuse of a female child; other criminal acts of accused with other persons, excluded); *New York:* 1859, Conkey v. People, 5 Park. Cr. 32, 35 (rape; violent conduct in the room by the defendant about the same time, in overturning the stove, throwing things out of the window, etc., admitted as indicating a purpose to alarm and coerce the woman); 1887, People v. O'Sullivan, 104 N. Y. 483, 10 N. E. 880 (rape by a Catholic priest upon his servant; the fact was received of an unsuccessful attempt, four days before, to ravish her; "it is always competent to show, upon the question of his guilt, that he has made an attempt to some prior time, not too distant, to commit the same offence"); *North Carolina:* 1877, State v. Laxton, 76 N. C. 216 (that the defendant "was running after one certain bad white woman," excluded); *Oklahoma:* 1905, Harmon v. Terr., 15 Okl. 147, 79 Pac. 765 (rape of another woman at the same time, by other men in the defendant's company, admitted); 1921, Dunscombe v. State, — Okl. Cr. —, 197 Pac. 1073 (assault with intent to rape; similar immoral acts with other females many months before, held improperly admitted on the facts); *Oregon:* 1914, State v. Jensen, 70 Or. 156, 140 Pac. 740 (assault with intent to rape a child; another assault on a different girl at another time and place, excluded); *Tennessee:* 1848, Williams v. State, 8 Hump. 585, 590, 594 (rape upon the defendant's daughter; the fact was admitted of a series of requests, threats, and attempts at the rape, extending about four months back, and beginning about eight months after the mother's death; Green, J.: "When a party for a series of months, by every persuasive, by importunity, by threats, and by force, seeks to gratify his lust for sexual intercourse with a particular woman, certainly every mind must perceive the force and relevancy of those facts to explain the intent with which he made an assault subsequently on the same woman"); *Utah:* 1909, State v. Williams, 36 Utah 273, 103 Pac. 250 (rape under age; the defendant's similar dealing with other little girls, excluded); *Washington:* 1896, State v. Thompson, 14 Wash. 285, 44 Pac. 533 (rape; a former "trouble" of a similar sort, excluded); *Wisconsin:* 1893, Proper v. State, 85 Wis. 615, 628,

indication of such a design. There is room for much more common sense than appears in the majority of the rulings.

§ 358. **Same: Other Principles discriminated.** (1) Occasionally the former act will be receivable for *other purposes* independently of the present principles, — as, in explanation of certain physical appearances,[1] or under the doctrine of Inseparableness (*ante*, § 218).[2] (2) The use of former *voluntary intercourse* of the *same complainant* with the defendant, as indicating her general sentiments toward him and therefore the probability of her consent on this occasion, involves a question of Emotion or Motive, dealt with elsewhere (*post*, § 402). The logical principles are distinct, but their application cannot always be discriminated. In the one class of cases the evidence is appropriate for the prosecution; in the other, for the defence.

§ 359. **Abortion.** (1) The *Knowledge* principle (*ante*, § 301) has here no application in practice; though it is available to show a knowledge of the nature and effect of the instruments or drugs used, if that should be disputed.[1] (2) The *Intent* principle (*ante*, § 302) is available; other occasions of using such instruments or drugs, whether prior or subsequent,[2] tend to negative an innocent intent.[3] (3) The *Design* principle (*ante*, § 304), where the act itself is to be proved, would allow resort to former acts showing by common features a general design indicating that it was carried out by doing the act charged.[4] The precedents in the various jurisdictions illustrate these principles with more or less consistency.[5]

55 N. W. 1035 (rape; the prosecutrix and a girl E. slept together in the defendant's house; evidence of the defendant's previous indecent assaults and rape on E. while so living, admitted).

Rape under Age of Consent: this is practically the offence of fornication, consent being immaterial, and hence is dealt with under § 402, *post*.

§ 358. [1] R. *v.* Chambers, Eng., People *v.* Fultz, Cal.

[2] Parkinson *v.* People, Ill.

§ 359. [1] See the quotation, *ante*, § 301, from R. *v.* Cooper.

[2] R. *v.* Perry, Eng., Lamb *v.* State, Md.

[3] Com. *v.* Corkin, Mass., People *v.* Seaman, Mich.

[4] Baker *v.* People, Ill., People *v.* Sessions, Mich.

[5] ENGLAND: 1847, R. *v.* Perry, 2 Cox Cr. 223, Wilde, C. J. (administering a drug with intent to produce a miscarriage; subsequent administrations of other drugs admitted to show intent); 1906, R. *v.* Bond, 2 K. B. 389 (abortion; the use of similar instruments upon another woman three months later, to procure a miscarriage, admitted on the facts; two judges dissenting; it is rather odd that neither counsel nor any of the seven judicial opinions, though canvassing the related precedents, cites the above ruling of R. *v.* Perry, which appears to be the only prior one in England on this precise crime); 1912, Thomson's Case, 7 Cr. App. 276 (abortion in March, 1912; operation on the same woman for another pregnancy in September, 1911, admitted); 1920, The King *v.* Lovegrove, 3 K. B. 643 (homicide by abortion; a similar operation on another woman 9 months before, admitted to show intent);

CANADA: 1909, R. *v.* Pollard and Tinsley, 19 Ont. L. R. 96 (performance of an abortion upon another person some weeks before, not admitted, though the defendant acknowledged the act and the only issue was lawful purpose); 1918, Brunet *v.* The King, 42 D. L. R. 405, Can. S. C. (abortion; defendant's use of similar instruments on two other occasions, held admissible to evidence intent, apart from evidence of definite system; elaborate opinion by Anglin, J.).

UNITED STATES: *Delaware:* 1913, State *v.* Brown, 3 Del. 499, 85 Atl. 797 (abortion; another abortion, near the same time, upon another woman, admitted to evidence intent, but not design); *Georgia:* 1904, Sullivan *v.* State, 121 Ga. 183, 48 S. E. 949 (prior unsuccessful attempts on the same female, admitted); *Illinois:* 1883, Baker *v.* People, 105 Ill. 452, 456 (abortion; the fact of another attempt to cause an abortion in the course of the same pregnancy, excluded; clearly wrong); 1892, Scott *v.* People, 141 Ill. 195, 213 (attempt at abortion; two other attempts on the same woman by defendant, near in time, admitted

§ 360. **Indecent Exposure, Sodomy, Bigamy, Incest, Seduction, Adultery, etc.** The same principles are occasionally applicable on charges of *indecent exposure*,[1] *sodomy*,[2] *bigamy*,[3] or *enticement for prostitution*,[4] and related offences.

to show knowledge and intent; such acts "may be proved whether they were prior or subsequent to the particular act charged"; People *v.* Baker not cited in the opinion); 1906, Clark *v.* People, 224 Ill. 554, 79 N. E. 941 (murder in attempting abortion; testimony by five or six persons that the defendant during several years preceding had "solicited patronage and held herself out as being able and willing to commit abortion", etc., admitted to show intent); 1908, People *v.* Hagenow, 236 Ill. 514, 86 N. E. 370 (abortion; the defendant's advertisements as a professional abortionist, and her habitual performance of abortions, admitted to show intent and means); 1917, People *v.* Schultz-Knighten, 277 Ill. 238, 115 N. E. 140 (abortion on E.; an abortion done upon R. in 1909, apparently held admissible); 1921, People *v.* Hobbs, 297 Ill. 399, 130 N. E. 779 (murder by abortion on C. in Feb. 1916; abortion done by defendant on M., in Nov. 1917, held admissible, but not so as to include the fact of death from the abortion); *Iowa:* 1899, State *v.* Moothart, 109 Ia. 130, 80 N. W. 301 (giving a drug with intent to cause miscarriage; subsequent use of an instrument on the same person for the same miscarriage, admitted); 1903, State *v.* Crofford, 121 Ia. 395, 96 N. W. 889 (murder by abortion; abortions by the defendant upon other women, excluded); 1914, State *v.* Moon, 167 Ia. 26, 148 N. W. 1001 (murder by abortion; other abortions by the defendant on other persons, excluded); 1922, State *v.* Rowley, — Ia. —, 187 N. W. 7 (attempt to produce a miscarriage; defendant's former acts of abortion, and her statements that she was in that business, admitted to negative innocent intent, the defendant here asserting that she had acted to save life); *Kentucky:* 1901, Clark *v.* Com., 111 Ky. 443, 63 S. W. 740 (abortion; other perpetrations of abortion admissible to prove intent, where the act in question is conceded but justified on the ground of necessity, but, by a majority of the Court, not admissible to prove a plan to do the act, its commission being denied); *Maryland:* 1886, Lamb *v.* State, 66 Md. 285, 7 Atl. 399 (attempt to procure abortion by drugs; a "subsequent attempt to accomplish the same purpose by a different means [viz., an operation] is admissible to show with what purpose and intent" he acted); 1913, Avery *v.* State, 121 Md. 229, 88 Atl. 148 (abortion; that the accused on the occasion of the woman's first visit had connection with another woman who accompanied her, excluded); *Massachusetts:* 1884, Com. *v.* Corkin, 136 Mass. 429 (the use of instruments with intent to produce a miscarriage; the use of them on the same woman a few days before, admitted to show the intent); *Michigan:* 1886, People *v.* Sessions, 58 Mich. 594, 600, 26 N. W. 291 (murder by abortion; the facts admitted on the frequent and habitual use of instruments by the defendant in other cases to produce abortion, and of the repeated proffer of services for that purpose); 1895, People *v.* Seaman, 107 Mich. 348, 65 N. W. 203 (abortion; the fact that the defendant's house was a place of resort for such practices, and that he had frequently performed such criminal operations, admitted to show a guilty intent; the defendant conceding that he had attended the case as a medical man); 1898, People *v.* Abbott, 116 Mich. 263, 74 N. W. 529 (a habit of performing abortions, receivable to show the intent of an operation); 1905, People *v.* Hodge, 141 Mich. 312, 104 N. W. 599 (manslaughter by abortion; performance of a similar operation upon a third person for the purpose of an abortion, admitted); *Minnesota:* 1916, State *v.* Newell, 134 Minn. 384, 159 N. W. 829 (manslaughter by abortion; defendant's consent to do a similar act to another person, admitted); *New Mexico:* 1921, State *v.* Bassett, 26 N. M. 476, 194 Pac. 867 (murder by abortion; later abortion upon the same person, admitted to show intent); *Texas:* 1915, Gray *v.* State, — Tex. Cr. —, 178 S. W. 337 (abortion; other offences excluded on the facts); *Utah:* 1918, State *v.* McCurtain, 52 Utah 63, 172 Pac. 481 (abortion, "similar operations upon other pregnant women", admitted); *Washington:* 1912, State *v.* Pryor, 67 Wash. 216, 121 Pac. 56 (abortion; rape and sodomy by the defendant upon the same woman, excluded).

§ **360.** [1] 1915, Perkins *v.* Jeffery, 2 K. B. 702 (obscene exposure of person in July; the respondent taking the stand was cross-examined as to a former exposure to the same woman in May, and the prosecution offered to prove the fact if denied; held, under par. (*f*), § 1 of the Act of 1898, quoted *ante*, § 194*a*, that this former instance was admissible to show intent, but that an offer of "a systematic course of conduct", etc., should not be admitted "until the defence of accident or mistake, or absence of intention to insult is definitely put forward"); 1921, People *v.* Anthony, 185 Cal. 152, 196 Pac. 47 (indecent liberties with female child; defendant was manager of a home for children; similar acts with other children under his care at the same time, excluded; unsound; here the Court was induced apparently to record poor law because it believed that in this case the charges were not well proved); 1893, State *v.* Stice, 88 Ia. 27, 55 N. W. 17 (indecent exposure; prior and subsequent instances, admitted to show intent); 1918, State *v.* Weaver, 182 Ia. 921, 166 N. W.

But for the offences of *adultery, seduction, rape under age of consent, incest,* and certain others, there is commonly no question of Intent, and the significance of prior conduct of the defendant with the woman is usually to show, not Intent, but an Emotion of lust. This is perhaps not always to be distinguished from evidence of Design; but it is best examined under the principles applicable to evidence of Emotion (*post,* §§ 398–402).

12. Homicide and Homicidal Assault

§ 363. **Homicide, including Murder by Poison.** (1) The *Knowledge* principle (*ante,* § 301) has practically little application here; though it would be available to show a knowledge of the nature and injurious effects of a lethal weapon.[1]

379 (lascivious acts with a child; similar acts with another child, excluded); 1918, Perales *v.* State, 14 Okl. Cr. 601, 174 Pac. 1100 (vulgar language to women tending to breach of the peace; assaults made on two of the women, a few minutes later, excluded; unsound).

[2] ENGLAND: 1917, R. *v.* Thompson, 2 K. B. 630, and 1918, A. C. 221 (gross indecency with boys; possession of photographs of naked boys, and other appliances or implements, admitted); 1918, R. *v.* Twiss, 2 K. B. 853 (similar).

UNITED STATES: 1921, People *v.* Troutman, 187 Cal. 313, 201 Pac. 928 (lewd act with a child; similar acts with the same child, before and after, held admissible); 1912, People *v.* Swift, 172 Mich. 473, 138 N. W. 662 (sodomy; two prior acts, admitted); 1916, State *v.* Katz, 266 Mo. 493, 181 S. W. 425 (crime against nature; similar act to the same person the same night, admitted); 1913, State *v.* Start, 65 Or. 178, 132 Pac. 512 (sodomy; other similar acts with other persons at other times, excluded; the majority opinion indulges in some misplaced sentimentality which might have been spared, such as "the law will pursue him with the vindictive zeal of a Javert"; the dissenting opinion, by McBride, C. J.; frankly would admit the evidence to indicate "that he possessed that abnormal moral nature that was equal to committing the act charged"; this would mean a large inroad upon the character rule, and indeed the learned Chief Justice avows that "the necessity for many of these archaic rules has ceased, and they may well be relegated to the scrapheap of unnecessary judicial machinery"; to which we may thankfully agree, with the saving request that a dignified historical museum, not the despised scrapheap, be the place of consignment); 1913, State *v.* McAllister, 67 Or. 480, 136 Pac. 354 (crime against nature; commission of the same act with other boys, excluded, following the majority opinion in State *v.* Start; McNary, J., diss., in one able opinion); 1893, State *v.* Place, 5 Wash. 773, 774, 32 Pac. 736 (assault with intent to sodomy; conduct about an hour before on the same train but in another State, admitted).

[3] 1909, Robinson *v.* State, 6 Ga. App. 696, 65 S. E. 792 (bigamy; arrest for beating his first wife eight years before, excluded); 1901, State *v.* Graham, 23 Utah 278, 64 Pac. 557 (cohabitation with several women at a prior time, admissible to show intent during the time charged).

[4] Here compare the cases *post,* § 367 (keeping a disorderly house); *Cal.* 1898, People *v.* Elliott, 119 Cal. 593, 51 Pac. 955 (enticement for prostitution; that the defendant had attempted to entice other young girls into the same house for the same purpose, excluded; but it should have been received to show intent); *Ill.* 1920, People *v.* Chrfrikas, 295 Ill. 222, 129 N. E. 73 (abduction of a female; defendant's indecent liberties with the girl a few weeks before, admitted); *Me.* St. 1919, c. 112 (prostitution, pandering, etc.; "record of a prior conviction . . . shall be admissible"); *Mich.* 1921, People *v.* Petropoulapos, — Mich. —, 185 N. W. 730 (sharing proceeds of prostitution by S.; sharing proceeds with J. at the same house and time, admitted); *Mont.* 1915, State *v.* Jones, 51 Mont. 390, 153 Pac. 282 (accepting a prostitute's earnings; other immoral acts, excluded on the facts); 1921, State *v.* Pippi, 59 Mont. 116, 195 Pac. 556 (pimping; acceptance of earnings of another prostitute, admitted to show intent, plan, etc.); *N. J.* 1920, State *v.* Mayewski, 94 N. J. L. 491, 110 Atl. 906 (living off a prostitute's earnings; prior conduct of the sort, admitted); *N. C.* Con. St. 1919, § 4360 (pandering, pimping, etc.; "prior conviction", admissible); *Wis.* § 4581 *h*–1 (pandering; the prosecution "may show other similar acts for the purpose of showing the intent and disposition of the accused").

§ 363. [1] See the quotation from R. *v.* Cooper, *ante,* § 301.

(2) The *Intent* principle (*ante*, § 302) receives constant application; for the intent to kill is in homicide practically always in issue, and is to be proved by the prosecution, and the recurrence of other acts of the sort tends to negative inadvertence, defensive purpose, or any other form of innocent intent. For this purpose, therefore, the evidence is receivable irrespective of whether the act charged is itself conceded or not. Where (as usually) it is not conceded, the evidence of intent goes to the jury to be used by them only on the assumption that they find the act to have been done by the accused; it is then to be employed by them in determining the intent. This use of such evidence is universally recognized.[2] As to the *similarity* of the other acts, no fixed rule can be formulated. They certainly need not have been done to the same person;[3] they need not have accompanied more or less immediately the act charged,[4] and they may have been done even at a subsequent time.[5] The precedents show every variety of circumstances, and a correct application of the principle would receive any evidence of the sort which conveys any real probative indication of the defendant's intent.

(2*a*) The principle of *Anonymous Intent* (*ante*, § 303) finds occasional application, particularly in poisoning cases. Other instances of death by poison under somewhat similar circumstances serve to negative the supposition of inadvertent taking or of mistaken administration, even though the person responsible for the other poisonings is not identified; and thus, a criminal intent having been shown for the act charged, by whomsoever done, the defendant may be then shown to be its doer.[6]

(3) The principle of *Design* or *System* (*ante*, § 304) finds here frequent application. It supposes that a design or plan in the defendant is to be shown, as making it probable that the defendant carried out the design or plan and committed the act; and it receives former similar acts so far as through common features they naturally indicate the existence of such a plan, design, or system, of which they are the partial fulfilment or means. This principle is fully recognized in the precedents.[7] There has been occasional hesitation

[2] R. *v.* Mobbs, R. *v.* Roden, Makin *v.* Att'y-Gen'l, Eng., Smith *v.* State, Ala., Austin *v.* State, Melton *v.* State, Ark., People *v.* Walters, People *v.* Craig, Cal., Killins *v.* State, Oliver *v.* State, Fla., Reese *v.* State, Shaw *v.* State, Ga., State *v.* Fontenot, La., State *v.* Pike, Me., Com. *v.* Campbell, Mass., People *v.* Knapp, People *v.* Marble, Mich., State *v.* Testerman, State *v.* Martin, State *v.* Sanders, Mo., Walters *v.* People, N. Y., State *v.* Mace, N. C., People *v.* Coughlin, Utah, Poindexter's Case, Va., Albricht *v.* State, Wis.

Poisoning Cases: R. *v.* Mogg, R. *v.* Calder, R. *v.* Geering, R. *v.* Winslow, R. *v.* Garner, R. *v.* Flannagan, Eng., Johnson *v.* State, Ala., People *v.* Thacker, Mich., Goersen *v.* Com., Pa.

[3] R. *v.* Roden, Makin *v.* A.-G., Eng., Smith *v.* State, Ala., People *v.* Walters, People *v.* Craig, Cal., Killins *v.* State, Oliver *v.* State, Fla., Reese *v.* State, Ga., State *v.* Fontenot, La., People *v.* Marble, Mich., State *v.* Testerman, State *v.* Sanders, Mo., People *v.* Coughlin, Utah; so also in almost all the poisoning cases.

[4] R. *v.* Roden, Makin *v.* A.-G., Eng., Austin *v.* State, Ark., Shaw *v.* State, Ga., Poindexter's Case, Va.; so also in almost all the poisoning cases.

[5] Smith *v.* State, Ala., People *v.* Walters, People *v.* Craig, Cal., Killins *v.* State, Fla., People *v.* Marble, Mich., State *v.* Sanders, Mo., State *v.* Mace, N. C. *Poisoning Cases:* R. *v.* Geering, R. *v.* Heesom, Eng.

[6] R. *v.* Geering, R. *v.* Flannagan, R. *v.* Bailey, Eng.

[7] Melton *v.* State, Ark., State *v.* Smith, Ia., State *v.* Vaughan, Nev., Stephens *v.* People, People *v.* Shea, N. Y., Snyder *v.* Com., Com. *v.* Mudgett, Pa., Heath *v.* Com., Nicholas *v.* Com., Va. In Makin *v.* Att'y-Gen'l, Eng., it should have been applied, but the opinion is not clear on this point.

in applying it in poisoning cases;[8] but this hesitation is wholly unfounded, and numerous instances illustrate its equal applicability to such cases.[9]

The precedents in the various jurisdictions illustrate the application of the foregoing principles, with more or less consistency, to *homicide* in general.[10]

[8] R. v. Flannagan, Eng., People v. Thacker, Mich.

[9] R. v. Cotton (*semble*), R. v. Heesom (*semble*), Eng., Com. v. Robinson, Mass. (leading case), People v. Wood, N. Y., Farrer v. State (*semble*), Brown v. State, Oh., Shaffner v. Com. (leading case), Goersen v. Com., Pa.

[10] For convenience of reference the *poisoning cases* have been arranged separately in a second list, *infra*.

ENGLAND: 1853, R. v. Mobbs, 6 Cox Cr. 223 (murder of wife; things done to her by the defendant ten days before, not admitted to show intent; Coleridge, J.: "It is very difficult to draw the line in these cases"); 1864, R. v. Reardon, 4 F. & F. 79, Willes, J., *semble* (other killings, admissible to show intent); 1874, R. v. Roden, 12 Cox Cr. 630, Lush, J. (murder by suffocating her infant while in bed; the fact that the defendant had "had four other children who had also died in infancy at early ages", was admitted, on the authority of R. v. Cotton, *infra*); 1889, R. v. Crickmer, 16 Cox Cr. 701, Charles, J. (murder by stabbing; the fact of another stabbing by the defendant an hour before, admitted); 1893, Makin v. Att'y-Gen'l of N. S. Wales, 17 Cox. Cr. 704, Privy Council (murder of an illegitimate infant intrusted for keeping by its mother to the defendant and found buried on the defendant's premises; the fact was admitted of the finding, in the various premises where the defendant had lived about the time in question, of the buried bodies of other infants, respectively four, six, and two at each place, no deaths having been registered from those addresses, and of several other infants having been received on similar arrangements to the one in question; received, per L. C. Herschell, following R. v. Geering, *infra*, as "bearing upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused"); 1914, Greenley's Case, 10 Cr. App. 273 (murder of a wife; shooting of two daughters shortly after discovery, admitted); 1915, George I. Smith's Trial (Notable British Trials; 1922), pp. 33, 272 (wife-murder by drowning her in a bath-tub the day after marriage; deaths of two other wives under similar circumstances, admitted).

CANADA: 1913, R. v. Gibson, 28 Ont. L. R. 525, 13 D. L. R. 393 (murder of R. while bargaining for the sale of junk; felonious assault on D., the companion of R., a few minutes later, held admissible).

UNITED STATES: *Alabama:* 1887, Lawrence v. State, 84 Ala. 424, 5 So. 33 (previous "difficulty", admissible to show "malice, or a motive"; but not "the particulars or merits" of the "difficulty"; 1889, Smith v. State, 88 Ala. 76, 7 So. 52 (quarrel with deceased and S.; the defendant's following up S. and shooting at him after shooting at the deceased, admitted); 1901, Miller v. State, 130 Ala. 1, 30 So. 379 (murder of a police-officer; conspiracy between the defendants to kill another officer at the same time, admitted);
Arkansas: 1842, Baker v. State, 4 Ark. 56, 61 (general principle stated, that other acts of violence are admissible to show intent); 1854, Austin v. State, 14 Ark. 555, 558 (murder by a slave, to show intent, "former grudges, former threats, previous lying in wait", etc., admissible; here, the slave's declarations that he would resist capture); 1884, Melton v. State, 43 Ark. 367, 371 (murder alleged to have been done in pursuance of a plan by the Ku-Klux Society to dispose of the deceased for having opposed the Society; the fact received that the defendant with others had on a former occasion gone masked to the deceased's house and flogged him as a part of the plan to stop his opposition);
California: 1893, People v. Walters, 98 Cal. 138, 141, 32 Pac. 864 (murder of a son; the killing of the mother immediately afterwards by an associate of the defendant, with the fact of a long-standing feud between the two parties, admitted to show intent); 1895, People v. Smith, 106 Cal. 73, 82, 39 Pac. 40 (murder of D.; the killing of C. in the same house at the same time, admitted to show that C. could not have killed D.); 1896, People v. Craig, 111 Cal. 460, 467, 44 Pac. 186 (wife-murder; after evidence of ill-feeling by the defendant against his wife's family generally, the fact that he shot the wife's brother at the same time as the shooting of the wife and then went immediately to her father and mother and shot them was admitted as showing that the shooting of the wife was not accidental); 1898, People v. Miller, 121 Cal. 343, 53 Pac. 816 (M. killed C. when C. stopped M.'s pursuit of a woman N.; the intent of the pursuit, admitted to show the intent against C.);
Colorado: 1915, Hillen v. People, 59 Colo. 280, 149 Pac. 250 (murder; attempted robberies about the same date and place, admitted; citing the above text with approval);
Columbia (Dist.): 1920, Bowman v. U. S., — D. C. App. —, 267 Fed. 648 (murder; subsequent assaults on an eye-witness, admitted);
Florida: 1891, Killins v. State, 28 Fla. 313, 333, 9 So. 711 (killing of the deceased's mother immediately afterwards, admitted to show intent); 1896, Oliver v. State, 38 Fla. 46, 20

So. 803 (shooting of another person at the same time and in the same affray, admitted); 1898, Milton *v.* State, 40 Fla. 251, 24 So. 60 (murder; shooting another at the same time, as negativing self-defence, admitted); 1900, West *v.* State, 42 Fla. 244, 28 So. 430 (murder; the killing of the only other man in the vicinity, just beforehand, robbery of a house being the motive, admitted to show intent);

Georgia: 1849, Reese *v.* State, 7 Ga. 373 (assault upon the deceased's father just before the murder; such evidence limited to "the time of the transaction"); 1878, Shaw *v.* State, 60 Ga. 246, 250 (wife-murder by beating; the fact of a similar beating four years before, admitted); 1914, Frank *v.* State, 141 Ga. 243, 80 S. E. 1016 (murder of a woman on the deceased's premises; prior lascivious conduct at similar stated periods with women on the premises, held admissible to show motive); 1922, Williams *v.* State, 152 Ga. 498, 110 S. E. 286 (murder; numerous other homicides of defendant's employees, admitted; this was the notorious case of peonage, in which the defendant, an employer of negroes under peonage contracts, directed ruthlessly the cruel killing of a dozen of them to prevent their escape and disclosure of his practices; the astonishing thing is that he received only a sentence of imprisonment for life);

Hawaii: 1904, Terr. *v.* Watanabe, 16 Haw. 196, 221 (murder; testimony as to the defendant's blackmailing, etc., admitted, presumably to show a general plan);

Idaho: 1900, State *v.* Taylor, 7 Ida. 134, 61 Pac. 288 (manslaughter; the defendant's shooting at a witness shortly afterwards while escaping, excluded);

Illinois: 1905, Brown *v.* People, 216 Ill. 418, 74 N. E. 790 (murder of R.; an assault in another room, a few minutes before, on M., excluded; unsound); 1914, People *v.* Pfanschmidt, 262 Ill. 411, 104 N. E. 804 (murder with arson; evidence of plans for a bank robbery having no relation to the murder, excluded); 1916, People *v.* Simmons, 274 Ill. 528, 113 N. E. 887 (murder; the defendant not allowed to be examined as to a family fight about six months before); 1916, People *v.* King, 276 Ill. 138, 114 N. E. 701 (murder of a police officer arresting the defendant for several holdups committed that evening; on cross-examination of defendant and a co-defendant taking the stand, they were asked about these holdups, and they admitted them; held not admissible to evidence motive, because, although apparently the mere fact of the holdups might have been evidenced, "in order to prove motive it was certainly not necessary to prove the details of all these holdups"; this is a feeble reason; the opinion exhibits the orthodox judicial tendency to protect the rank confessed villain with fostering strictness and to ignore the claims of sympathy for the robbed citizen and for the officer who sacrifices his life in the courageous performance of his duty); 1920, People *v.* Cione, 293 Ill. 321, 127 N. E. 646 (homicide; defendant's assault on deceased's wife, and larceny of his property, shortly afterwards, admitted; but disparaging the recital of "details of the robbery");

Iowa: 1916, State *v.* O'Donnell, 176 Ia. 337, 157 N. W. 870 (murder of wife; "inhuman abuse, assaults, and beatings" inflicted on her at prior times excluded; unsound);

Kansas: 1922, State *v.* King, — Kan. —, 206 Pac. 883 (murder of W.; homicide of R. and G. also admitted, as indicating a scheme to murder and despoil all three; careful opinion by Dawson, J.);

Kentucky: 1895, Saylor *v.* Com., 97 Ky. 184, 30 S. W. 390 (murder; killing of two other persons "at the same place and immediately afterwards", excluded; erroneous); 1896, Green *v.* Com., — Ky. —, 33 S. W. 100 (a nearly simultaneous killing; obscure); 1901, Bishop *v.* Com., — Ky. —, 58 S. W. 817, 60 S. W. 190 (murder of an officer; that the defendant had just killed another man and was fleeing from arrest, admitted as evidencing motive); 1903, O'Brien *v.* Com., 115 Ky. 608, 74 S. W. 666 (murder during a burglary; burglary of neighboring houses on the same night, admitted); 1905, Shepherd *v.* Com., 119 Ky. 931, 85 S. W. 191 (murder; defendant's admission that "he is the third one I have knocked down", excluded); 1921, Steale *v.* Com., 192 Ky. 223, 232 S. W. 646 (murder; defendant's bigamy, etc., held improperly admitted);

Louisiana: 1896, State *v.* Fontenot, 48 La. 305, 19 So. 111 (attacks by the defendant on a third person just before killing the deceased, admitted); 1909, State *v.* Blount, 124 La. 202, 50 So. 12 (murder; killing of two other persons at the same time, admitted);

Maine: 1876, State *v.* Pike, 65 Me. 111, 113 (manslaughter of wife by cruel abuse; other acts of violence on the same evening, admissible, but not "another distinct assault");

Massachusetts: 1863, Com. *v.* Campbell, 7 All. 541 (murder at 7 P. M. by one of a mob during the Draft Riots; riotous acts by the defendant at 1 P. M. of the same day, admitted to show the subsequent guilty intent, provided there was a general resistance and disturbance of the public peace such that the earlier and the later acts formed "a part of one transaction"); 1905, Com. *v.* Snell, 189 Mass. 12, 75 N. E. 75 (murder of K., who lived with H.; the defendant's plan to murder H., against which K.'s presence was an obstacle, etc., admitted);

Michigan: 1872, People *v.* Knapp, 26 Mich. 112, 116 (murder; the preceding affray, alleged to have involved a rape on the deceased, admitted); 1878, People *v.* Marble, 38 Mich. 117, 123 (murder of A.; three persons attacked at once; A. was killed outright, M. was pursued, and all fired at, within two minutes; the shooting and pursuit of M., admitted as "coloring" the act of attacking A.); 1901, People *v.* Dowd, 127 Mich. 140, 86 N. W. 546 (certain "acts of violence" to other persons,

excluded); 1909, People *v.* Klise, 156 Mich. 373, 120 N. W. 989 (assault with intent; prior assault on a third person, excluded);
Mississippi: 1846, Dowling *v.* State, 5 Sm. & M. 664, 666, 686 (murder of a slave by an overseer, by beating; the fact excluded that the defendant's usual manner of punishing the slaves was by a thick wooden paddle); 1898, Herman *v.* State, 75 Miss. 340, 22 So. 873 (murder; defendant's assault on the deceased with a knife, about a year before, excluded); 1920, Herring *v.* State, 122 Miss. 647, 84 So. 699 (murder; prior independent assault on another person, excluded);
Missouri: 1878, State *v.* Testerman, 68 Mo. 408, 415 (murder; the cutting of another person by the defendant in the same affray, admitted); 1881, State *v.* Martin, 74 Mo. 547 (murder; two other indictments for felonious assault, excluded); 1882, State *v.* Sanders, 76 Mo. 35, 36 (a stroke at a bystander, who had seized the defendant after the killing and as he was escaping, admitted); 1882, State *v.* Emery, 76 Mo. 349 (previous assault to show intent to kill; obscure); 1900, State *v.* Tettaton, 159 Mo. 354, 60 S. W. 743 (murder; the killing of other members of the family at the same time, and the burning of the house, admitted); 1905, State *v.* Brown, 188 Mo. 451, 87 S. W. 519 (murder; assault on a hackman the same evening, excluded; on the facts, the ruling is an extreme example of morbid phantasmagoria); 1905, State *v.* Bailey, 190 Mo. 257, 88 S. W. 733 (murder of a non-union hack-driver; assault and robbery of another such driver just before, admitted); 1915, State *v.* Tatman, 264 Mo. 357, 175 S. W. 69 (murder during burglary; a prior assault, the same night, on a third person, admitted); 1915, State *v.* Sherman, 264 Mo. 374, 175 S. W. 73 (similar; the carrying of concealed weapons, admitted);
Montana: 1901, State *v.* Shafer, 26 Mont. 11, 66 Pac. 463 (conflict between the same parties a few hours before, admitted);
Nebraska: 1903, Jahnke *v.* State, 68 Nebr. 154, 94 N. W. 158, 104 N. W. 154 (prior attempts by other means to take the deceased's life, admitted); 1907, Clark *v.* State, 79 Nebr. 473, 113 N. W. 211 (murder while robbing; other robberies on the same night by the same gang, held admissible);
Nevada: 1895, State *v.* Vaughan, 22 Nev. 2, 39 Pac. 733 (whether or not the deceased had been the aggressor; former attempt by the deceased to shoot the defendant's brothers, excluded);
New Mexico: 1893, Roper *v.* Terr., 7 N. M. 255, 265, 33 Pac. 1014 (murder; previous attempt at robbery of another, not admitted on the facts to show intent to rob the deceased);
New York: 1859, Stephens *v.* People, 4 Park. Cr. 396, 511, 19 N. Y. 571 (wife-murder; to show a general design to get rid of all obstacles to marry a woman B., of which the wife-murder was to be one part, the fact was received of an attempt by the defendant to drive away B.'s suitor C., by sending him after the wife's death an anonymous letter reflecting on B.'s character); 1864, Walters *v.* People, 6 Park. Cr. 15, (murder by stabbing; acts of violence to the deceased on the day before, admitted to show deliberation of intent); 1893, People *v.* Larubia, 140 N. Y. 87, 35 N. E. 412 (murder; violence on behalf of the same paramour, four months before, excluded); 1895, People *v.* Shea, 147 N. Y. 78, 41 N. E. 508 (admitting, in a trial for homicide at the polls, the fact of a general plan to repeat votes and to intimidate by violence those who opposed, and of instances of this conduct); 1899, People *v.* Place, 157 N. Y. 584, 52 N. E. 576 (homicide of a stepdaughter; assault by defendant on her husband after the daughter's death and on his return, admitted to show intent); 1904, People *v.* De Garmo, 179 N. Y. 130, 71 N. E. 736 (manslaughter by beating a child; certain former acts of violence to the same child, not admitted: an over-strict ruling); 1908, People *v.* Governale, 193 N. Y. 581, 86 N. E. 554 (murder while being arrested; prior shooting affray leading to the pursuit, admitted on the issue of self-defence);
North Carolina: 1873, State *v.* Shuford, 69 N. C. 486, 492 (murder of a new-born child; the defendant's admission that she had "had a child this way before, and put it away", excluded; the evidence here left it uncertain whether the child was killed by an accident); 1896, State *v.* Mace, 118 N. C. 1244, 24 S. E. 798 (an assault, a quarter of an hour after a killing, upon an eye-witness who was going away to tell the news, admitted to show intent); 1905, State *v.* Adams, 138 N. C. 688, 50 S. E. 765 (murder of M. B.; the killing of her two children at the same time, admitted); 1910, State *v.* Plyler, 153 N. C. 630, 69 S. E. 269 (murder; prior attempt to assassinate the deceased, admitted);
North Dakota: 1907, State *v.* Hazlet, 16 N. D. 426, 113 N. W. 374 (murder; sodomy by the defendant, under circumstances not appearing, excluded);
Ohio: 1907, State *v.* Dickerson, 77 Oh. 34, 82 N. E. 969 (murder of a woman; arson of her house two weeks before by defendant, not admitted to show intent, and on the facts held not admissible to show motive);
Oklahoma: 1912, Clemmons *v.* State, 8 Okl. Cr. 159, 126 Pac. 704 (assault with intent to kill; the shooting of the same person by the defendant, two years before, excluded); 1911, Williams *v.* State, 4 Okl. Cr. 523, 114 Pac. 1114 (murder; a former assault admitted); 1915, Dykes *v.* State, 11 Okl. Cr. 602, 150 Pac. 84 (murder; other criminal acts, admitted on the facts);
Oregon: 1909, State *v.* La Rose, 54 Or. 555, 104 Pac. 299 (murder; two similar assaults on other persons within the next two days, admitted on the facts);
Pennsylvania: 1877, Snyder *v.* Com., 85 Pa. 519, 521 (murder of the illegitimate infant of

Homicide by *poisoning*, though in substantive law not different in its elements, provides a special group of precedents illustrating the present principle;[11] because the deliberate features which usually attend the use

the defendant's daughter; the fact of an incestuous rape upon her, excluded); 1896, Com. *v.* Mudgett, alias Holmes, 174 Pa. 211, 34 Atl. 588 (the killing of three children of the deceased so as to prevent the deceased's wife from learning of his death, admissible); 1898, Com. *v.* Wilson, 186 Pa. 1, 40 Atl. 283 (murder; attempt to rob another person at another time, and other unconnected crimes, excluded); 1901, Com. *v.* Major, 198 Pa. 290, 47 Atl. 741 (murder; prior burglary at another place the same evening, admitted as showing intent); 1901, Com. *v.* Biddle, 200 Pa. 647, 50 Atl. 264 (murder; casual mention of other crimes by an accomplice relating his intimacy, held not improperly admitted); 1920, Com. *v.* Morrison, 266 Pa. 223, 109 Atl. 878 (murder of a pursuer; the robbery for which defendant was being pursued, admitted); 1917, Com. *v.* Haines, 257 Pa. 289, 101 Atl. 641 (murder; defendant's share in other crimes, excluded);
Rhode Island: 1833, Avery's Trial, Newport, Hildreth's Rep. 41 (murder; anonymous letter making an appointment with the deceased, admitted "to rebut the presumption of suicide"; Eddy, C. J., Brayton and Durfee, JJ., sitting);
South Carolina: 1906, State *v.* Smalls, 73 S. C. 516, 53 S. E. 976 (murder; defendant's violent conduct to third persons just before, admitted);
South Dakota: 1904, State *v.* Coleman, 17 S. D. 594, 98 N. W. 175 (murder; certain forgeries admitted as showing motive and plan);
Tennessee: 1843, Stone *v.* State, 4 Humph. 27, 35 (murder; the fact that the defendant had shortly before set fire to the deceased's house, rejected, because proof of a separate felony could not be received; erroneous reason); 1907, Holder *v.* State, 119 Tenn. 178, 104 S. W. 225 (murder of a father by shooting, attempt to poison the whole family, admitted);
Texas: 1899, Barkman *v.* State, 41 Tex. Cr. 105, 52 S. W. 69 (murder; a single accidental prior killing, excluded);
Utah: 1896, People *v.* Coughlin, 13 Utah 58, 44 Pac. 94 (killing of another person in the same affray, to show intent, admitted);
Vermont: 1902, State *v.* Eastwood, 73 Vt. 205, 50 Atl. 1077 (murder of a wife's sister's husband at M.; defendant's shooting of his wife's sister at the same time, and of his wife and her mother immediately before, five miles away at East M., where he said "I have come to break up the family", held admissible to show "purpose, preparation, and intent");
Virginia: 1842, Heath *v.* Com., 1 Rob. 735, 738, 743 (murder of a woman by stabbing; the fact admitted of the shooting of her companion by the defendant just previously on the same night under circumstances indicating a design to do away with both); 1880, Poindexter's Case, 33 Gratt. 766, 788 (murder; a prior attack on the deceased by the defendant on the same morning, admitted); 1895, Nicholas *v.* Com., 91 Va. 741, 21 S. E. 364 (the defendant's giving strychnine to a wife and telling her to administer it in milk or coffee to the deceased, admitted; here the deceased in fact was drowned in a boat, which the defendant was charged with sinking);
Wisconsin: 1857, Albricht *v.* State, 6 Wis. 74 (manslaughter of his son by striking with a chisel; evidence of former strikings of the boy with an axe-helve and otherwise, not admitted even to show intent; clearly wrong); 1903, Paulson *v.* State, 118 Wis. 89, 94 N. W. 771 (murder; larcenies several years before, excluded); 1912, Dietz *v.* State, 149 Wis. 462, 136 N. W. 166 (murder in resisting arrest; to negative the defendant's assertion that he believed the officers to be private marauders, the defendant's course of conduct in prior years in resisting arrest under similar circumstances was admitted);
Wyoming: 1903, Horn *v.* State, 12 Wyo. 80, 73 Pac. 705 (defendant's assault, shortly before, on the deceased's father, admitted to show motive and identity).

Additional instances, analogous to the foregoing cases, are cited under § 106, *ante*, §§ 396, 397, *post*, dealing with acts of prior hostility as evidence of motive.

[11] POISONING CASES: ENGLAND: 1830, R. *v.* Mogg, 4 C. & P. 335 (mixing poison with a horse's feed; the administration to the other horses in the same stable, admitted to show intent); 1844, R. *v.* Calder, 2 Cox Cr. 348 (administration of similar drugs on subsequent days, admitted to show intent on the day in question); 1847, Pollock, C. B., in R. *v.* Bailey, ib. 312 (declaring evidence admissible, on a charge of poisoning, that the prisoner had attempted to drown the deceased by sawing nearly in two the limb of a tree on which the deceased was accustomed to sit when fishing); 1849, R. *v.* Geering, 18 L. J. M. C. 215 (murder of husband by arsenic-poisoning; evidence was offered of the death by arsenic, within six months later, of two sons of the defendant, and of the arsenical illness of a third son, to show (1) "that the deceased had in fact died of poison administered by some party", and (2) "to prove that the death of the deceased husband was not accidental"; objected to because the death and illness occurred after the death in issue; Pollock, C. B., Alderson, B., and Talfourd, J., approving, admitted it, "to determine whether such taking was accidental or not"; the prosecution also connected the defendant with the plan or system by showing that she generally cooked the meals for all four persons); 1860, R. *v.* Winslow, 8 Cox Cr. 397, Martin, B. (murder by antimony-poison-

of poison give more frequent occasion for evidencing Design or System by a series of related acts.

ing; evidence that within six months three other persons in the same family, the prisoner being employed there, had died from antimony-poisoning, was offered chiefly "to exclude the supposition of an accidental poisoning in present case", but was excluded; no reason given); 1863, R. *v.* Garner and wife, 3 F. & F. 681, 4 Cox Cr. 346 (murder by arsenic-poisoning; the deceased was the mother of the male defendant; the latter sold arsenic for agricultural purposes; the fact that one of his own horses and some of his milk-customers, against whom he apparently had no feeling, had suffered from arsenic, had been received to show accidental administration; and the fact of the death of his former wife was then received to negative accident); 1864, R. *v.* Harris, 4 Cox Cr. 342, Willes, J. (general principle of R. *v.* Geering, approved); 1873, R. *v.* Cotton, 12 Cox Cr. 400, Archibald, J., Lush, J., and Pollock, B. (murder of the defendant's stepchild by arsenic-poisoning in July; the fact was received of the death of the defendant's two sons in the preceding November and March, and of one M., lodging in the house, in the preceding April; all were supplied with food by the defendant and all showed arsenic-traces; the evidence was received on the authority of Geering's and Garner's Cases); 1878, R. *v.* Heesom, 14 Cox Cr. 40, Lush, J. (murder of her child by arsenic-poisoning in October, 1877; evidence having been received of the death of another child of the defendant in March, 1876, and of the defendant's mother in November, 1877, by the same poison, both being in the same household, the fact was also received that the lives of all three had been insured a short time before by the defendant, and that on the death of the other two she had collected the insurance; following Geering's Case); 1884, R. *v.* Flannagan, 15 Cox Cr. 403 (two sisters, charged with the murder by arsenic of the husband of the second; evidence was offered of the deaths by arsenic-poisoning, within three years, of three other persons in the same household; Butt, J.: "I think, where the authorities are at all in conflict, the safest rule to be guided by is one's common sense, and I cannot conceive that on a charge of this nature it is consistent with common sense to exclude such evidence. It has been decided . . . in the case of poisoning by arsenic, that evidence of the deaths of people other than the deceased, whose death was the subject-matter of the particular inquiry might be given, with a view to showing not that the prisoner had poisoned the deceased, but that the deceased had in fact died by poison administered by some one; that is the extent to which that authority went, and that is the extent to which, I have no hesitation in saying, I shall admit evidence as to the other deaths in this case").

UNITED STATES: *Alabama:* 1850, Johnson *v.* State, 17 Ala. 618, 622 (wife-murder by poison; a former attempt by the defendant to poison her, admissible to negative mistake);

Arkansas: 1920, Sneed *v.* State, 143 Ark. 178, 219 S. W. 1019 (murder of wife by strychnia), the defendant being the beneficiary of policies carried by his wife; evidence was not admitted of the recent death by poison, in defendant's household, of three other persons, viz. his mother-in-law, from whom his wife inherited an estate which she then devised by will to him; his infant child, born after the execution of that will and not mentioned therein; and his adopted daughter, whose life was insured for the benefit of defendant's wife: the ruling is based solely on the ground that the evidence of these deaths having been due to poison given by the defendant was insufficient);

Connecticut: 1918, State *v.* Gilligan, 92 Conn. 526, 103 Atl. 649 (murder by strychnine; the accused kept a home for the aged, payment being made by a lump sum in advance; deaths of three other inmates besides the one named in the indictment, not admitted on the facts, except under special conditions; careful opinion by Beach, J.; two judges diss. from the reasoning);

Georgia: 1904, Cawthon *v.* State, 119 Ga. 395, 46 S. E. 897 (poisoning of T.; after T.'s death, H. died, after drinking T.'s brandy; obscure ruling);

Iowa: 1897, State *v.* Smith, 102 Ia. 656, 82 N. W. 279 (the deceased was insured in the defendant's favor, and had died of poison; one year before, he had been shot in the head, but had only lost sight thereby; the complicity of the defendant, his wife, in the shooting, admitted); 1899, State *v.* Lightfoot, 107 Ia. 344, 78 N. W. 41 (poisoning a horse by strychnine; the presence of strychnine in other horse-boxes in the same barn, and the poisoning of other horses in other barns of the same owner, on the same night, admitted); 1921, State *v.* Browman, 191 Ia. 608, 182 N. W. 823 (theft as connected with murder);

Massachusetts: 1888, Com. *v.* Robinson, 146 Mass. 571, 16 N. E. 452 (murder by poisoning a brother-in-law, the obtaining of an insurance-benefit being the alleged motive; the prosecution, to show that the defendant had formed a general design to obtain the money by killing him, was allowed to give in evidence that her sister, the original beneficiary, and then a child of her sister, had died by poisoning within the previous five months while under the defendant's care, and that the brother-in-law had then appointed the defendant the beneficiary; *ante*, § 304); 1897, Com. *v.* Kennedy, 170 Mass. 18, 48 N. E. 770 (poisoning, by putting poison in a tea cup; the finding of the same

poison in the same cup at other times, admitted to show an anonymous scheme);
Michigan: 1870, People *v.* Lansing, 21 Mich. 221, 226 (poisoning a grandmother by putting arsenic into wine; a similar attempt, a few days before, by putting arsenic into her food, admitted for another purpose, and the present question left undecided); 1896, People *v.* Thacker, 108 Mich. 652, 66 N. W. 562 (wife-poisoning; attempts to poison the wife's sister, living in the same household, held admissible to show intent and negative accident, but not to show the act itself of administering); 1903, People *v.* Quimby, 134 Mich. 625, 96 N. W. 1061 (poisoning of another child in the same way at the same time, admitted); 1906, People *v.* Collins, 144 Mich. 121, 107 N. W. 1114 (murder of L. by arsenic; death of W. by arsenic, four months before, W. living in the defendant's family, not admitted; no sufficient foundation being shown; Grant and Montgomery, J.J., diss., on the ground that it was admissible to show defendant's possession of arsenic); 1914, People *v.* Macgregor, 178 Mich. 436, 144 N. W. 869 (murder by arsenic poisoning; the defendant was a physician, attending the S. family; the father John W. died in 1908, the sons Peter in July, 1910, Albert in May, 1911, and Seyrel in August, 1911; the charge being the death of Seyrel, the death of Albert by arsenic poisoning was admitted);
Missouri: 1911, State *v.* Hyde, 234 Mo. 200, 136 S. W. 316 (murder of the father-in-law of defendant, a physician, by poisoning with strychnine and cyanide; killing of other members of the family, co-legatees with the defendant's wife of the deceased's fortune, by various poisons, including disease germs, offered to evidence intent, excluded, on the absurd and unfounded principle that the means of death used in the other instances must be "precisely similar"; the ruling is founded on the unsupported statement of a single treatise; Donellan's Case, *supra*, § 303, sufficiently shows the novelty and impropriety of such a limitation; offered to show motive, the other killings were held to be admissible, but not sufficiently evidenced);
New York: 1858, People *v.* Wood, 3 Park. Cr. 685 (murder of a sister-in-law by poison; the fact was admitted, to show a general purpose to get the brother's estate for himself, of the prior poisoning of the brother, the contemporaneous attempt at poisoning of his two children, the procuring himself appointed as their guardian, and the forging of claims against the estate; all these being "parts of a single transaction, influenced by a single motive, and designed to accomplish a single object"); 1901, People *v.* Molineux, 168 N. Y. 264, 61 N. E. 286 (murder of A. by poison sent to C. and taken by him and also by A.; the defendant's murder of B. by similar poison, more than a month previously, the only other common circumstances being that B. and C. were members of the same club as the defendant and that the defendant had conducted false correspondence with other persons in the names of B. and of C., held inadmissible, as not relevant to prove motive, intent, common plan, or any other evidential element; three judges dissenting); 1915, People *v.* Buffom, 214 N. Y. 53, 108 N. E. 184 (wife's murder of her husband by poisoning; subsequent killing of one of the children, held inadmissible);
North Carolina: 1892, State *v.* Best, 111 N. C. 638, 640, 15 S. E. 930 (wife-murder by poisoning; the presence of uneaten poisoned food in the house, admitted);
Ohio: 1853, Farrer *v.* State, 2 Oh. St. 54, 61, 67 (murder by arsenic of a child in F.'s family, by the defendant, the nurse, in December, 1851; the fact admitted of deaths of other members of the same family in the same way about the same time; but the fact rejected of the death of I., a former mistress of the defendant, in the same way, in the preceding August, before the defendant came to F.'s house; Bartley, C. J., diss.); 1875, Brown *v.* State, 26 Oh. 176, 180 (poisoning horses; the fact admitted of the poisoning of other horses about the same time in the same village, to indicate that the defendant had inflicted the injuries and had given out that a general epidemic prevailed, with the design of profiting by treating the horses professionally for cure);
Pennsylvania: 1872, Shaffner *v.* Com., 72 Pa. 60 (wife-murder by poison; the defendant had been criminally intimate with Susan C. for many years, during the life of his first wife, and married the deceased, his second, while Susan C. was still unmarried; the criminal relation continued, C. was married to S., and both lived in the defendant's house; S.'s life was insured for his wife in November, 1870; he died in February, 1871, and the defendant collected the insurance; then the defendant's wife died in June, 1871; an offer by the prosecution to show that the cause and circumstances of the two deaths were similar, and that the defendant attended both, was rejected, because the other facts did not show that the death of S. and the wife could have been "contemplated as parts of one plan in his mind in which the taking of S.'s life was part of his purpose of taking the life of his wife"; the opinion works out the application of the principle carefully and instructively, and is worth study as a useful illustration of method; though the conclusion reached is perhaps a strained one); 1882, Goersen *v.* Com., 99 Pa. 388, 390, 398 (wife-murder by arsenic-poison; the fact that the wife's mother, living in the same house and attended by the defendant, had died a few days before in the same way and that her daughter succeeded to her property in remainder after her life-estate, was received "to show his purpose and intent, and the system by which that purpose was to be accomplished, and to connect the death of both women with that purpose and intent"; also

§ 364. **Assault with Intent; Other Crimes of Personal Violence.** The principle of Intent (*ante*, § 302) here admits other acts of the defendant tending to negative innocent intent and thus to establish the criminal intent charged (to kill, to wound, to resist an officer, and the like). No fixed rule can be formulated as to the similarity which the other act must bear; it may be done to another person;[1] it may not accompany immediately the act charged;[2] and it may occur at a time subsequent.[3] The precedents illustrate these various aspects of the principle.[4]

"to rebut the theory that the death of Mrs. G. was the result of accident or suicide, or of the negligent or ignorant use or administering of arsenic by either his wife or by him");
Vermont: 1904, State *v.* Sargood, 77 Vt. 80, 58 Atl. 971 (poisoning of B.'s colts; H. having opposed defendant's desires, the attempted poisoning of H. was admitted as part of a plan);
Washington: 1913, State *v.* Hazzard, 75 Wash. 5, 134 Pac. 514 (murder by starvation; the deceased being one of two women who had jointly arranged to put themselves under the defendant's care, the illness of the other woman under the defendant's treatment was admitted);
Wisconsin: 1892, Zoldoske *v.* State, 82 Wis. 580, 599, 52 N. W. 778 (poisoning of E., the supposed intended wife of M.; the death of M.'s wife by poison, admitted to negative the accidental nature of E.'s death, E. and M.'s wife being obstacles in the way of defendant's marriage to M.).

§ 364. [1] People *v.* Wilson, Cal.; though this is not frequent, and its propriety is sometimes, though erroneously, denied: People *v.* Gibbs, N. Y.

[2] Ross *v.* State, Ala., State *v.* Merkley, Ia., State *v.* Patza, La., People *v.* Jones, N. Y.

[3] R. *v.* Voke, Eng.; in People *v.* Hopson, N. Y., a subsequent act was excluded.

[4] ENGLAND: 1823, R. *v.* Voke, R. & R. 531 (by all the Judges; assault with intent to kill; defence, accident; the fact of the accused having run away after the firing and concealed himself beside the road ahead, and then fired again at the same person, was received to prove the intent).

CANADA: 1877, Hickey *v.* Fitzgerald, 41 U. C. Q. B. 303 (assault; question to the plaintiff as to prior fights, excluded).

UNITED STATES: *Federal:* 1919, West *v.* U. S., 6th C. C. A., 258 Fed. 413, 419 (perjury on the hearing of an injunction against a strike with violence; assault upon another person contemporaneously, admitted); *Alabama:* 1878, Ross *v.* State, 62 Ala. 224 (assault with intent to commit murder; previous assaults upon the same person on the same evening, admitted to show intent); 1893, Horn *v.* State, 102 Ala. 144, 151, 279, 15 So. 278 (assault with intent to kill; an attempt to shoot the wife and the clerk immediately after, admitted; Freeman, J., diss.); 1898, Gaston *v.* State, 117 Ala. 162, 23 So. 682 (shooting a gun across a public road; defence, accidental discharge; declarations just before of an intent to shoot at Mr. Bryan's picture, admitted); 1899, Ellis *v.* State, 120 Ala. 333, 25 So. 1 (assault with intent to kill; previous "difficulty" between the parties, admitted); *Arizona:* 1919, Owen Guey *v.* State, — Ariz. —, 181 Pac. 175 (battery; prior assault on the same party and her sister, two years before, held not admissible); *California:* 1897, People *v.* Wilson, 117 Cal. 688, 49 Pac. 1054 (shooting an officer; a shooting of others just preceding the arrest, admitted to show intent); 1899, People *v.* Teixeira, 123 Cal. 297, 55 Pac. 988 (assault with intent; another assault about the same time upon the injured person's companion, admitted); *Colorado:* 1913, Rice *v.* People, 55 Colo. 506, 136 Pac. 74 (assault and battery; the defendant's admission, "This has been going on for 7 years", received); *Illinois:* 1921, People *v.* Lane, 300 Ill. 422, 133 N. E. 267 (murder; commission of other independent murders and robberies, recited in defendant's confession, held improperly admitted); *Indiana:* 1916, Underhill *v.* State, 185 Ind. 587, 114 N. E. 88 (assault; other prior quarrels excluded); *Iowa:* 1888, State *v.* Merkley, 74 Ia. 695, 39 N. W. 111 (burning an adopted child with a hot iron, with intent to kill; other similar burnings of the child admitted to show intent); *Louisiana:* 1848, State *v.* Patza, 3 La. An. 512 (stabbing with intent to kill; a former attempt to poison the same person by putting laudanum in her wine, admitted); 1900, State *v.* Cavanaugh, 52 La. 1251, 27 So. 704 (assault with intent to kill; assault on the same person the previous night, excluded); *Missouri:* 1897, State *v.* Raper, 141 Mo. 327, 42 S. W. 935 (defendant's riotous misconduct before an assault, admitted to show intent); *New York:* 1845, People *v.* Hopson, 1 Den. 574 (assault and battery on a constable and resisting him in performing his duty; an assault on him ten days later while the same proceedings of execution were being carried out, excluded); 1875, Kerrains *v.* People, 60 N. Y. 228 (the purpose of taking up a weapon, shortly before assaulting with it, admitted to show the purpose at the time of the assault); 1883, People *v.* Gibbs, 93 N. Y. 470 (assault with intent to kill M.;

§ 365. **Other Principles, discriminated.** (1) According to the principle of § 218, *ante*, another act may be evidenced so far as it is an *inseparable part* of the whole act charged. This is simply because in narrating the one it is impracticable to avoid describing the other, and not because the other has any evidential purpose. The phrase 'res gestæ' is sometimes used to sanction the admission of such acts, but it merely serves to obscure thought and to confuse principle. Either the act is an inseparable part of the main act or 'res gestæ', in which case it has no evidential function; or it serves to evidence intent or the like, in which case it must be tested by the foregoing principles. This latter purpose is often the one really in mind when this phrase is used, — as where the other act is said to "color" or "characterize" the main act charged;[1] obviously this is an evidential use, throwing light on the intent, and the phrase 'res gestæ' not only has no real application but introduces a loose and unworkable test.

(2) Another act of violence may need to be offered so as to assist in *identifying* the defendant, — as where it is shown that the same person did both acts, and then that the defendant did the other (*post*, § 413).

(3) Prior acts of violence by the defendant against the same person, besides evidencing intent, may also evidence *emotion or motive*, *i.e.* a hostility showing him likely to do further violence; this principle is elsewhere dealt with (*post*, § 396). The practical difference is that in the latter use the acts may range over a wider period of time (as indicating an enduring emotion) than in the present use, where they must be fairly near in time in order to throw light on the design or intent of the act charged.

(4) *Threats* of violence are in themselves expressions of a design to injure, and are accordingly dealt with elsewhere (*ante*, §§ 105–109).

the defendant had entered M.'s house, claiming the right to it, and about 8 o'clock shot at M.; then about half-past 9 J. came, and took M.'s part, who was absent, and the defendant attempted to shoot him; excluded, as throwing no light on the intent in assaulting M., and also because "the principle upon which evidence is admitted of other offences to show the intent . . . has no application to a case of this kind"; no cases cited; clearly wrong); 1885, People *v.* Jones, 99 N. Y. 667, 2 N. E. 49 (wife-murder, by shooting; as indicating whether he fired in anger to frighten her, or fired intending to kill, the fact was admitted of two prior shootings at his wife during the preceding twelve months; no cases cited); *Oklahoma:* 1915, Appleby *v.* State, 11 Okl. Cr. 284, 146 Pac. 228 (assault; another assault long prior, and an adultery, excluded); *Pennsylvania:* 1909, Com. *v.* House, 223 Pa. 487, 72 Atl. 804 (assault on a woman; assault on another woman about the same time, excluded); *So. Dakota:* 1918, Hansen *v.* Boots, 41 S. D. 96, 168 N. W. 798 (battery; cross-examination to prior assaults on other persons, held improper); *Texas:* 1892, Moore *v.* State, 31 Tex. Cr. 234, 236, 20 S. W. 563 (assault with intent to kill; indecent language to the assaulted, just before, admitted); 1900, Hamilton *v.* State, 41 Tex. Cr. 644, 56 S. W. 927 (assault with intent to kill; prior assaults on the same person during a year or more, admitted); 1904, Livingston *v.* State, 47 Tex. Cr. 405, 83 S. W. 1111 (assault by a father on his daughter; repeated attempts of the father to have intercourse with her, explaining her refusal to go with him, which led to the assault, excluded; unless the Supreme Court knew of facts not disclosed in the decision, it was a brutally unjust one); 1922, Solosky *v.* State, 90 Tex. Cr. 537, 236 S. W. 742 (unlawfully carrying a pistol); *Vermont:* 1866, Devine *v.* Rand, 38 Vt. 621, 627 (trespass for beating, kicking, throwing into the snow, placing on a hot stove, etc.; the various acts of cruelty admitted to show the intent, exemplary damages being allowable for wilful trespass); *Washington:* 1917, State *v.* Clark, 98 Wash. 81, 167 Pac. 84 (assault in a saloon; prior violent conduct, admitted on the facts).

§ 365. [1] *E.g.*, People *v.* Marble, Mich., *ante*, § 363.

13. Miscellaneous Offences

§ 367. **Riot, Trespass, Gaming, Electoral Offences, etc.** The foregoing principles apply to this class of evidence in any offence where knowledge, intent, or design is to be proved. What is to be kept in mind is that the Intent principle (*ante*, § 302) is available wherever the intent accompanying an act is to be shown, the other acts being so far similar as to negative by their recurrence that innocent intent which might be conceded for one occasion but becomes less supposable with every repetition; and that the Design or System principle (*ante*, § 304) has application wherever the doing of the act itself is to be proved, and the design or system pointing towards it is to be inferred from other acts indicating by their common features its existence. These principles may thus have application on a charge of *rioting*, or the like,[1] keeping a *disorderly house*,[2] *gambling*, or keeping a *lottery*,[3]

§ 367. [1] 1820, R. *v.* Hunt, 3 B. & Ald. 566, 569, 573 (mob-meeting; acts of various parts of the mob admitted to show its intent as a whole); 1876, R. *v.* Mailloux, 16 N. Br. 499, 507, 512, 516 (indictment for a riot; evidence to explain away conduct previous to the day alleged was rejected, because it did not call for explanation); 1844, State *v.* Renton, 15 N. H. 169, 170, 174 (riot on the 4th of July, 1842; the fact that the celebrations on that anniversary in 1839, 1840, and 1841 were riotous, and that the defendant took part in them, excluded).

The various other questions of evidence that become material in proving mob violence are analyzed, with cross-references, *post*, § 1790.

[2] *Fed.* 1919, De Four *v.* U. S., 9th C. C. A., 260 Fed. 596 (keeping a house of ill-fame, under U. S. St. 1917, May 18, § 13, defendant's previous conduct of houses of ill-fame, admitted to negative guilty knowledge); *N. J.* 1896, Roop *v.* State, 58 N. J. L. 479, 34 Atl. 749 (former keeping of a disorderly house, that being the offence charged, excluded); 1897, Parks *v.* State, 59 N. J. L. 573, 36 Atl. 935 (keeping a disorderly house; matters connected with a similar offence in another State, excluded); *N. Mex.* St. 1921, c. 69, § 3 (prostitution; prior conviction admissible); St. 1921, c. 69, § 4 (similar, in a proceeding to enjoin keeping a house for prostitution); *N. D.* St. 1919, Mar. 7, c. 190, § 3 (prostitution offences; former conviction, admissible; quoted *post*, § 1620); *Oh.* Gen. Code Ann. 1821, § 13031–15 (keeping a house for prostitution, etc.; "a prior conviction" is admissible).

For other *related offences* (abduction, enticement for prostitution, etc.), see *ante*, § 360. For other acts to evidence *character of inmates*, see *ante*, § 204.

[3] *Arkansas:* 1921, Cain *v.* State, 149 Ark. 616, 233 S. W. 779 (conducting a gaming house: defendant's operation of other gaming houses in the same town, admitted); *Florida:* 1898, Toll *v.* State, 40 Fla. 169, 23 So. 943 (keeping a gaming room; where acts within the period charged are shown, acts prior and subsequent are admissible to illustrate); *Illinois:* 1866, Dunn *v.* People, 40 Ill. 469 (lottery; the defendant called it a "gift-sale"; and other envelopes and advertisements were admitted to show its real nature); 1871, Thomas *v.* People, 59 Ill. 160, 162 (lottery; other tickets, bills, and advertisements, connected with the same enterprise, admitted to show intent); 1908, First Nat'l Bank *v.* Miller, 235 Ill. 135, 85 N. E. 312 (gambling in grain contracts without intent to deliver, as a defence to a note; the payee's similar transactions with other persons, admitted, to show intent); 1912, People *v.* Viskniskki, 255 Ill. 384, 99 N. E. 621 (renting premises for gaming; two former instances of renting to the same party and their use for gaming, admitted); *Kentucky:* 1878, Miller *v.* Com., 13 Bush. 737 (maintaining a lottery; the fact admitted of its regular maintenance for several years preceding the time alleged); *Louisiana:* 1904, State *v.* Behan, 113 La. 754, 37 So. 714 (keeping a house for illegal faro-banking; prior similar acts of gaming not more than two weeks before, admitted to show knowledge and intent); *Massachusetts:* 1888, Com. *v.* Ferry, 146 Mass. 209, 15 N. E. 484 (pool-selling in rooms kept for the unlawful purpose of so selling, etc.; the carrying on of such transactions shortly before, admitted); *New Jersey:* 1885, Clark *v.* State, 47 N. J. L. 556, 4 Atl. 327 (sale of lottery tickets; the sale of a ticket to another person, not admitted "for the purpose of showing that the defendant would be likely to commit the crime charged"); *Oklahoma:* 1913, Dupree *v.* State, 10 Okl. Cr. App. 65, 134 Pac. 86 (gambling; former convictions for gambling, excluded); *Texas:* 1920, Watson *v.* State, 88 Tex. Cr. 227, 225 S. W. 753 (keeping a gaming house;

committing a wilful *trespass to property*,[4] uttering a criminal *libel*,[5] refusing a *vote*,[6] or casting a vote,[7] *packing a jury*,[8] and sundry other offences and wrongs.[9]

possession of a pistol next day when arrested, held inadmissible); *Washington:* 1919, State v. Kaukos, 109 Wash. 20, 186 Pac. 269 (conducting a gambling-game; operation of the game on other days, admitted; prior rulings collected).

Compare the cases cited *ante*, § 203, n. 2 (proof of an habitual or continuing offence, *e.g.* keeping a gaming house).

For *reputation* to evidence knowledge, see *ante*, § 254.

[4] 1897, Louisville & N. R. Co. *v.* Hill, 115 Ala. 334, 22 So. 163 (in proving, to recover a penalty, that a trespass was wilful and knowing, under the statute, the breaking down of the fence at the same time may be shown); 1909, Jaynes *v.* People, 44 Colo. 535, 99 Pac. 325 (poisoning a horse; rule stated); 1903, State *v.* Roscum, 119 Ia. 330, 93 N. W. 295 (malicious mischief; larceny of similar articles two years before, excluded); 1909, People *v.* Minney, 155 Mich. 534, 119 N. W. 918 (mutilating a horse by cutting off its tongue; other similar offences, excluded); 1895, Mayer *v.* R. Co., 90 Wis. 522, 63 N. W. 1048 (to show that the defendant had piled snow at a certain crossing, the fact that it had piled snow at other adjacent points was admitted).

[5] 1791, R. *v.* Pearce, Peake 75 (several other paragraphs about the plaintiff by the defendant were admitted in corroboration, to prove him the author); 1907, Price *v.* Clapp, 199 Term. 425, 105 S. W. 864 (libel in an anonymous letter written to the plaintiff's employer and calling the plaintiff a thief; the defendant and his wife were alleged as the writers, but denied it; admissions of the defendant's wife that she had written other anonymous letters, excluded: clearly unsound: the peculiar custom of writing anonymous letters served to identify the defendant on the issue before the court; post-office inspectors could have enlightened the court on this subject).

For the use of other libels to evidence *malice*, see *post*, § 403.

[6] 1870, Friend *v.* Hamill, 34 Md. 298, 305 (action by a Democrat for malicious and corrupt refusal of an election officer to allow him to vote; the fact was received of the defendant's prior declaration that the plaintiff and certain others should not vote, the fact that these persons were not allowed to vote, and the fact that they were all Democrats while the defendant was a Republican). Compare the jury cases *infra*.

The following case illustrates a similar application: 1899, People *v.* Alton, 179 Ill. 615, 54 N. E. 421 (mandamus to compel the allowance of the relator's negro children to attend the public schools; an ordinance authorized the superintendent or the board committee to assign pupils to specific schools; the relator's children were alleged to have been excluded from schools containing white children only and sent to schools containing negro children only; to prove that the exclusion was made with sole intent to discriminate on grounds of race, the treatment of other negro children by the defendant was admitted).

[7] 1895, People *v.* Shea, 147 N. Y. 78, 41 N. E. 508 (admitting evidence of previous repeating, to show a general design of fraudulent voting); 1919, State *v.* Unger, 93 N. J. L. 50, 107 Atl. 270 (receiving fraudulent votes; receipt of other illegal votes, admitted).

[8] 1848, *R. v.* Mitchel, 6 State Tr. N. s. 599, 630 (challenge to the array because not impartially selected by the sheriff; the fact that among the qualified persons the Catholics and the Protestants were as two to one, but on the panel were as one to five, held admissible as tending to show an unfair intent in the sheriff; quoted *ante*, § 302); 1848, R. *v.* O'Doherty, 6 St. Tr. 831, 881, 888 (same); 1848, R. *v.* O'Brien, 7 St. Tr. 1, 28, 30 (similar); 1848, R. *v.* Duffy, 7 St. Tr. 795, 859, 870 (similar facts allowed, but the ruling is obscure, apparently from a failure to distinguish between religious disproportion as a ground of challenge and the same as evidence of corrupt selection); 1903, Binyon *v.* U. S., 4 Ind. T. 642, 76 S. W. 265 (grand jurors discriminated against, in selection, on account of race; evidence held insufficient on the facts); 1903, Carter *v.* State, 45 Tex. Cr. 430, 76 S. W. 437 (similar question; evidence held insufficient).

[9] *Federal:* 1866, The Springbok, 5 Wall. 1, 7, 25, 27 (confiscation of goods of a neutral, captured between England and Nassau, and consigned to Nassau, a blockade of Confederate ports then prevailing; issue, whether the cargo was destined by the shippers for transshipment at Nassau to a Confederate port; to evidence the intention, the facts were admitted that two other vessels, the Gertrude and the Hart, recently captured on their way to blockaded ports, had a cargo consigned by the same shippers, of the same classes of goods marked in the same way, and that many consecutively numbered bales, missing in the other two vessels, were found on the Springbok); 1898, Safter *v.* U. S., 31 C. C. A. 1, 87 Fed. 329 (mailing lewd letters; subsequent adultery of the defendant with the addressee, held irrelevant); 1917, Alaska Packers' Ass'n *v.* U. S., 9th C. C. A., 244 Fed. 710 (unlawful destruction of salmon; takings of salmon subsequent to the date charged, admitted to evidence intent); 1918, U. S. *v.* Pineda, 37 P. I. 456 (negligence in erroneously filling a prescrip-

368. **Dealing in Liquors or Drugs.** The violation of the laws in regard to *intoxicating liquors* involves constantly the use of evidence under the present principles. There were originally four chief varieties of offences under these laws: *selling*, being a *common seller*, *keeping with intent* to sell, and *keeping a place* for the purpose of sale. (1) The first may raise the question how far an intent may be evidenced by other instances, and how far a design or plan, as showing probably an actual sale, may be evidenced by former acts of the sort.[1] (2) The second involves the principle of separate instances to show a character or habit (*ante*, § 203).[2] (3) The third may raise the question how far other acts of keeping or selling may be received to show the intent;[3] (4) and the fourth may raise the same

tion for drug X with drug Y; similar error on another occasion, admitted to show negligence); *Alabama:* 1890, Dodd *v.* State, 92 Ala. 61, 9 So. 467 (carrying a concealed pistol; the fact of the use of a pistol shortly before, excluded); *Illinois:* 1906, Joseph Taylor Coal Co. *v.* Dawes, 220 Ill. 145, 77 N. E. 131 (injury to a mine-workman by an unlawful lowering of the cage at a speed forbidden by statute; the engineer's repeated lowering of the cage at such speed, admitted to show knowledge and wilfulness); *Indiana:* 1855, Thomas *v.* State, 103 Ind. 419, 431, 434, 2 N. E. 808 (knowingly sending a lewd letter; another letter to the same person, admitted); *Massachusetts:* 1916, Com. *v.* Lindsey, 223 Mass. 392, 111 N. E. 869 (unlawful practice of medicine; acts and conversations on other days than alleged, admitted); *Michigan:* 1919, People *v.* Wheaton, 207 Mich. 173, 173 N. W. 335 (illegal hunting; another similar act five days before, in the same region, excluded; the opinion does not seem to appreciate the principle involved); *New Jersey:* 1896, Meyer *v.* State, 59 N. J. L. 310, 36 Atl. 483 (knowingly and unlawfully prescribing medicine to C. without a license; the fact excluded of similar unlawful prescriptions to others; the Court treat it as character-evidence, and ignore its use as indicating intent or scheme); *Wisconsin:* 1920, State *v.* Till, — Wis. —, 177 N. W. 589 (unlawful practice of medicine on T.; visits of the same person at prior times to defendant, admitted to show intent).

§ 368. [1] Cluff *v.* State, 16 Ariz. 179, 142 Pac. 644; 1921, Richardson *v.* State, — Ariz. —, 201 Pac. 845 (manufacturing intoxicating liquor; prior offer to sale, admitted); 1920, Thompson *v.* State, 189 Ind. 182, 125 N. E. 641 (prior sales by defendant and co-defendant, admitted); 1922, Bullington *v.* Com., 193 Ky. 529, 236 S. W. 961 (selling whisky; other sales, excluded on the facts); 1912, State *v.* Oden, 130 La. 598, 58 So. 351 (illegal liquor selling; later sale in another parish, excluded); 1909, Lockard *v.* Van Alstyne, 155 Mich. 507, 120 N. W. 1 (damage by sale of liquor; on the issue whether the intent was to sell for medicine or to sell for beverage, the practice of the defendant to sell for beverage was admitted); 1910, People *v.* Giddings, 159 Mich. 523, 124 N. W. 546 (illegal sale; sales to others, admitted); 1877, State *v.* Shaw, 58 N. H. 73 (illegal liquor-selling; sales during the same month, admitted as showing a plan or course of business); 1920, State *v.* Donaluzzi, 94 Vt. 142, 109 Atl. 57 (prior similar transaction, admitted; here the question was whether an apparent theft by the alleged buyer was merely a pretence covering a sale); 1895, Fosdahl *v.* State, 89 Wis. 482, 62 N. W. 185 (illegal selling of whiskey on Oct. 29, 1892; illegal selling of beer and whiskey during the summer of 1892, excluded; but illegal possession during October, 1892, admissible, apparently to show the selling charged).

[2] 1915, Day *v.* U. S., 4th C. C. A., 220 Fed. 818 (dealing in liquor in 1910 and 1911 without paying tax; issue whether the business belonged to defendant's brother and the defendant acted only as agent; four acts of ownership by defendant in 1909, held inadmissible; unsound; no authority cited; Woods, J., diss.; the principle applicable is really that of § 382, *post*); 1921, Simmons *v.* People, 70 Colo. 262, 199 Pac. 416 (keeping for sale; other recent sales, admissible to show intent); 1890, People *v.* Haas, 79 Mich. 457, 461, 44 N. W. 928 (illegal sales shortly before the date charged, admitted); and instances cited *ante*, § 203.

[3] *Federal:* 1914, Taliaferro *v.* U. S., 5th C. C. A., 213 Fed. 25 (illegal sale of liquor; keeping also a bawdy-house held inadmissible; unsound on the facts); 1921, Basich *v.* U. S., 9th C. C. A. 290, 276 Fed. 290 (liquor nuisance; possession of similar liquor at another time and place, admitted); *Maine:* 1876, State *v.* Plunkett, 64 Me. 534 (keeping with intent; former sales admitted; here a conviction for illegal selling); 1919, State *v.* O'Toole, 118 Me. 314, 108 Atl. 99 (possession with intent to sell; possession more than a year before, admitted); *Maryland:* 1912, Curry *v.* State, 117 Md. 587, 83 Atl. 1030 (illegal sale; prior sales admitted to show intent and to evidence

question.[4] (5) A fifth type of offence, *issuing a medical prescription* unlawfully, involves similar questions.[5]

The answers are not difficult, so far as they depend on the application of the foregoing principles. But in order to discriminate properly the various other questions of substantive law and criminal pleading which occasionally bear a superficial resemblance to the evidential questions, it would become necessary to consider a great variety of local statutory material and a mass of decisions having no bearing on the law of Evidence.

The widespread use of *narcotic drugs* has lead to repressive penal statutes, defining offences which broadly follow the types already established by the legislation against intoxicating liquors; and similar principles apply.[6]

the "place of business" mentioned in the statute); *Massachusetts:* 1885, Com. *v.* Cotton, 138 Mass. 501 (keeping liquor with intent to sell unlawfully; the defendant was the driver of a wagon sent out from the city, where sales were lawful, to a suburb where they were unlawful; the fact of deliveries in the same suburb three and four months before was admitted to show intent); 1895, Com. *v.* Vincent, 165 Mass. 18, 42 N. E. 332 (keeping liquor illegally; to show intent, the fact was admitted of intoxicated men leaving the place some weeks before; that "the same condition of things existed both before and after the day named" was admissible "for the purpose of showing the intent with which the liquors were kept on the day set forth)"; *Nebraska:* 1897, Hans *v.* State, 50 Nebr. 150, 69 Mo. 838 (sales shortly before, admitted to show the intent of keeping); *New Hampshire:* 1903, State *v.* Wenzel, 72 N. H. 396, 56 Atl. 918 (keeping in December, not admitted to prove intent in April, on peculiar facts and theory); *North Carolina:* 1919, State *v.* Simons, 178 N. C. 679, 100 S. E. 239 (possession with intent to sell; possession of a new still two months later, admitted); 1920, State *v.* Beam, 179 N. C. 768, 103 S. E. 370 (keeping for sale, and selling liquor; several sales a year before, excluded); 1921, State *v.* Crouse, 182 N. C. 835, 108 S. E. 911 (making and keeping liquor with intent to sell; prior possession of a still in recent operation, admitted); *Vermont:* 1898, State *v.* White, 70 Vt. 225, 39 Atl. 1085 (keeping with intent to sell on June 18; keeping with intent to sell on Sept. 14 of same year, admitted to show intent); 1905, State *v.* Costa, 78 Vt. 198, 62 Atl. 38.

Another principle to be distinguished is that which, while allowing a range between certain dates for the offence proved at the trial, forbids the attempt to prove more than one as the *basis of the charge*, on the ground that each juror might regard a different one as proved, *e.g.* Boldt *v.* State, 72 Wis. 14, 38 N. W. 177.

[4] 1917, State *v.* Maguire, 31 Ida. 24, 169 Pac. 175 (liquor nuisance; other sales, etc., admitted); 1860, Com. *v.* Edds, 14 Gray Mass. 406, 408 (keeping a tenement used for illegal sales of liquor; after evidence of the keeping of the tenement, the fact of sales by others in the absence of the defendants was received); 1871, Sherman *v.* Wilder, 106 Mass. 537, 540 (the intent charged being to give a lease knowingly to one selling liquor illegally, the intent at another time was admitted); 1896, People *v.* Caldwell, 107 Mich. 374, 65 N. W. 213 (former sales, admitted to show a general plan).

[5] *Colo.* 1898, Chipman *v.* People, 24 Colo. 520, 52 Pac. 677 (sale of liquor said to have been in good faith for medicinal purposes; the sale being denied and the medicinal use being immaterial, evidence of other sales to disprove good faith was held improperly admitted); *Mich.* 1916, People *v.* Humphrey, 194 Mich. 10, 160 N. W. 445 (false prescription of whisky as a medicine; other frequent prescriptions, admitted); *Mo.* 1920, State *v.* Patterson, — Mo. App. —, 222 S. W. 882 (unlawful issuance of a liquor prescription by a physician; five other such prescriptions issued by defendant to the same person in the same month, admitted); *Wash.* 1917, Everett *v.* Cowles, 97 Wash. 396, 166 Pac. 786 (prescribing whisky without belief in illness, contrary to a city ordinance; other prescriptions to various persons about the same time, admitted); 1918, State *v.* Holland, 99 Wash. 645, 170 Pac. 332 (druggist's sale of alcohol not for mechanical purposes as represented by the buyer when registering; other recorded sales by defendant for such purposes, increasing many fold since the date of the prohibitory law, admitted); 1917, Seattle *v.* Hewetson, 95 Wash. 612, 164 Pac. 234 (prescribing whisky without good reason to believe in illness, etc., under a city ordinance; similar prescriptions to other persons, admitted; cases collected).

[6] *Federal:* 1917, Wallace *v.* U. S., 7th C. C. A., 243 Fed. 300 (sale of drugs under St. 1914, Dec. 17, Harrison Drug Act; convictions for similar sales in State courts prior to the date of the Federal statute, admitted to show "state of mind and motive"); 1919, Thompson *v.* U. S., 8th C. C. A., 258 Fed. 196 (unlawfully dispensing narcotic drugs, under U. S. St. Dec.

§ 369. **Treason, Sedition.** In *treason*, the period of the Restoration saw a general improvement in the definition of the crime as well as in its procedure and rules of Evidence (*post*, § 2036), — an improvement which was permanently established by the practice under Lord Holt after the Revolution and the accession of William and Mary. As a part of this advance there came in the doctrines of criminal law and pleading that treason must consist in an overt act (which was in truth a revival of an ancient limitation), and that no overt act other than such as is charged in the indictment can be proved as constituting the offence.[1] But this latter doctrine was one of pleading only; and it did not prohibit the use of *other overt acts as evidential of Intent* under the present principle;[2] and this result has been accepted in applying our own constitutional enactment of the same rule.[3]

In *sedition* (including seditious riot and seditious libel), other acts and utterances are receivable, under the present principles, to evidence seditious intent.[4] In the prosecutions under the Federal so-called Espionage Act

17, 1914, Anti-Narcotic Act; sales to other persons under similar circumstances, admitted to show intent); 1919, Workin *v.* U. S., 2d C. C. A., 260 Fed. 137 (illegal sale of narcotic drugs; other sales of such drugs, admitted where "there is some real connection between the extraneous crime and the crime charged"); 1919, Paris *v.* U. S., 8th C. C. A., 260 Fed. 529 (violation of U. S. St. 1914, Dec. 14, c. 1, Anti-Narcotic Act; certain other sales of narcotics many months before, here excluded); 1921, Dysart *v.* U. S., 5th C. C. A., 270 Fed. 77 (sale of morphine, under § 2 of Harrison Anti-Narcotic Act; defendant was a physician; defendant's issuance of prescriptions to a "large number of other persons", admitted, to show intent); 1921, Harris *v.* U. S., 2d C. C. A., 273 Fed. 785 (violation of the Harrison Narcotic Drug Act, U. S. St. 1914, Dec. 17, by a physician, charging 6 separate prescriptions in April, etc., 1919; evidence that during those three months defendant wrote 7940 prescriptions for narcotic drugs, admitted to show intent); 1921, Hoyt *v.* U. S., 2d C. C. A., 273 Fed. 792 (like Harris *v.* U. S.; defendant's purchase of large quantities of narcotic drugs, admitted); *Georgia:* 1910, Lee *v.* State, 8 Ga. App. 413, 69 S. E. 310 (prescription of cocaine not in good faith as medicine; defendant's frequent issuance of such prescriptions without inquiry, admitted; enlightened opinion by Powell, J.); 1911, Stanley *v.* State, 9 Ga. App. 141, 70 S. E. 894 (unlawful prescription of cocaine; frequent prescription of cocaine to others, without inquiry, admitted); *Washington:* 1918, State *v.* Smith, 103 Wash. 267, 174 Pac. 9 (druggist selling morphine without a prescription; illegal sales to four other persons, held not admissible on the facts).

Compare some analogous case in § 367, n. 9.

§ 369. [1] 1696, R. *v.* Vaughan, Salk. 634 ("a distinct overt act cannot be given in evidence unless it relate to that which is alleged or conduces to the proof of it. But if it conduce to prove an overt act alleged, it is good evidence").

For the history of the rule, see the following authorities: 1660, Regicides' Trials, 5 How. St. Tr. 947, 976; 1762, Foster, Crown Law, 245; 1803, East, Pleas of the Crown, I, 130.

Several States have placed this rule in statutes: *Can. Dom.* R. S. 1906, c. 146, Crim. C. § 847; *U. S. Ariz.* Rev. St. 1913, P. C. § 1044; *Ark.* Dig. 1919, § 3117; *Cal.* P. C. 1872, § 1103; *Kan.* Gen. St. 1915, § 8125 (in treason, "no evidence shall be given of an overt act that is not expressly laid in the indictment or information"); *Mont.* Rev. C. 1921, § 11978 (like Cal. P. C. § 1103); *Nebr.* Rev. St. 1922, § 10143; *N. J.* Comp. St. 1910, Crim. Proc. § 57; *N. D.* Comp. L. 1913, § 10839 ("nor can evidence be admitted of an overt act not expressly charged"); *Wyo.* Comp. St. 1920, § 7523.

[2] R. *v.* Vaughan, *supra*.

[3] 1799, U. S. *v.* Fries, Whart. St. Tr. 482, 585, 594 ("evidence may be given of other circumstances or even of other overt acts, connected with that on which the indictment is grounded, and occurring or committed in any other part of the district than the place mentioned, . . . to show the 'quo animo', the intent, with which the act laid was committed"); 1807, Burr's Trial, Robertson's Rep. I, 472 (acts of treason elsewhere than as charged, admissible, since they, "by showing a general evil intention, render it more probable that the intention in the particular case was evil").

[4] *England:* 1820, R. *v.* Hunt, 1 State Tr. N. S. 171, 476, 486, 491 (seditious meetings; resolutions at a similar meeting shortly before, admitted to show intent and design); 1821,

of 1917, the well-established English precedents of a century before were given renewed application to the various kinds of actively disloyal conduct so effectively struck at by that legislation.[5] In the same way, the accused

Redford *v.* Birley, 1 St. Tr. N. S. 1071,1237 (seditious mob; antecedent doings of the same persons admitted); 1848, R. *v.* O'Brien, 7 St. Tr. N. S. 1, 75 (sedition; other speeches than those charged, six months before, admitted to show intent); *Canada:* 1918, R. *v.* Barron, 44 D. L. R. 332, Sask. (seditious words; prior similar utterances, admitted).

[5] *Federal:* 1918, U. S. *v.* Schulze, D. C. S. D. Cal., 253 Fed. 377 (charge of favoring by word or act the cause of a hostile country, under U. S. St. June 15, 1917, c. 30, § 3; defendant's utterances of pro-German sentiments at various times from 1915 to date of the indictment, admitted, to show intent); 1918, Deason *v.* U. S., 5th C. C. A., 254 Fed. 259 (charge under U. S. St. June 15, 1917, c. 30, § 3, Espionage Act, of obstructing the recruiting service, etc., by threats against a local board; other utterances against the Selective Service Act, before its passage on May 18, 1917, and before the date of the Espionage Act, admitted); 1918, Kirchner *v.* U. S., 4th C. C. A., 255 Fed. 301 (charge of making false statements with intent to interfere with military operations, etc., under U. S. St. June 15, 1917, c. 30, § 3; similar statements made by defendant before the date of the statute, admitted, to evidence intent); 1919, Rhubery *v.* U. S., 9th C. C. A., 255 Fed. 865 (charge under U. S. St. June 15, 1917, c. 30, of obstructing the recruiting service, etc., by utterances against the U. S. taking part in the war; other utterances of the same sort prior to the U. S. declaration of war, admitted); 1919, Hall *v.* U. S., 4th C. C. A., 256 Fed. 748 (obstructing the recruiting service, etc.; threats that "he would like to shoot the President", excluded, the offence being distinct); 1919, Coldwell *v.* U. S., 1st C. C. A., 256 Fed. 805 (charge under U. S. St. June 15, 1917, c. 30, § 3, of obstructing the recruiting service, etc., by utterances approving the action of certain men who had been convicted of unlawful refusal to serve as soldiers; other utterances in May, 1917, prior to the passage of the Espionage Act, urging refusal to register in June, 1917, under the Selective Service Act, admitted); 1919, Herman *v.* U. S., 9th C. C. A., 257 Fed. 601 (publication of a circular violating the Espionage Act, St. June 5, 1917, c. 30, opposing military service; the defendant's conversations expressing opinions similar to those in the pamphlet, admitted to show intent); 1919, Wells *v.* U. S., 9th C. C. A., 257 Fed. 605, 614 (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, by utterances in April and May, 1917, urging resistance by force to military conscription; a resolution introduced by defendant at a meeting on May 23, 1917, after the passage of the Selective Service Act of May 18, 1917, admitted to show his "attitude of mind towards the Conscription Act"); 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 promoting the success of the enemy cause by utterances against the war, against conscription, etc.; other utterances prior to the date of the declaration of war, admitted); 1919, Kammann *v.* U. S., 7th C. C. A., 259 Fed. 192 (seditious utterances during war; utterances prior to the entrance of the U. S. into the war, while the nation was neutral, excluded; unsound); 1919, Wolf *v.* U. S., 8th C. C. A., 259 Fed. 388 (seditious utterances on July 15, 1917, charged under the Espionage Act of June 15, 1917; utterances prior to the date of the statute, excluded; unsound); 1919, Equi *v.* U. S., 9th C. C. A., 261 Fed. 53 (violation of U. S. St. June 15, 1917, c. 30, Espionage Act, by inciting resistance to the U. S., etc.; former speeches of the defendant, uttered before the enactment of the statute, held admissible to show intent); 1920, Partan *v.* U. S., 9th C. C. A., 261 Fed. 515 (charge under St. June 15, 1917, c. 30, Espionage Act, of uttering disloyal language against the military forces; other articles distributed by defendant after declaration of war, admitted to show intent); 1920, Seebach *v.* U. S., 8th C. C. A., 262 Fed. 885 (charge under St. June 15, 1917, c. 30, Espionage Act, of attempting to cause insubordination in the military forces; other similar statements to other persons, admitted to show intent); 1920, Howenstine *v.* U. S., 9th C. C. A., 263 Fed. 1 (charge under St. June 15, 1917, c. 30, Espionage Act, of attempting to cause insubordination in the military forces; a newspaper article of Nov. 22, 1914, admitted to show defendant's state of mind); 1920, White *v.* U. S., 6th C. C. A., 263 Fed. 17 (charge under St. June 15, 1917, c. 30, Espionage Act, of attempting to cause insubordination in the military forces; statements made at other times and places "not too remote", admissible to show intent); 1920, Albers *v.* U. S., 9th C. C. A., 263 Fed. 27 (charge under St. June 15, 1917, c. 30, of attempting to cause resistance to the U. S., etc.; other utterances of defendant, in Sept. 1914–15, held admissible to evidence intent, not being too remote; here the defendant alleged that he was so drunk at the time of the utterances charged as not to realize what he said); 1920, Schoborg *v.* U. S., 6th C. C. A., 264 Fed. 1 (charge under St. June 15, 1917, § 3, as amended May 16, 1918, of supporting the enemy's cause by word or act; other similar

may offer his other utterances and acts to evidence his loyal (*i.e.* non-seditious) intent,[6] — an application of the rule which became well enough established

statements, "made at near-by times and places", admitted to show intent, and also to show the actual utterance of the words charged); 1920, Wimmer *v* U. S., 6th C. C. A., 264 Fed. 11 (like Schoborg *v.* U. S., first point); 1920, Lockhart *v.* U. S., 6th C. C. A., 264 Fed. 14 (like Schoborg *v.* U. S., first point); 1920, Anderson *v.* U. S., 8th C. C. A., 264 Fed. 75 (charge under St. June 15, 1917, tit. 1, § 3, Espionage Act, of attempting to cause disloyalty in the military forces; per Sanborn, J., "There is no longer any doubt that where, as in this case, the intent . . . is material, statements and acts similar to and made and done by him about the same time . . . are admissible in evidence to illustrate and prove his intent"; but when and where was there any doubt on the subject, unless perhaps in the learned judge's own mind?); 1920, Schurmann *v.* U. S., 9th C. C. A., 264 Fed. 917 (cancellation of a native German's naturalization certificate dated 1904; defendant's conduct in 1916–17 being shown, his declaration in 1917 that "I have sworn allegiance . . . but I didn't swear away my birthright", etc., admitted to evidence "original fraud" in 1904 in that he did not "absolutely and entirely renounce and abjure" all foreign allegiance); 1920, Bold *v.* U. S., 9th C. C. A., 265 Fed. 581 (charge under the Espionage Act of "supporting and favoring the cause of the German Government", etc.; utterances of similar import, to other persons, some before and some after the date of declaration of war by the U. S., admitted); 1920, American Socialist Society *v.* U. S., 2d C. C. A., 266 Fed. 212 (charge of wilfully obstructing enlistment, etc., under St. June 15, 1917, tit. 1, § 3, Espionage Act, by publishing a pamphlet "The Great Madness" in September, 1917; defendant's publication of similar pamphlets on prior occasions, admitted, to show intent); 1920, Holzmacher *v.* U. S., 7th C. C. A., 266 Fed. 979 (utterances, under Espionage Act, as amended May 16, 1918, § 3, abusing the U. S. military forces; utterances of a similar sort held not admissible, no question of intent being involved in the issue as to the utterance charged; so far as the offered utterances might be remote, the ruling might be tenable; but so far as it excludes other similar acts to evidence "whether it happened or did not happen", the ruling is unsound, for it ignores the principle of § 304, *ante*); 1920, Bochner *v.* U. S., 8th C. C. A., 267 Fed. 562 (obstructing recruitment, under St. 1917, June 15, tit. 1, § 3, Espionage Act; statements to parties not named in the indictment, admitted to show intent); 1921, Dierkes *v.* U. S., 6th C. C. A., 274 Fed. 75, 81 (violation of Espionage Act, 1917, June 5, § 3, as amended 1918, May 16; other utterances prior to dates of amendment and original act, but after the U. S. was at war, admitted);
Iowa: 1919, State *v.* Gibson, 189 Ia. 1212, 174 N. W. 34 (sedition; by the prosecution, whether the witness had at any time, "in talking with defendant, heard him speak favorably of the U. S. Government", allowed; that defendant was hostile to the American Red Cross, the Y. M. C. A., and the Army Y. M. C. A., allowed, these organizations being "in effect auxiliaries in the task" of conducting the national war);
Kansas: 1918, State *v.* Shumaker, 103 Kan. 741, 175 Pac. 978 (charge of casting contempt on the U. S. flag, by word or act, under Gen. St. 1915, § 3706; defendant's utterance, a year before, as to the "rags", meaning the flags, admitted to show intent);
Montana: 1920, State *v.* Smith, 57 Mont. 349, 188 Pac. 644 (sedition; other seditious utterances, admissible, explaining State *v.* Kahn, 56 Mont. 108, 182 Pac. 107).

[6] *England:* 1683, Lord Russell's Trial, 9 How. St. Tr. 577, 622; 1684, Rosewel's Trial, 10 How. St. Tr. 147, 197, 206, 212; 1691, Grahme's Trial, 12 How. St. Tr. 645, 794; 1831, R. *v.* Cobbett, 2 State Tr. N. S. 789, 877 (seditious libel; the defendant's publications nine years before, received to negative wrongful motive or intent); 1839, R. *v.* Frost, 4 St. Tr. N. S. 85, 380 (treason; former anti-seditious conduct described); 1843, R. *v.* O'Connor, 4 St. Tr. N. S. 935, 1162 (sedition; acts of good conduct testified to); 1843, R. *v.* O'Connell, 5 St. Tr. N. S. 1, 537 (sedition; defendant's speeches in 1841, read to negative seditious intention); 1848, R. *v.* O'Brien, 7 St. Tr. N. S. 1, 260, 266 (sedition; past expressions of loyalty received); 1848, R. *v.* Rankin, 7 St. Tr. N. S. 711, 747 (seditious riot; former assistance to police in quelling riots, received);
United States: 1920, Erhardt *v.* U. S., 7th C. C. A., 268 Fed. 326 (charge of wilfully obstructing army enlistment, under St. 1917, tit. 1, § 3, Espionage Act; the defendant's possession of the German kaiser's portrait having been shown, he was allowed to be asked whether he had kind feelings towards the kaiser, whether he had an intent to foster sentiment in Germany's favor, etc.). *Contra*, but grossly unsound: *Federal:* 1920, Howenstine *v.* U. S., 9th C. C. A., 263 Fed. 1 (charge under St. June 15, 1917, c. 30, Espionage Act, of attempting to cause insubordination in the military forces: defendant's statements prior and during the war "evidencing their opposition to Germany and the German cause and their patriotism toward the United States", excluded; unsound); *Montana:* 1919, State *v.* Kahn, 56 Mont. 108, 182 Pac. 107 (sedition, in uttering sentiments opposed to the existing war; defendant's conduct as to Red Cross, liberty loans, etc., was admitted, but state-

as law, but was no doubt hampered by its apparent relation to other rules which might have prohibited it, such as the character-rule (*ante*, § 195), the rule for innocent conduct (*ante*, § 293), the rule for standard of behavior (*ante*, § 461), and the hearsay exception for declarations of a mental condition (*post*, § 1731).

§ 370. **Conspiracy.** In so far as the doctrine of overt acts applies also in the substantive law of Conspiracy, the same distinction has developed as in the case of treason, viz. that overt acts other than the one alleged in the charge may nevertheless be introduced to evidence Intent or Plan.[1]

14. Civil Cases

§ 371. **In general.** The foregoing principles are equally as applicable to civil cases as to criminal cases, *i.e.* to the use of other torts, sales, forgeries, or the like, in evidencing similar issues in civil cases. The peculiarity of the question involved is merely whether and under what conditions other similar acts are receivable to show Knowledge, Intent, or Design as to the act charged. This question is of much less frequent occurrence in civil cases than in criminal cases, mainly because the issues of intent and the like are less commonly open in civil cases. But wherever Knowledge or Intent or Design is relevant in a civil case the foregoing principles are equally applicable. Thus, where the act of forgery is in issue, there may be a criminal prosecution for the forgery or there may be a civil action based on the forged document, and the same evidence may be applicable in both. So, where a false representation is charged, it not only may be but usually is a civil case in which the issue arises and the foregoing principles become applicable. In almost every one of the foregoing classes of cases there are instances of the application of the principles in civil litigation. The salient feature is the nature of the issue and the kind of evidence offered, not the penal or the civil form of the proceeding. There are, however, a few classes of cases to be noticed in which the present principles may be applied, and yet the opportunity occurs practically in civil litigation only.

§ 372. **Copyright Infringement.** The infringement of copyright may be evidenced by the aid of the present principle, in connection with another one, actually different, but seldom distinguished in practice:

ments "favorable to our prosecution of the war and of our soldiers and sailors, and generally utterances indicating his loyalty to the U. S. and his loyal intent", were excluded; the opinion cites merely a treatise).

§ 370. [1] *Ariz.* Rev. St. 1913, P. C. § 1045; *Ark.* Dig. 1919, § 3118; *Cal.* P. C. 1872, § 1104 (conspiracy; an overt act must be alleged and proved; "but other overt acts not alleged may be given in evidence"); *Iowa:* Code 1919, § 9360; *Kan.* Gen. St. 1915, § 8126 (conspiracy; other overt acts not alleged may be evidenced); *Minn.* 1921, State v. Townley, 149 Minn. 5, 182 N. W. 773 (criminal conspiracy; other speeches of the accused, not admitted on the facts; the above English rulings distinguished); *Mo.* Rev. St. 1919, § 4030; *Mont.* Rev. C. 1921, § 11979 (like Cal. P. C. § 1104); *Nebr.* Rev. St. 1922, § 10142; *Nev.* Rev. L. 1912, § 7173; *N. D.* Comp. L. 1913, § 10849 (conspiracy, where overt act is necessary; "any other overt act not alleged in the information or indictment, may be given in evidence"); *Okl.* Comp. St. 1921, § 2700; *Porto Rico:* Rev. St. & C. 1911, § 6278; *Tex.* Rev. C. Cr. P. 1911, § 804; *Wyo.* Comp. St. 1920, § 7524.

(1) Where B's book is published subsequently to A's, and in B's is found a passage, similar to a passage in A's, but purporting to be composed by B, the reappearance of the same passage points back to A's book as the source of its borrowing, — on the principle of Traces (examined *ante*, §§ 148, 152). But B may explain away this indication, in showing that there were other sources from which the passage could equally well have been composed, — as, in a directory, from a canvass of the same persons, or, in a guide-book, from observation of the same places; the similarity in reproduction being thus more or less unavoidable. It is only in the rare case when A is the sole source of the information, or when the passages are peculiar in tenor and also identical in wording, that the inference from similarity is a necessary one. But this hypothesis of other sources is not available as an explanation where the same errors — either of fact or of printing — occur in B's passage as well as in A's; and accordingly the recurrence of such errors is a well-established mode of evidencing, to a high degree of probability, the copying of such a specific passage by B from A:

1858, Wood, V. C., in *Spiers* v. *Brown*, 31 L. T. 16: "The difficulty that arises in this class of cases [dictionaries] is that they only relate to a subject common to all mankind, and that the mode of expression and language is necessarily so common that two persons may to a very great extent express themselves in identical terms in conveying the instruction or information to society which they are anxious to communicate. The most obvious case is that of figures, such as a table of logarithms, where the calculations are so nicely performed that the result and the expression of the result must be identical; neither is it very easy to vary the order. The same may be said of directories, calendars, court guides, and works of that description. Those are cases on which the only mode of arriving at the amount of labor bestowed is by the common test resorted to of discovering the copy of errors and misprints, indicating a servile copying."

1852, Kindersley, V. C., in *Murray* v. *Bogue*, 1 Drewry 353, 360: "Now the use of showing the same errors in both is that . . . if the evidence is unsatisfactory on the question whether the defendant did use the plaintiff's work or not, to show the same errors in the subsequent work that are contained in the original is a strong argument to show copying; . . . which is the ordinary and familiar mode of trying the fact whether the defendant has used the plaintiff's book."

(2) But, assuming that in this way there is shown the probability of the copying the specific passages, it remains to invoke the present principles (of Intent and Design), and to argue that the copying of a number of such passages indicates a more extensive copying of other passages not otherwise shown to have been copied. This argument is always open, and its use has constantly been sanctioned; there can merely be a question of its weight in a given instance.[1] Just what its nature is, however, is not entirely clear.

§ 372. [1] England: 1809, Longman *v.* Winchester, 16 Ves. Jr. 269 (Royal Calendar, etc.; the "identity of the inaccuracies" taken as proof of "a vast proportion of the work" being mere copying); 1826, Mawman *v.* Tegg, 2 Russ. 385, 394 (Eldon, L. C.: "When a considerable number of passages are proved to have been copied, by the copying of blunders in them, other passages, which are the same with passages in the original book, must be presumed 'prima facie' to be likewise copied, though no blunders occur in them"); 1839, Lewis *v.* Fullarton, 2 Beav. 6, 13 (copying of parts taken as justifying an inference of further copying).

Canada: 1900, Cadieux *v.* Beauchemin, 31 Can. Sup. 370.

(*a*) It seems at first sight to be an argument from the System or Design principle (*ante*, § 304); *i.e.* because B in various instances copied from A's book, therefore he probably had a general plan to copy, which he carried out in other instances. (*b*) It is doubtful, however, whether a Court would give much weight to this argument as showing a copying of passages which are merely more or less similar. Practically, the argument is resorted to only where there is a certain similarity in specific passages, and this similarity is attempted to be explained as due to the use of common sources necessarily resulting in similar language or thought; this explanation may suffice to leave the Court in a state of doubt; but if it can be shown that there was copying in other passages also, this doubt may disappear and the Court become willing to believe that the similarity in question is not entitled to an innocent explanation. In short, the effect is precisely analogous to that of the Intent principle (*ante*, § 302), where the conceivable innocent explanation of the intent of an ambiguous act is negatived by other instances of the sort. So that perhaps the Intent principle is in essence the one here involved.

§ 373. **Contracts (Sale, Agency, Lease, etc).** There is a large class of civil issues in which at least one of the foregoing principles may receive frequent application, — the issue whether a specific contract was made; the fact being offered to be proved by other instances of the making of similar contracts. The argument here is that the other instances indicate a general plan, system, or habit of making such contracts, which was probably carried out in the specific instance, — as where a factory-hand, to show the agreed amount of his wages, offers instances of the same amount being paid to others in the same factory doing the same kind of work. This question theoretically

UNITED STATES: *Federal:* 1847, Webb *v.* Powers, 2 Woodb. & M. 497, 513 (coincidences in descriptions used to determine whether there was a systematic copying); 1869, Lawrence *v.* Dana, 4 Cliff. 1, 74 ("When a considerable number of passages are proved to have been copied by the copying of the blunders in them, other passages which are the same with the passages in the original book must be presumed, 'prima facie', to be likewise copied, though no blunders appear in them"; "coincidence of citations" and "identity in the plan and arrangement of the notes" were also treated as evidential); 1887, Publishing Co. *v.* Keller, 14 C. C. A. 213, 30 Fed. 772 (alleged infringement of a directory; the fact that in 2,800 names and addresses paralleled in the defendant's book 39 material errors were also reproduced, was taken as evidence of a general piracy; "in a case like this, when a close resemblance is the necessary consequence of the use of common materials, the existence of the same errors in the two publications affords one of the surest tests of copying; the improbability that both compilers would have made the same mistakes, if both had derived their information from independent sources, suggests such a cogent presumption of copying by the latter compiler from the first that it can be overcome only by clear evidence to the contrary"); 1888, Callaghan *v.* Myers, 128 U. S. 617, 660, 9 Sup. 177 (the improper use of the plaintiff's headnotes, etc., in some instances in every one of many volumes, taken by the Court as indicating similar use in a "large portion of the work"); 1895, Chicago D. D. Co. *v.* Chic. D. Co., 13 C. C. A. 8, 66 Fed. 977 (the defendant's directory contained about 60,000 names; 67 errors in the plaintiff's directory were shown to be repeated in the defendant's; no ruling as to evidence, except to admit the above and similar facts indicating system); 1897, West Pub. Co. *v.* Lawyers' Co-op. Pub. Co., 25 C. C. A. 648, 79 Fed. 756 (the defendant having made a digest of some 38,000 paragraphs, the piracy of a limited number (such as 303 out of 548 examined by the master) was held evidence of a systematic use of the plaintiff's material, indicating piracy in other portions not expressly pointed out; the opportunity and temptation to pirate being similar in the other portions); 1904, Encyclopædia Brit. Co. *v.* American N. Ass'n, 130 Fed. 460, 464, C. C. A.

has a place here. But it also verges on and often really is the question of proof of Habit. It is perhaps in most cases merely a matter of words whether these other instances be offered as evidencing a Plan, System, or Design, or be offered as evidencing a Habit or Course of Business. For this reason, and also because there are many instances which strictly involve only the question of Habit, and because the principle is in such cases practically the same for proving both Habit and System, the rulings on such evidence are collected under one head (§§ 376, 377, *post*).

SUB-TITLE II (*continued*): EVIDENCE TO PROVE A HUMAN QUALITY OR CONDITION

TOPIC VIII: EVIDENCE TO PROVE HABIT, STATUS, COURSE OF BUSINESS, OR CUSTOM

CHAPTER XIII

§ 375. **General Principle.** That a habit, course of business, or custom is relevant to show the doing of an act, has already been seen (*ante*, §§ 92–98). Evidence of Habit or Custom may of course be furnished testimonially, by a witness who asserts its existence in the form: "A has a habit of riding to the city"; "There is a custom of granting a discount." But the question is now of circumstantial evidence only. Of the three modes of evidencing circumstantially a human quality or condition (*ante*, § 190), two only are practically here available, namely, specific instances of conduct exhibiting the habit or custom, and the prior or subsequent existence of it. And first, of the former.

At the outset may be distinguished two kinds of things that come to be proved (1) Habit proper, *i.e.* a course of conduct by an individual; and (2) Custom, or usage, *i.e.* a course of conduct by a community or other body of individuals.

(1) In evidencing the *Habit of an individual*, it is impossible to group the precedents with entire exactness, because a Court occasionally excludes the evidence without making it clear whether its objection is to Habit as itself irrelevant to something else, or merely to the evidence of Habit. In general, wherever the evidence excluded is of individual instances, the precedent is considered here. Another obstacle arises through the occasional difficulty of distinguishing between Habit and other qualities. Where Habit and Disposition (or Character) may both be fairly applicable terms to describe a condition or quality — *i.e.* that of intemperance — specific acts would be in most cases inadmissible from the latter point of view (*ante*, §§ 194, 199, 203), but admissible from the present point of view. Where Habit and Design or

System are both conceivably applicable terms, the instances of specific conduct could equally well be treated from the latter point of view (*ante*, § 372). There must therefore be numerous instances in which the precedents could be as well considered under one principle as under another; and this difficulty is insuperable, until Courts become more exact in indicating the precise effect of their rulings on these points. It is worth while, then, to keep in mind the possible bearings of other principles; for example, the relevancy of Habit, as indicating the doing of an act (*ante*, §§ 92–98), and of Character or of Capacity, for the same purpose (*ante*, §§ 65, 85); so also the relevancy of specific conduct as indicating Character (*ante*, §§ 198–203), or Capacity (*ante*, §§ 219–225).

(2) In evidencing Custom or *Usage of the community* or of a trade, the foregoing difficulties do not arise.

§ 376. **Individual Habit; Miscellaneous Examples.** In general, where a habit of conduct is to be evidenced by specific instances, there is no reason why they should not be resorted to for that purpose. The only conditions (*ante*, § 32), are (*a*) that they should be numerous enough to base an inference of systematic conduct, and (*b*) that they should have occurred under substantially similar circumstances, so as to be naturally accountable for by a system only, and not as casual recurrences. As to the first condition, convenience requires that the discretion of the trial Court should control, in order to avoid the objections of Unfair Surprise and Confusion of Issues (*ante*, §§ 42, 194, *post*, §§ 1849, 1904). The following passage illustrates this consideration:

1883, Morton, C. J., in *Com.* v. *Ryan*, 134 Mass. 223 (murder; the debauched habits of the deceased were alleged by the defendant to have been the cause of her death, and he offered testimony directly to her intoxicated habits; but the facts of particular instances of intoxication were held admissible only in the discretion of the trial judge): "The question is whether . . . the defendant had the right to go into any number of individual instances of intoxication throughout her life, unrestrained by the discretion of the Court. We do not understand that the law gives him such a right. . . . It must be in the power of the Court to limit the amount of the testimony where it may be extended indefinitely, — as in cases of usage, or character, or genuineness of handwriting. Confirmed habits of drunkenness can usually be easily proved without going into the investigation of particular instances; while such investigations, if unlimited, would tend to raise a multiplicity of issues, and to distract and confuse the minds of the jury and to divert them from the real issues of the case. . . . It was within the discretion of the presiding justices to admit or reject the evidence offered of particular acts of drunkenness."

As to the second condition, it may be said that the Courts are apt to require too much, often ruling as if it were their function to require incontrovertible demonstration from each piece of evidence instead of merely to declare it relevant to be considered by the jury. The following passage illustrates the proper treatment:

1835, Shaw, C. J., in *Howe* v. *Thayer*, 17 Pick. 91, 96 (the defendant had given a general notice of dissolution of partnership to all creditors; the terms of the notice received by the

plaintiff being in question, the terms of the notice to another creditor were admitted): "A man goes forth to a class of persons, all standing in the same relation, to give them a notice affecting their interests alike; if there are ten, and he gives a particular notice to nine, it leads to a probable inference that he gave a like notice to the tenth, where he states that he intended to make no distinction and believes that he notified all alike." [1]

That a *negative habit* may be shown, and not merely an affirmative one, seems unquestionable, *i.e.* that a person systematically omits to do a certain thing; separate instances suffice to persuade us on such matters in everyday life, and they should be received as probative in courts of justice. The only conditions are as before, namely, that the instances be sufficiently numerous, and that they occur under such circumstances as to indicate a general course of behavior under like circumstances.[2]

Subject to the foregoing considerations, and to the distinctions noted in § 375, the proof of habit by specific repeated instances of conduct is allowed in all varieties of situations.[3]

§ 376. [1] The following is an example of improper and pedantic treatment: 1837, Watts *v.* Fraser, 7 A. & E. 223, 232 (answering in the negative, "whether or not, in the absence of direct proof, it can be inferred from the printing of one newspaper [or book] which was not circulated, that another exactly corresponding with it was printed" and published in the usual way and quantity).

[2] *Fed.* 1897, Lake Erie & W. R. Co. *v.* Craig, 25 C. C. A. 585, 80 Fed. 488 (to show an abandonment of an employer's rule by the habitual sanction of its disobedience, instances of such sanction under circumstances not entirely similar are admissible; here, a rule forbidding train hands to go between cars in uncoupling); *N. Car.* 1906, Parrott *v.* Atlantic & N. C. R. Co., 140 N. C. 546, 53 S. E. 432 (to disprove an alleged custom of a conductor in taking tickets, instances of his not doing so were received); *N. H.* 1873, State *v.* M. & L. Railroad, 52 N. H. 528, 532, 549 (to show a habit of omitting the ringing of the bell and the blowing of the whistle at a particular crossing by a particular fireman and engineer, the fact was received of such omissions by them at that place during the preceding year); 1878, State *v.* B. & M. Railroad, 58 N. H. 410 (same; compare the citations *ante*, § 93); *N. Y.* 1877, Adams *v.* Ins. Co., 70 N. Y. 169 (whether a condition of an insurance policy had in fact been waived; the fact held inadmissible that he had never waived such a condition before in other it; the policies, or that he had constantly waived ruling is confused, however, by raising the question of corroborating an impeached witness).

[3] *Fed.* 1903, Louisville & N. R. Co. *v.* Summers, 60 C. C. A. 487, 125 Fed. 719, 723 (that the plaintiff on prior occasions on the same day had stopped, looked, and listened, before crossing the track, held inadmissible); *Ind.* 1898, Ferner *v.* State, 151 Ind. 247, 51 N. E. 360 (whether a person was "engaged in the practice of dentistry"; specific instances received); *Ia.* 1909, Gray *v.* Chicago, R. I. & P. R. Co., 143 Ia. 268, 121 N. W. 1097 (deceased's practice of care at a crossing, admitted, but not particular instances); *Kan.* 1899, Eagon *v.* Eagon, 60 Kan. 97, 57 Pac. 942 (alienation of husband's affections by father; after evidence of defendant's solicitations of the son to abandon the plaintiff, defendant's evidence of a series of acts and solicitations of an opposite tenor were excluded; incorrectly, because they tended to show an habitual course of conduct, and thus to disprove the acts alleged by the plaintiff; Smith, J., diss.); *Mass.* 1861, Gahagan *v.* R. Co., 1 All. 187 (an issue was whether the defendant's cars were unreasonably standing across the highway; the fact of an unreasonable use of the highway for switching, etc., at times past, excluded; compare the citations *ante*, § 199); *N. H.* 1878, State *v.* Shaw, 58 N. H. 73 (illegal sale of liquor; sales at former times, admitted to show "a course of business according to which it would naturally be done"; compare § 367, *ante*); 1903, Reagan *v.* Manchester St. R., 72 N. H. 298, 56 Atl. 314 (collision; by a motorman, that he had often run at a speed of twenty miles, admitted); *N. Car.* 1884, Davis *v.* Lyon, 91 N. C. 444 (libel on a justice of the peace charging him with "habitual abuse of his authority for private gain" by receiving money; evidence received of other cases of his corrupt receipt of money as justice; compare the citations *ante*, § 203); *Or.* 1900, Wade *v.* R. Co., 36 Or. 311, 59 Pac. 875 (particular instances of high speed on former occasions, not admissible to prove speed on the present occasion; compare the citations *ante*, § 93); *Vt.* 1900, Clark *v.* Smith, 72 Vt. 138, 47 Atl. 391 (injury by negligent jerking of the car; that "the train was jerked violently at other stations", excluded.

Compare the citations *ante*, § 199.

§ 377. **Same: in Contracts (Sale, Lease, Loan, Agency, Hiring, etc).** It has already been pointed out (*ante*, § 372) that it is often difficult to say whether the idea of Habit or that of Plan or System is the more appropriate in evidencing a course of conduct in making contracts. This, however, is after all chiefly a question of words, for the underlying notion and the applicable principle are the same in each case. That principle is (*ante*, §§ 32, 33) (*a*) that the instances must be numerous enough, and (*b*) that they must have occurred under conditions so similar as to indicate a system, plan, or habit of doing that particular thing under similar circumstances. This principle has, however, found slow acceptance in application. The reason seems to have been chiefly a notion that because such evidence would in some cases clearly be improper (even under the above principle), therefore it must be in all cases improper, — an over-cautious attitude founded on a fallacy. Many precedents, however, do distinctly recognize the principle. It is impossible to reconcile all the conflicting precedents; but it is possible to explain most of them. The solution of any given case can easily be reached if it is remembered that no technical rule or general policy obstructs such evidence; that the only question can be whether the instances produced do have any real probative value to show a system or plan or habit; that in commercial affairs it is sometimes very unlikely, and sometimes very likely, that a particular contract or term of a contract will be habitually made; and that it is frequently possible to differ in opinion over the solution in a given case, while there may be no difference of opinions as to the principle applicable. The cases may be grouped under three heads: (1) the Authorization of an Agent; (2) the Making of some Other Contract, evidenced (*a*) by other contracts with the *same person*, (*b*) by other contracts with *other persons*.

(1) *Authorization of an agent.* Here the use of such evidence has always been sanctioned. Where a general authority to do an act is alleged, and the plaintiff relies on the defendant's having held out the third person as his agent, other instances of the plaintiff's having treated the person as agent for such an act are receivable to show a general holding-out of that person as agent.[1] This principle applies as well to a criminal agency as to a civil

§ 377. [1] *England:* 1794, Gibson *v.* Hunter, 2 H. Bl. 288 (H. drew a bill on G., payable to F., a fictitious person, or order, and indorsed it in F.'s name; the plaintiff, a 'bona fide' holder for value, in order to show in H. a general authority from G. to draw such bills, offered the fact of many other bills of the sort being drawn and accepted by H. with apparent consent of H.; the objection raised conceded that "a general authority to do such acts . . . can only be inferred by showing an acquiescence of the person supposed to have given such authority in other acts done with his privity or consent", and rested on the failure to show such actual privity to the former drawings; the evidence was held admissible, the grounds not appearing); 1800, Barber *v.* Gingell, 3 Esp. 61, Kenyon, L. C. J. (to show that the defendant had given authority to T. to accept the bill for him, the drawee, the fact was received of the defendant's having paid several bills drawn like the present by T., a general authority being thus inferable); 1830, Cash *v.* Taylor, Ll. & W. C. C. 178, K. B. (similar facts); 1845, Llewellyn *v.* Winkworth, 13 M. & W. 599 (authorizing the acceptance of another bill is evidence of a general authority to accept bills and therefore to accept the bill in question); 1869, Morris *v.* Bethell, L. R. 4 C. P. 765 (the fact of a single such former payment as in

agency;[2] for though the facts making a person liable criminally for an agent's act may be different from those involving civil liability, the mode of evidencing a general authority is the same for both.[3]

(2) (*a*) *Contract* evidenced by *other contracts with the same person.* Here the making of other contracts with the same person should be received to show either the making in general or the specific terms of the contract in question, provided the other instances were so connected as to indicate a general plan or habit of which they were merely parts:[4]

Barber *v.* Gingell was held not improperly rejected, no general authority being set up).

United States: 1899, Lytle *v.* Bank, 121 Ala. 215, 26 So. 6 (the giving of other notes by an alleged agent, and their ratification, admitted); 1885, Sun Mut. Ins. Co. *v.* Barrel Co., 114 Ill. 99, 29 N. E. 477 (previous relations of a broker and an insurance company, admitted to show that the former was authorized to receive the plaintiff's premium); 1908, Hawkins *v.* Windhorst, 77 Kan. 674, 96 Pac. 48 (wife's authority to husband to sign checks; former instances admitted); 1854, Lee *v.* Tinges, 7 Md. 215, 235, 237 (to show ratification of certain settlements by an employer, the ratification of other such settlements by him during the same week was excluded, because made "under circumstances very different from those existing at the time of the occurrence of the principal matter"); 1851, Trull *v.* True, 33 Me. 367 (whether H. had given S. the authority to sign a note; their business relations admitted); 1917, Brownell *v.* Moorehead, — Okl. —, 165 Pac. 408 (injury to a passenger in a vehicle driven by A.; to show A. to be agent of the defendant J., former course of action by A. for J. was admitted); 1824, Irvine *v.* Buckloe, 13 S. & R. Pa. 35 (agency one or two years later, admitted); 1862, Stevenson *v.* Hoy, 43 Pa. 191, 196 (authority to give a written guaranty; similar guaranties by the same person previously recognized by the defendant, admissible); 1910, Valiquette *v.* Clark B. C. M. Co., 83 Vt. 538, 77 Atl. 869 (authority to draw a draft; the acceptance of three prior drafts, admitted).

Contra: 1905, Patterson *v.* First N. Bank, 73 Nebr. 384, 102 N. W. 765 (certificate of deposit signed by the president of a bank; prior instance of the bank's honoring such a document, excluded, partly because too remote, but partly on the erroneous theory that such evidence must involve an issue of fraud).

[2] *Accord:* 1909, People *v.* Zito, 237 Ill. 434, 86 N. E. 1041 (sales of cocaine; the clerk's authority being in issue, sales before and after the one charged were admitted).

Contra: 1896, People *v.* McLaughlin, 150 N. Y. 365, 44 N. E. 1017 (the fact of B. having acted as agent for the defendant in other cases of corrupt official conduct, not admitted to show that B., the actor in the present misconduct, was the defendant's agent then: "It is true that in civil actions upon contract the course of dealing between parties may be proved to establish a general agency, but that principle has no place in criminal jurisprudence").

[3] Cases cited *ante*, § 4, especially Lord Melville's Trial.

[4] ENGLAND: 1844, Bourne *v.* Gatliff, 11 Cl. & F. 45, 49, 70 (the defendant, a sea-carrier, claimed the right to deliver goods immediately on the wharf without further responsibility; the fact was received, from the consignor, of former bills of freight and of lading, and of the mode of other deliveries, in consignments between the same parties between the same countries; L. C. Lyndhurst: "That evidence was offered . . . to explain the meaning of the contract by showing what had been the meaning of the parties. It is said that the evidence offered was that of instances of individual contracts. Be it so; that does not render the evidence the less admissible; it may be open to observation on that ground, but it is not inadmissible").

CANADA: 1895, Bank of Nova Scotia *v.* Robinson, 33 N. Br. 326, 334 (false representations as to negotiable paper; certain similar prior transactions between the parties, admitted, but on varying grounds).

UNITED STATES: *Federal:* 1892, Holmes *v.* Goldsmith, 147 U. S. 150, 162, 13 Sup. 288 (whether the payee of a note was in fact an accommodation maker; the "relations", not specified, between the defendant and the payee, admitted); *California:* 1903, Zane *v.* Onativia, 139 Cal. 328, 73 Pac. 856 (whether a sum advanced by plaintiff was a loan to defendant or a deposit for plaintiff's expenses to be paid by defendant; the parties' prior relations as friends, admitted to show the probable intent); *Illinois:* 1897, Gardner *v.* Meeker, 169 Ill. 40, 48 N. E. 307 (whether a note was given for a gaming transaction; the prior and subsequent dealings of the parties, admissible, for a time within the trial Court's discretion); *Iowa:* 1899, Mabry *v.* Cheadle, — Ia. —, 80 N. W. 312 (action for attorney's services; on a plea denying a contract, a prior employment "as leading up to the second employment", allowed to be shown); 1903, Livingston *v.* Stevens, — Ia. —, 94 N. W. 925 (previous dealings between the parties showing a "system of dealings" in waiving a

1878, PETERS, J., in *Eaton* v. *Telegraph Co.*, 68 Me. 63, 67 (whether A had sold to B, or was merely holding for B, certain certificates of stock in the former's possession; the certificates were in A's name and bore assignments to B; the fact of A's possession as custodian of other certificates of the same stock made out in B's name was received): "The difficulty is to decide what is and what is not relevant evidence. The best authorities clearly sustain the doctrine that 'the fact of a person having once or many times in his life done a particular act in a particular way does not prove that he has done the same thing in the same way upon another and different occasion.' It is sometimes permissible to show, however, what men generally have done under certain circumstances and conditions, as showing how a particular man might act under the same surroundings. . . . Here the dealing inquired about was between the same persons at the same time and related to the same kind of property. The reason of the rule which excludes irrelevant testimony admits such as this."

(2) (*b*) *Contract* evidenced by *other contracts with other persons*. Here, obviously, though the principle remains the same, the other instances must be more marked in their similarity in order to be admissible to evidence a general plan or habit, because the element of a different personality is so important in affecting the making or the terms of a contract that the likelihood of making a similar contract with different persons is relatively much smaller.

mortgage lien, admitted); *Maine:* 1890, Nickerson *v.* Gould, 82 Me. 512, 20 Atl. 86 (whether a note was a forgery; other pecuniary transactions between the parties, admitted); 1898, Wood *v.* Finson, 91 Me. 280, 39 Atl. 1007 (whether the contract for sale of oil to the defendant by a salesman E. involved also an agreement to insure the oil; terms of former similar sales between the same parties, through a salesman C., admitted to show the "probability or improbability of the contract being as claimed by the plaintiff"); *Massachusetts:* 1837, Tibbetts *v.* Sumner, 19 Pick. 166 (prior and usual course of dealings between the parties, admitted to show whether a particular sale was upon credit); 1859, Farnum *v.* Farnum, 13 Gray 508 (several prior dealings of lease and loan between the parties, rejected on the facts); 1875, Huntsman *v.* Nichols, 116 Mass. 521 (promissory note, made by F., alleged to have been indorsed by the defendant, who denied the indorsement; to show the likelihood of the indorsement, F. testified to several such transactions and indorsements about the same time); 1905, Galbin *v.* Beals, 187 Mass. 250, 72 N. E. 969 ("The fact that a landlord makes other repairs is not evidence that he agreed to keep the premises in repair"); *Minnesota:* 1875, Schwerin *v.* De Graff, 21 Minn. 354 (excavation-contract; the amount excavated in December, under similar conditions as to number of men, etc., admitted to show the probable amount in January and February); *Missouri:* 1876, Iron Mountain Bank *v.* Murdock, 62 Mo. 70, 74 (whether a bookkeeper had inserted an interest-clause in a promissory note without authority after indorsement; the fact that the maker had indorsed four other notes with a clause of that tenor, excluded as irrelevant); *Nebraska:* 1909, Fitch *v.* Martin, 84 Nebr. 745, 122 N. W. 50 (services rendered as attorney; "continued professional services" admitted of discretion to evidence "an annual renewal in the contract"); *New Hampshire:* 1851, Swamscot M. Co. *v.* Walker, 22 N. H. 457, 467 (whether the plaintiff's contract was made with the defendant or with W. and F.; the fact that the plaintiff had formerly refused to trust W. and T. for other articles, not admitted to show that they had not here contracted with W. & T.); *North Dakota:* 1905, Waldner *v.* Bowdoin S. Bank, 13 N. D. 604, 102 N. W. 169 (usury; habit of the defendant to charge usurious interest; not decided); *Vermont:* 1896, Welch *v.* Ricker, 69 Vt. 239, 39 Atl. 200 (to show no agreement to pay for goods furnished to I., the fact that the defendant had paid for goods thus furnished on another such agreement was excluded, as not relevant); 1898, Limerick Nat'l Bank *v.* Adams, 70 Vt. 132, 40 Atl. 166 (plaintiff claimed as 'bona fide' purchaser of notes; other purchases of similar notes from the same person, not received to show a 'bona fide' purchase in this instance); *Wisconsin:* 1899, Koehler *v.* Koehler, 104 Wis. 260, 80 N. W. 449 (alleged contract with a daughter for services; the fact of a similar contract three years before, excluded).

Compare the citations *ante*, § 94 (habit of dealing, in sales and agencies), and *post*, § 462 (business patronage, to evidence quality of a chattel, etc.).

Distinguish the use of other transactions of the parties to *interpret the meaning* of a contract whose words are not disputed (*post*, § 2465).

It thus happens that the Courts are generally inclined to exclude such evidence, and, in the majority of instances, properly. In the much cited English case of Hollingham *v.* Head, there has sometimes been discovered an intimation that such evidence as a class is inadmissible; but the later ruling of Woodward *v.* Buchanan, and numerous American rulings, show that this is an error. There is merely a question in each instance of the probative value of the particular facts offered:[5]

[6] ENGLAND: 1792, Carter *v.* Pryke, Peake 95 (whether rent was payable quarterly or half-yearly; that the plaintiff's other tenants of the same description paid quarterly, excluded); 1806, Spencelcy *v.* Wilmot, 7 East 108 ('Qui tam' for usury; the fact that the borrower, alleging usury, had on the same and other days received sums for investment as agent, and not as loans, from third persons who belonged to the same circle of intimates as the borrower and the defendant, was rejected; since "whatever contracts the witness might have entered into with other persons for other loans, they could not be evidence of the contract made with the defendant, unless the witness had first said that he had made the same contract with the defendant as he had made with those persons; which he had not said"); 1833, Smith *v.* Wilkins, 6 C. & P. 180, Tindal, C. J. (assumpsit for goods sold to a wife; defence, that the credit was given to the defendant's father-in-law; the fact that other tradesmen had given her father credit when she bought, rejected); 1836, Borden *v.* Keverberg, 2 M. & W. 61 (the defendant having pleaded, in assumpsit, that credit had been given to her husband, the plaintiff, after proving her husband to be an absent alien, offered the facts that in her dealings with other tradesmen she had not disclosed her marriage, in order to prove that she had in the contracts with him presented herself as a 'feme sole'; the evidence was rejected, because her failure to disclose was not equivalent to an affirmative representation); 1870, Woodward *v.* Buchanan, L. R. 5 Q. B. 285 (action for plumbing work and materials on a house, the defendant being mortgagee, and the issue of fact being whether he or a contractor had hired the plaintiff; the fact was received that in building the same house and at the same time others of the contracts had been made by the defendant, as showing that he was systematically taking the responsibility; Mellor, J.: "Had the evidence applied to other houses, the authorities might be in point against the admissibility of the evidence").

UNITED STATES: *Federal:* 1899, Cravens *v.* Carter-Crume Co., 34 C. C. A. 479, 92 Fed. 479 (plaintiff agreed to sell his factory products to defendant only, and to close his factory, in consideration of certain shares in the defendant company and a guaranteed dividend; in an action to obtain the dividend, the defence being that the contract was unlawful as having for its object the restraint of trade, similar contracts of other manufacturers with the defendant were admitted); 1912, Chesterfield Mfg. Co. *v.* Leota Cotton Mills, C. C. A., 194 Fed. 358 (whether the plaintiff's cotton had been properly dyed by the defendant; to show that the trouble was due to the poor quality of cotton and not to the defendant's process, the defendant's evidence that three other mills' cotton had been properly dyed during the same period was excluded; erroneous);
Illinois: 1873, Stolp *v.* Blair, 68 Ill. 541 (assumpsit for $500 loaned for six months, without a note; the fact that the plaintiff had formerly loaned various persons such sums without notes, admitted as rebutting the inference that might be drawn from the failure to take a note);
Indiana: 1892, Schmidt *v.* Packard, 132 Ind. 398, 402, 31 N. E. 944 (indorsement of a note as transferring ownership; similar indorsements by him on the same day, held admissible to negative intent to transfer);
Kansas: 1893, Roberts *v.* Dixon, 50 Kan. 436, 31 Pac. 1083 (money loaned on cattle-investments; the terms of defendant's contracts with other investors in the same business, held not admissible to show the terms of plaintiff's investment);
Kentucky: 1898, Lexington & E. R. Co. *v.* Lyons, 104 Ky. 23, 46 S. W. 209 (whether representations as to a ticket were made; similar representations to another person about similar tickets, admitted);
Maine: 1909, Provencher *v.* Moore, 105 Me. 87, 72 Atl. 880 (horse-boarding; terms of plaintiff's offer to another person, excluded);
Maryland: 1903, Gill *v.* Staylor, 97 Md. 665, 55 Atl. 398 (wages of another hand in the same employ, not admitted to show the terms of the plaintiff's contract);
Massachusetts: 1906, Taylor *v.* Schofield, 191 Mass. 1, 77 N. E. 652 (commission on a patent-sale to C.; defendant's former agreement with P. for a sale, not admitted to show the terms of the present one or the reason for breaking it); 1917, Adams *v.* Dick, 226 Mass. 46, 115 N. E. 227 (action for repayment of moneys paid on account of fictitious stock transactions; that the defendant "had never carried on fictitious transactions" etc., held not improperly excluded; erroneous);

1858, WILLES, J., in *Hollingham* v. *Head*, 4 C. B. N. S. 388 (to show a warranty, by a travelling agent of a manure-company, that the guano should be equal to Peruvian guano, evidence that other contracts of his contained such a guaranty was rejected): "I am of

Michigan: 1893, Davis *v.* Kneale, 97 Mich. 72, 76, 56 N. W. 220 (whether a contract by a subscriber to a factory was made conditionally by C.; the terms of the contract with another subscriber, excluded);
Minnesota: 1880, Roles *v.* Mintzer, 27 Minn. 31, 6 N. W. 378 (to prove that the plaintiff's wages were agreed to be his board only, and not $20 and board and washing, the defendant offered to show that about the same time the plaintiff offered to work for W. for board only; excluded, because "there is no presumption that a person will work for one man on certain terms from the fact that he is willing to work for some other man on those terms"); 1897, Murphy *v.* Backer, 67 Minn. 510, 70 N. W. 799 (defence of usury; question to the plaintiff whether he "had not made certain other usurious loans to other persons at other times," allowed in discretion);
New Hampshire: 1853, True *v.* Sanborn, 27 N. H. 383 (selling diseased beef; a sale of unwholesome beef by the defendant several years before, excluded, as not having such an intimate connection . . . as to lead naturally to the conclusion" alleged;
New York: 1827, Jackson *v.* Smith, 7 Cow. 717 (loans of money on land at an alleged usurious rate, the bond being dated Dec. 22; another usurious bond dated Dec. 21 was offered, and also the fact of two other persons who on applying for loans had been offered the same usurious terms; treated as showing "that N. was in the habit of loaning money at usurious interest", but excluded because it involved "his general character or habit as a usurer"; this is unsound; compare § 216, *ante*); 1893, McLoghlin *v.* Bank, 139 N. Y. 514, 522, 34 N. E. 1095 (whether a deposit bore interest; that the depositor had interest-bearing deposits at other banks, excluded); 1900, Lowenstein *v.* Lombard, 164 N. Y. 324, 58 N. E. 44 (to show the terms of a contract for carriage by sea, the fact was admitted of contracts by the same agent of the defendant with other parties about the same time, "for the purpose of defining the contract that was actually made"); 1912, Mance *v.* Hossington, 205 N. Y. 33, 98 N. E. 203 (action for services; cross-examination of the defendant about other suits brought against him by his employees for services, held improper);
North Carolina: 1902, Thompson *v.* Exum, 131 N. C. 111, 42 S. E. 543 (rent-contract of one tenant, not admitted to show the terms of another's);
Pennsylvania: 1876, Coxe *v.* Deringer, 82 Pa. 236, 258 (payment of taxes in 1832–33; the fact received of the owner's continuous payments on all five tracts in January of biennial periods from 1826 to 1844, then 1849 to 1868; "it was a very natural conclusion that a man who always paid his taxes promptly in biennial periods previous to the time of the sale [1834] would have paid them in time in 1832 and 1833");
Porto Rico: 1910, Belber *v.* Calvo, 16 P. R. 343 (services; contract with another for services, admitted on the facts);
Vermont: 1858, Phelps *v.* Conant, 30 Vt. 277, 282 (action on a promise to pay for goods furnished to W.; the fact that the defendant promised to pay another person for other goods furnished to W. was rejected; "nor is there any legal probability that he would pay one because he agreed to pay the other; . . . to have one fact prove another, there must be a necessary or probable connection between the two"); 1886, Aiken *v.* Kennison, 58 Vt. 665, 5 Atl. 757 (trover; defence, a contract of purchase different from that asserted by the plaintiff; the question whether the plaintiff had had "other transactions of a similar nature with other people dealing with him" was excluded, since the fact would not amount to "any such course of office or business as would suffice"); 1896, Jones *v.* Ellis, 68 Vt. 544, 35 Atl. 488 (to show that stock sold had been warranted, the fact of a warranty in sales of the same stock to another person was not admitted); 1897, Pictorial League *v.* Nelson, 69 Vt. 162, 37 Atl. 247 (representations to other persons in the same city in making similar contracts, excluded);
Virginia: 1901, Repass *v.* Richmond, 99 Va. 508, 39 S. E. 160 (action on a deputy-treasurer's bond; mode of execution of the other deputies' bonds, not admitted);
West Virginia: 1893, Hartman *v.* Evans, 38 W. Va. 669, 673, 18 S. E. 810 (usury; that loans to others by the same person were usurious, excluded);
Wisconsin: 1884, Kelley *v.* Schupp, 60 Wis. 76, 18 N. W. 725 (services in cutting logs, etc.; the defendant's promise to pay "one similarly situated", not admitted to show a promise to the plaintiff); 1893, Brunnell *v.* H. S. M. Co., 86 Wis. 587, 57 N. W. 364 (trimmer hired a saw-mill; the contracts of service of other trimmers as to a drawback, excluded); 1897, Oliver *v.* Morawetz, 95 Wis. 1, 69 N. W. 977 (to show the price at which a real-estate agent was authorized to sell, the fact of the price so authorized for another agent for the same piece at the same time was not admitted); 1901, Coman *v.* Wunderlich, 122 Wis. 138, 99 N. W. 612 (goods not equal to sample; similar insufficiency of similar goods sold to another person on the same day, excluded); 1904, Sullivan *v.* Manston M. Co., 123 Wis. 360, 101 N. W. 679, *semble* (whether grain was bailed or sold; usage admitted).

opinion that the evidence was properly disallowed as not being relevant to the issue. It is not easy in all cases to draw the line and to define with accuracy where probability ceases and speculation begins; but we are bound to lay down the rule to the best of our ability. . . . Now it appears to me that the evidence proposed to be given in this case, if admitted, would not have shown that it was more probable that the contract was subject to the condition insisted upon by the defendant. The question may be put thus: Does the fact of a person having once or many times in his life done a particular act in a particular way make it more probable that he has done the same thing in the same way upon another and different occasion? To admit such speculative evidence would I think be fraught with great danger. . . . If such evidence were held admissible it would be difficult to say that the defendant might not, in any case where the question was whether or not there had been a sale of goods on credit, call witnesses to prove that the plaintiff had dealt with other persons upon a certain credit; or in an action for an assault, that the plaintiff might not give evidence of former assaults committed by the defendant upon other persons, or upon other persons of a particular class, for the purpose of showing that he was a quarrelsome individual and therefore that it was highly probable that the particular charge of assault was well-founded. The extent to which this sort of thing might be carried is inconceivable."

In all of the foregoing uses, the precise purpose of the offer is important; for the same evidential fact may be affected by other rules, elsewhere dealt with; in particular (*ante*, § 94) concerning *habit* as evidence; (*ante*, §§ 300–370) concerning former instances of forgery, false representations, and the like, to evidence *intent* or *design;* and (*post*, § 379) concerning evidence of trade, *custom* or usage; also the rule for *market-value*, as evidencing the probable price *of a sale* (*post*, § 392), and for *business patronage* as evidence of another article's quality (*post*, § 462).

§ 378. **Same: in Prescriptive Possession; Surveys and Boundaries evidenced by other Lines.** A mode of argument which seems to belong here is that by which *possession of a whole tract of land* is sought to be inferred from specific instances of *possession of parts* of it. The inference seems to be genuinely one of the present sort, rather than one of mere prior or subsequent possession as a condition or state (*post*, § 382), because it involves the thought that the separate instances of conduct in relation to the land indicate a larger and habitual course of conduct. The conditions of admissibility are that the various acts should be so connected with each other, as to the topography of the place where they are done, that they suggest a system or course of conduct with reference to other parts of the adjacent land; *i.e.* that the various places where the acts are shown should be parts of one estate, manor, way, range, section, survey, or other entity, so that acts done upon these would naturally be done only as a part of a system to do them upon the other parts of the same entity. The doctrine has been fully developed in England:[1]

§ 378. [1] *England:* 1811, Stanley *v.* White (quoted *supra*); 1813, Barnes *v.* Mawson, 1 M. & S. 85 (Ellenborough, L. C. J.: "In the case of an encroachment on a waste, it might not be proved that any acts of ownership had been exercised by the lord upon the very spot; but showing acts of ownership upon other parts within the general ambit of the waste has always been deemed sufficient"); 1831, Doe *v.* Kemp, 7 Bing. 332 (issue as to the title to a slip of waste alongside a road; evidence offered for the defendant, as lord of the manor, of acts of ownership upon similar slips further along for several hundred yards, to a bridge,

1811, Ellenborough, L. C. J., in *Stanley* v. *White*, 14 East 332 (trespass for cutting trees; the title being in dispute, after evidence had been offered that the plaintiff's manor was surrounded on all sides by a belt of land extending fifteen feet beyond a circular hedge, the fact was offered by him of acts of ownership — involving prescriptive title — at parts of this belt other than that where the cutting had occurred; objection, that there was no connection proved between the titles of the several owners around the belt, without which no inference could be drawn in prejudice of one from acts of ownership exercised by the Stanley family against others): "The same law may be shown by general evidence to govern one entire district, though it may affect the rights of different persons in different parts. It is then one entire thing, 'quoad' that district; as in the case of the Border-law. In this case the eye may see that there is one continuity of belt; and the witnesses' proving that the Stanley family have asserted the same right from time to time against different owners in different parts of the belt is evidence of their general right."

1837, Parke, B., in *Jones* v. *Williams*, 2 M. & W. 326 (issue between opposite owners as to the title to the bed of a stream, whether the plaintiff owned the whole or only up to the middle; the fact was received that, further down, where the plaintiff's riparian estate was opposite X's land, the former was owner of the whole bed and had done acts of repairing, by taking stones and the like): "[Acts of enjoyment, when used to prove extended possession, need not be precisely on the same spot,] provided there is such a common character of locality between those parts and the spot in question as would raise a reasonable inference in the minds of the jury that the place in dispute belonged to the plaintiff if the other parts did"; so that the plaintiff was "entitled to show the taking of stones not only at the spot in question but all along the bed of the river."

Where the possession of the part is under a *deed* which covers a larger tract, the principle is the same,[2] but here the inference is stronger, because the

and again beyond it to a common; rejected, as to parts beyond the bridge, since the defendant, though owning enclosed lands adjacent to the slips of waste up to the bridge, owned none beyond it; Bosanquet, J.: "Where evidence is offered of acts done in other places than the place in dispute, it is for the judge to decide, in the first instance, whether there is such a unity of character in the different parts as to render evidence affecting a part not in dispute admissible with reference to the part in dispute"); 1837, Jones v. Williams (quoted *supra*); 1844, Doe v. Roberts, 13 M. & W. 520, 530 (Parke, B.: "How can you show a title to the whole estate except by acts of ownership in different parts?" Counsel: "That would be only where there is some evidence of a general right." Parke, B.: "There is such evidence here"); 1878, Lord Blackburn, in Bristow v. Cormican, L. R. 3 App. Cas. 641, 670 ("Acts of ownership on parts of a tract are evidence to prove ownership in the whole [quoting Parke, B., in Jones v. Williams]. This, which I think is the right rule, makes the weight of the evidence depend on the nature of the locality and of the acts, and on what it is reasonable for a jury to infer"); 1882, Neill v. Devonshire, L. R. 8 App. Cas. 135, 151, 166 (acts of fishery in several other parts of a river, admitted, there being evidence that the whole region was treated "as 'unum quid'").

United States: 1902, South v. Deaton, 113 Ky. 312, 68 S. W. 137 (possession of part of a tract, treated as evidence of possession of the whole); 1847, Bogardus v. Trinity Church, 4 Sandf. Ch. N. Y. 633, 746 (a series of acts of possession over a large district were apparently used on the present principle); 1867, Abel v. Van Gelder, 36 N. Y. 513, 515 ("The defendants offered to show that for a great number of years they had cut wood and timber yearly on the premises adjoining the 'locus in quo' and up to and along the line thereof, for the use of their adjoining premises. . . Where the 'locus in quo' and the territory on which the acts indicating ownership were done are similarly situated as regards inclosures and other circumstances, such acts may be proved with a view to show occupation of the land in dispute and an intention to maintain and assert their right of ownership").

The principle is equally applicable to the possession of *personalty:* 1827, Moon v. Hawks, 2 Aik. 390 (issue as to the title to a mare possessed by R., and claimed by him to be a gift from the plaintiff; R.'s possession and claim being 'prima facie' sufficient to show title, his possession and claim of another mare, delivered to him at the same time by the plaintiff in payment of a legacy, were admitted; "any act of ownership over either . . . would be evidence as it respects the other").

[2] *E.g.* 1884, Lancy v. Brock, 110 Ill. 609, 612.

But this use is seldom judicially distin-

deed, by marking the singleness of the entire tract, supplies the place of other evidence of unity of character.

The same principle seems to operate where, from the condition or bearing of a *boundary* or *survey* at one point, its condition or bearing at another point may be inferred, provided there is a unity between the two in the sense that the former is a part of the same general line or system of lines (township, range, section, or the like) as the latter is.[3]

§ 379. **Custom or Usage, in Trade and Commerce.** In evidencing a custom or usage (*i.e.* the habit of a body of persons) by specific instances, the same general principle as before is applicable; that is, the instances offered (*a*) should be sufficiently numerous to indicate a fairly regular course of business, and (*b*) should occur under conditions substantially similar to that in question.

(*a*) Under the first head, no difficulty seems to arise; the discretion of the trial Court should control.[1]

(*b*) Under the second head, it is obvious that there must be such a similarity or unity of conditions that what is done by one or more persons or sets of persons may be taken as indicating the probable general habit of the class of persons under similar circumstances. Here there is much opportunity for difference of opinion in given cases. The precedents illustrate all sorts of trades and usages, and no detailed generalization seems feasible.[2] It is

guished from the rule of substantive law by which possession of a part, under a deed, is deemed legally *equivalent* to possession of the whole, *i.e.* a constructive possession; 1866, Bowman *v.* Wettig, 39 Ill. 416, 426 (possession of part under a deed to the whole is possession of the whole, and thus 'prima facie' evidence of title to the whole, as against a mere trespasser showing no paper title); 1907, Godfrey *v.* Dixon P. & L. Co., 228 Ill. 487, 81 N. E. 1089. Here the deed is used, as a *verbal act*, to color the possession, under the principle of § 1778, *post;* see Sedgwick and Wait, Trial of Title to Land, §§ 761–781.

[3] 1898, Olsen *v.* Rogers, 120 Cal. 225, 52 Pac. 486 (boundary line making uniform subdivisions; survey of one lot received to indicate the lines of an adjacent one); 1893, Goldsborough *v.* Pidduck, 87 Ia. 599, 601, 54 N. W. 431 (adjacent lines, etc., used to determine lines of connected blocks); 1844, Overton's Heirs *v.* Davisson, 1 Gratt. Va. 211, 227 (the description of another survey of a coterminous tract, admissible to show the boundary); 1856, Clements *v.* Kyles, 13 Gratt. Va. 468, 479 (same); 1895, Reusens *v.* Lawson, 91 Va. 226, 21 S. E. 347 (same).

§ 379. [1] Of course individual instances, offered one at a time, are receivable; the practical question is commonly whether enough have been offered to suffice to go to the jury (*post*, § 2494). But even a single one may suffice for this purpose: 1770, Doe *v.* Mason, 3 Wils. 63 (custom of descent); 1813, Roe *v.* Jeffrey, 2 M. & S. 92 (custom to bar entails; Ellenborough, L. C. J.: "It is true that one act undisturbed does not make a custom; but it will be evidence of a custom"). There was an old French law maxim, 'une fois n'est pas coutume' (Glasson, Hist. du droit, etc. de la Fr., vi, 546).

For the different question whether *one witness' testimony* may suffice to establish a custom, see *post*, § 2053.

[2] ENGLAND: 1842, Milward *v.* Hibbert, 3 Q. B. 120, 139 (to prove a custom of London as to the stowage of goods in regard to general average, a similar custom in other English ports was received); 1863, Falkner *v.* Earle, 3 B. & S. 360 (to prove a custom of trade between Liverpool and California, after incorporation with the United States, as to discounts on freight, a similar custom as to trade with Texas after incorporation and as to other ports of British North America, etc., was received); 1866, Place *v.* Allcock, 4 F. & F. 1074 (usage as to a bleaching-lien in Nottingham; usage at Loughborough admitted, by reason of "the vicinity of the places and the interchange of trade"); 1871, Fleet *v.* Marton, L. R. 7 Q. B. 126, 130, 134, 41 L. J. Q. B. N. S. 49 (action for the price of fruit on a sold-note signed by the brokers only, the dispute being whether in that trade brokers were liable on such notes for the default of principals; the custom of the trade being held to be involved in the

enough to point out (1) that no particular circumstance is conclusive either *pro* or *con;* (2) that instances from another trade or another region are not necessarily without probative value, while instances from the same trade and the same locality are not necessarily admissible; and (3) that the question is not whether the offered instances fully prove the custom alleged, but merely whether they are receivable as having probative value:

contract, evidence was received, with some hesitation, of the custom on the point in the colonial market; Blackburn, J.: "It seemed to be conceded at the trial that the two trades were so far allied to each other that the same usages would be likely to prevail in both, and I thought that upon the question of the liability of a broker, evidence of his liability in a similar trade might be received").

UNITED STATES: *Federal:* 1870, Insurance Co. *v.* Weide, 11 Wall. 438 (to show that the value of the stock of goods burned could not have reached the amount claimed, viz. half the value of the annual sales, the fact was received from the defendant that persons in the same city and in the same business had on hand a stock only one fifth the amount of their annual sales; Davis, J.: "It would establish a fact connected with this kind of business, to wit, the uniform relation between the stock on hand and the annual sales"; adding, "it is true there are no reported cases on the subject"); 1894, Keystone Mfg. Co. *v.* Adams, 151 U. S. 139, 148, 14 Sup. 295 (profits of infringement; the profits made by other users of a patent, excluded); *Alabama:* 1863, Barnes *v.* Ingalls, 39 Ala. 201 (because "there are so many points in common between such an establishment [ambrotype and photograph gallery] and those in which the ordinary mechanic arts are pursued", a custom as to working hours in the latter was admitted to show the same in the former); *Colorado:* 1874, Sullivan *v.* Hense, 2 Colo. 424, 433 (number of feet in a mining claim; length of other claims in the district controlled by similar customs, admitted); 1878, Denver & R. G. R. Co. *v.* Glasscott, 4 Colo. 270 (action to recover the salary of a railroad-conductor; set-off for money collected on the trains from passengers without tickets and never delivered over; the fact that on trains making the same number of trips with substantially the same number of cars at the same rates of fare over the same route the receipts of the sort by another conductor had been much higher, was rejected; because, whether or not the habit of passengers in entering trains in forgetfulness of the prior purchase of tickets was subject to unvarying principles, yet the conditions were too complicated for investigation; this is unsound); *Illinois:* 1855, Caldwell's Trial, 1 Am. St. Tr. 614, 622, 634 (embezzlement as a railroad conductor; the average receipts of other conductors on the same run, admitted); *Kansas:* 1882, Sexton *v.* Lamb, 27 Kan. 429 (the fact admitted of the average waste of ice in handling, to show an original stock of ice as calculated from the part sold); *Massachusetts:* 1896, Todd *v.* Keene, 167 Mass. 157, 45 N. E. 81 (damages from failing to perform a contract to give a theatrical performance of a Shakespearean tragedy, in the profits of which the plaintiff was to share; the cash receipts of similar plays at the same theatre in the same town under the same auspices, rejected, because "there are too many elements of uncertainty and conjecture to make it safe to rely upon" such evidence; unsound); *Michigan:* 1877, Reynolds *v.* Ins. Co., 36 Mich. 131, 142 (to show the extent of the authority of an agent of an insurance company, the extent of authority given by other insurance companies on the same point, was excluded); *Minnesota:* 1861, Walker *v.* Barron, 6 Minn. 508 (a custom elsewhere as to a discount in boarding stage-employees, excluded, because not defined as to place or time); *New Jersey:* 1872, Jones *v.* Ins. Co., 36 N. J. L. 29, 43 (like Ins. Co. *v.* Weide, *infra;* excluded, because the circumstances were not similar); *New York:* 1834, Phœnix Ins. Co. *v.* Philip, 13 Wend. 81 (to show that the plaintiff's stock probably did not amount to the value claimed, the value of the largest stock in that business in the city was offered; excluded, as being a mere surmise; unsound); 1847, Howard *v.* Ins. Co., 4 Den. 507 (similar evidence was rejected on the principle of excluding opinions); *Texas:* 1895, Weatherford M. W. & N. R. Co. *v.* Duncan, 88 Tex. 611, 32 S. W. 878 (here the manner, not the fact, of the act was in issue, and hence the custom of railroads elsewhere was immaterial); *Utah:* 1897, Anderson *v.* Mining Co., 16 Utah 28, 50 Pac. 815 (to show the practice of employees in a certain mine, the general custom among miners of the camp under similar circumstances was admitted); *Vermont:* 1868, Hine *v.* Pomeroy, 30 Vt. 103, 104, 106 (whether an attorney had directed a process-server to take receiptors; the practice of other attorneys in the same city, excluded, because "there was no such relation of lawyers to each other, in respect to habits and modes and practice, in the details of professional service in matters of this kind, as to make what is true of some the ground of inference as to what is true of another").

1780, *Noble* v. *Kennoway*, 2 Doug. 510, the plaintiff's vessel, bound to Labrador, delayed landing her cargo and was captured; to show that the delay was reasonable and customary, and thus could not forfeit the insurance, the custom was offered in the Newfoundland trade to keep their goods on board several months; it was objected that "Newfoundland and Labrador are distant and discontiguous, and although the object of the voyages to both may be the fishery, yet the fishing trade is conducted very differently at different places; would the practice at Greenland, Nova Zembla, on the coast of Scotland, or in the new whale fishery in the Mediterranean, be evidence in this case?" Lord MANSFIELD, C. J.: "The trade of fishing on the coast of Newfoundland, especially from the west of England, has been known and practiced for many years. Since the treaty of Paris, a new trade has been opened to Labrador. . . . It is well known that the fishery is the object of the voyage, and the same sort of fishing is carried on in the same way at Newfoundland. I still think the evidence was properly admitted to show the nature of the trade." BULLER, J.: "If it can be shown that the time [of delay] would have been reasonable in one place, that is a degree of evidence to prove that it was so in another; the effect of such evidence may be taken off by proof of a difference of circumstances."

1867, PIGOT, C. B., in *M'Fadden* v. *Murdock*, 1 Ir. C. L. 218 (the question being as to proof from other trades of the fact and amount of loss in handling particular goods by retail): "It was argued that Mr. C. ought not to have been allowed to give evidence of what occurred in his own trade, or of the losses which he himself had sustained in the course of his own experience. If he founded his judgment on facts not similar to those which were proved in the present case, the argument would be most cogent. But if he stated (as I think he did) what occurred in his own trade in matters similar to those which, on the very point of controversy, were proved to have existed in the trade of the defendant, then the evidence would appear to be admissible."

1895, GAINES, C. J., in *Texas P. R. Co.* v. *Reed*, 88 Tex. 439, 31 S. W. 638 (excluding evidence of the custom on other railroads as to a foreman's authority over railroad hands): "Did the fact that other railroad companies give that authority to such servants tend to throw light upon the question? We think not. It is a matter of policy in the management of internal affairs upon which one manager would have one opinion, while another or all others might pursue a different course. One owner of a plantation might intrust his superintendent with power to employ and discharge hands; another might reserve that right to himself, or commit it to another agent. . . . [As to excluding evidence of the custom on the same road at large stations, while admitting the custom at small stations like the one in question,] the conditions at large stations, where much freight and many cars were to be handled, are so different from those at small places that we are of opinion that the practice at the latter raises no presumption that the same practice existed at the former."

Distinguish here the evidential use of a custom of other railroads, factories, or the like, as indicating the *danger* of certain apparatus or the *reasonableness* of certain precautions (*post*, § 461).

§ 380. **Same: Customary Rights in Land.** The use of other instances to prove a custom of descent or of other right affecting land has not been and is not likely to become common in the United States, because here such usages are rare.[1] But this sort of evidence has had frequent use in England, and the precedents on this point well illustrate the general principle. Instances occurring within the *same manor*, it is clear, will be received, because the

§ 380.[1] 1869, Gilman *v.* Rippelle, 18 Mich. 145, 165 (other instances of a practice among French settlers of giving a possessory right to the eldest son, excluded, in the absence of direct testimony in the case in question).

original unity of the holding allows each instance to appear as merely one illustration of a general system working uniformly;[2] and the same principle may apply where a *township*, or other unity likely to involve community of conduct in the matter in question, is a common feature in all the instances.[3] On the same principle, however (though the matter was not clearly settled until Rowe *v.* Brenton), instances from *other manors* may be received, provided that, behind their apparent difference of conditions, a unity of some sort can be shown which makes instances from the one equally illustrative of a general system including and operating in the other.[4] The precedents on

[2] 1810, Doe *v.* Sisson, 12 East 62 (to prove a custom of descent in the female line, particular instances were received of such descent in other estates of the manor, as well as of a general reputation as to such custom of descent in the manor; the particular instances being, per Lord Ellenborough, C. J., "only so many branches derived from the same root").

[3] 1813, Blundell *v.* Howard, 1 M. & S. 292 (custom as to tithes; payments by other holdings in the same township, admitted to show its general character); 1842, Jewison *v.* Dyson, 9 M. & W. 540, 556 (custom of appointing coroners; the appointment of coroners in other places within the same grant, admissible); 1879, Lendrum *v.* Deazley, 4 L. R. Ire. 635, 639, 645 (usage as to tenant-sight in another part of the same estate, the usage on all parts of the estate being the same, admitted).

[4] 1637, Moulin *v.* Dallison, Cro. Car. 484 (whether an estate descended by custom to the eldest daughter in the manor of S.; after showing that S. was a part of a manor O., and thus establishing a unity of custom, the fact was received of the rule of descent in O.); 1672, Champion *v.* Atkinson, 3 Keb. 90 (whether in a copyhold estate a fine was due on the death of the lord in certain circumstances; the fact was received of the existence of such a custom in the copyhold estates of adjoining manors; no reason being given); 1725, Somerset *v.* France, 1 Stra. 654 (whether the tenant for life could collect by custom a fine from the customary tenants of the manor upon the death of the last admitting lord; the fact was received of a similar custom for other tenants of the plaintiff himself in other manors, no reason being given; but the fact of a similar payment by other tenants to other lords of manors was objected to because "each manor hath its particular customs, and they have no relation to one another but by accident"; Fortescue, J., was for admitting, because "it is very proper to enquire what are the qualities which attend other estates which are held by the same tenure"; Raymond, C. J., was opposed, because "I should readily admit that this evidence might be allowed if the customs of tenant-right estates were the same in all manors; but it is plain that the customs of these estates are different in different manors"; yet he yielded to supposed authority); 1778, Furneaux *v.* Hutchins, 2 Cowp. 807 (action for not carrying off tithes; plea, that they were not properly set out; the fact was rejected of a custom in the adjacent parishes to set them out as the plaintiff had done; Lord Mansfield, C. J.: "Proof of the custom in other parishes is no evidence to affect the parish in question, unless the custom had been laid as a general custom of the whole country"); 1793, Beebee *v.* Parker, 5 T. R. 26, 31 (descent-custom; Kenyon, L. C. J., speaking obiter, of outside instances: "and the latter has gone so far that the custom of one manor has been given in evidence to show the custom of another, where they are both governed by the Border-law"); 1813, R. *v.* Ellis, 1 M. & S. 652, 661 (whether a fishery was so connected with land as to be subject to a poor rate; Ellenborough, L. C. J., speaking of Somerset's Case, supra: "I have always thought that . . . this evidence is to be considered rather as evidence of a custom pervading one common district of manors, than as the custom of one manor to show the custom of another"); 1828, Rowe *v.* Brenton, 8 B. & C. 737, 758 (issue as to the ownership of coppermines, and the rights of a plaintiff who was a "conventionary lessee" in the copper on his land; there were 17 manors in the duchy, and some of the above tenancies, renewable every 7 years, existed in each manor; evidence was received as to the terms of the customary right of such a tenant in these other manors; Tenterden, L. C. J.: "The same character, whatever that may be, belongs to them all. . . . It certainly belongs to all those called 'free conventionaries' in this district. . . . Must we not, then, in fairness, in order to ascertain what are the relative rights of the lord and these tenants in one part of this district, enquire what are their rights in another?"; Bayley, J.: "I am of opinion that the usage which has prevailed in one part . . . is evidence to explain a grant expressed in similar terms as to any other part of the district"); 1842, Anglesey *v.* Hatherton, 10 M. & W. 218 (trover for coals, limestone, and ironstone, taken from the manors of C. and R.; issue as to the right of copyholders to

this point are full of instruction upon the class of evidence dealt with in the preceding topics.

§ 381. **Same: Other Principles discriminated.** Certain aspects, in which the question arises whether the usage of others may be resorted to, are to be distinguished from the foregoing subject.

(1) When the nature of an external object is to be determined, its *effect upon others* may throw light upon its qualities. Thus, in a railroad accident, the conduct of other persons may show whether the situation was a terrifying and dangerous one; in a plea of breach of quality of an article sold, the patronage of other persons may throw light on its quality; in an issue as to the dangerousness of machinery, the conduct of others in taking precautions may throw light on its dangerous quality. In all these cases, the conduct of others is not offered as instances showing a general custom or habit; such a general custom would be irrelevant; it is offered as showing the effects produced on ordinary persons by the nature of the article, place, or machinery in question (*post*, § 461).

(2) Where a *term of a contract* is sought to be imported into it on the score of usage or custom, this usage or custom must be shown to have been known to and impliedly accepted by the party. As a principle of contracts this is clear; and accordingly a Court is occasionally found saying that such a custom must be a local one, — meaning merely that it must be brought home to the knowledge of the opponent. But, this being conceded, it still remains to prove the custom, and for this purpose instances in other districts may be received, as above seen. This evidential use is always allowable, the assumption throughout being that the principle of substantive law, sooner or later, in some way or other, will be satisfied and knowledge of the custom be brought home to the opponent. The local custom, *i.e.* the custom as known to the opponent, is required by the substantive law, but it may be evidenced by instances from other districts, on the principle of § 379, *ante*.

(3) Whether a custom or usage may thus be imported as a term of a *written contract*, or may be used to interpret a written contract, concerns the parol-evidence rule (*post*, §§ 2440, 2464).

take minerals; the fact was offered by the defendant of the custom in the adjoining manor of W., after first offering evidence that W. was only a subinfeudation of C. and hence the customs would presumably be the same, excluded; Abinger, C. B.: "It should be established clearly and beyond all controversy that the two manors originally formed one manor. . . . [As to the cases *supra* of 'border-law'] there prevails throughout those manors a particular species of tenure, called 'tenant-right'; . . . since in those manors *all* the tenants hold under the same right, if it should happen that in one particular manor no example can be adduced of what is the custom in any particular case, . . . in order to explain the nature of tenure, which is not confined to one manor but prevails in a great number, you may show what is the general usage with respect to that tenure"; and he then approves also of Rowe *v.* Brenton; Alderson, B.: "If indeed there be some general connecting link between them — as, for instance, if the customs in question be a particular incident of the general tenure which is common to the two manors, then you have a right to show what the custom of one manor is as to that tenure, for the purpose of showing what the custom of the other manor is as to that tenure; but you must begin by showing that there is a general tenure common to them both; that fact fails here").

(4) Whether testimony to a custom violates the *Opinion rule* (*post*, § 1955), and whether *one witness alone* suffices to prove a custom (*post*, § 2053), also involve different rules.

§ 382. **Prior or Subsequent Status (Business, Possession, Ownership, Solvency, Coverture, etc.).** It has already been seen (*ante*, § 190) that the prior or the subsequent existence of a quality or condition is evidential of its existence at a given time. This principle is equally applicable in evidencing a habit or cause of conduct. Its use is most frequent for facts which can at first sight hardly be ranked here in any natural classification, — facts roughly to be described as involving a human status or relation to external affairs; for example, possession, ownership, solvency, and the like. The possession or ownership of property, the incumbency of an office, the existence of a debt, of coverture, and such relations, in truth involve a human course of conduct or a human attitude or position regarded as voluntarily and habitually maintained towards outward things and events; and this seems their most appropriate place in any classification of propositions to be proved.

The prior or the subsequent existence of such a fact is always evidential to show its existence at a time in issue, upon the general experience that such facts involve a human attitude more or less continuous and permanent. The probability of continuance depends much, of course, on the nature of the specific fact and the circumstances of each case; and therefore, in setting a limit of time for the range of the evidence, the discretion of the trial Court should control. The principle is illustrated by many sorts of facts. Such evidence is receivable to show the *mode of conducting a business*,[1] the *keeping of liquors illegally*,[2] the *possession of goods*, *land*, or *money*,[3] the *ownership of*

§ 382. [1] 1792, R. *v.* Neville, Peake N. P. 91 (nuisance in carrying on the business of a melter of grease; an admission, made at a former place, that the business there was a nuisance, received, to "weigh more or less against him as it shall appear more or less like that where he before resided"); 1857, R. *v.* Fairie, 8 E. & B. 486 (nuisance; a conviction for a similar nuisance in the preceding year was offered, because "the same thing was done in 1856 that was done in 1855, and if that was so, it is important to show that what was done in 1855 was an offence"; excluded, because, per Campbell, L. C. J., "a collateral issue is raised" on the question whether the places were alike; repudiating R. *v.* Neville; Coleridge, J., accord; Williams, J., uncertain); 1912, Potlatch Lumber Co. *v.* Anderson, C. C. A., 199 Fed. 742 (lumber-camp injury; that no rules for protection from falling trees were in force a year before and a year after the injury in question, held properly admitted in trial Court's discretion).

[2] 1889, Com. *v.* Finnerty, 148 Mass. 162, 19 N. E. 215 (Knowlton, J.: "The illegal keeping of intoxicating liquor with intent to sell it, like keeping a nuisance, is a continuing offence, which may extend over a long or a short period of time. If attention is directed to any point of time during the keeping, there is a probability, from the very fact of keeping then, that the same condition has existed from some previous time, and will continue for some time into the future. And so, as to offences which are in their nature continuing, evidence has often been received of a condition a little before or a little after the time within which the offence must be proved"). *Accord:* 1871, Com. *v.* Carney, 108 Mass. 417, 1872, Com. *v.* Berry, 109 Mass. 366; 1873, State *v.* Colston, 53 N. H. 483 (keeping liquor illegally for sale on Dec. 6; the keeping liquor for sale in the same house — a hotel — a short time before, admitted, because "a state of things once shown to exist is presumed to continue until something is shown to rebut the presumption"). Compare the cases cited *ante*, § 367.

[3] 1817, R. *v.* Watson, 2 Stark. 116, 137 (treason; the finding of pikes in the defendants' house three months after their arrest, objected to because they might have been placed there by others, admitted; papers, etc., found similarly in a room that had been locked by the defendant and not opened in the interval, also

property,[4] the *existence of a debt*,[5] the *condition of solvency*,[6] the *condition of coverture*,[7] the *condition of residence*,[8] the *incumbency of office*,[9] and so on.[10] The occasional repudiation of such evidence in some of the above precedents is not to be taken as a negation of the general principle, but only as a deter-

admitted; compare the citations *ante*, § 149); 1898, Com. v. Williams, 171 Mass. 461, 50 N. E. 1035 (possession six months before, allowed); 1909, Sullivan *v.* Girson, 39 Mont. 274, 102 Pac. 320 (possession of a ring pledged); 1910, Tonopah & G. R. Co. *v.* Follanbaum, 32 Nev. 304, 107 Pac. 883 (land-patent; but erroneously declining to presume earlier from later possession); 1845, Wells *v.* Burbank, 17 N. H. 409 (possession of a tax-warrant by the deputy Secretary of State on June 1, admitted evidence of its possession by him on Sept. 1); 1847, Bogardus *v.* Trinity Church, 4 Sandf. Ch. N. Y. 633, 744 (the general principle of the continuance of a state of things once shown, applied to infer a subsequent from an earlier possession of land); 1868, Kennedy *v.* People, 39 N. Y. 245, 254 (possession of money, and sales of goods, six weeks and six months before, admitted; whether the time is too remote must "depend very much on the circumstances of each case"); 1870, Wilkins *v.* Earle, 44 N. Y. 172 (bailment of money to an innkeeper; the bailor's prior possession of such sums of money, admitted).

For the possession of a *document*, as indicating *prior possession*, see *ante*, § 157.

For the use of *subsequent possession of money* as indicating a prior act of *larceny*, etc., see *ante*, § 154.

For the *possession* or *lack of money* as involving *incapacity to lend* and therefore probable non-lending, see *ante*, § 224.

For the *possession or lack of money* as indicating a *motive* to do or not to do something, see *post*, § 392.

For the *possession of goods*, etc., as showing a prior *larceny or other crime*, see *ante*, §§ 149–153.

[4] 1855, Montgomery & W. P. R. Co. *v.* Webb, 27 Ala. 618 (ownership of corporation-stock in 1850, held admissible to show ownership in 1853); 1882, Donahue *v.* Coleman, 49 Conn. 464, 466 (freeholder as eligible to be appraiser; ownership six months before, admitted; the presumption to be "merely one of fact"); 1913, Carey *v.* Hawaiian Lumber Mills, 21 Haw. 506 (continuance of original corporators and stockholders, presumed); 1872, Com. *v.* Dearborn, 109 Mass. 370 (proprietorship of a shop in July, admitted to show proprietorship in December); 1878, Hanson *v.* Chiatovich, 13 Nev. 395 (recovery of personalty of a testator; ownership at death, inferred from prior ownership); 1909, Tate *v.* Rose, 35 Utah 229, 99 Pac. 1003 (ownership in 1875, to evidence ownership at time of action begun).

[5] 1809, Jackson *v.* Irvin, 2 Camp 50 (bankruptcy; a creditor's claim having been proved to exist several months before the bankruptcy, its continuance to the latter date was presumed); 1867, O'Neil *v.* Mining Co., 3 Nev. 141 (a debt due and unpaid, on Oct. 5, inferred to remain unpaid on Oct. 16); 1860, Eames *v.* Eames, 41 N. H. 177 (assumpsit for two weeks' board; the parties' relations for the previous year, admitted); 1854, Bell *v.* Young, 1 Pa. 175 (the existence of a note at testator's death, inferable from its prior existence).

[6] 1884, Cozzens *v.* Holt, 136 Mass. 237 (insolvency a short time before, admitted); 1891, Dumangue *v.* Daniels, 154 Mass. 483, 485, 28 N. E. 900 (insolvent's deed; lack of property "at some previous time", admissible "if there was nothing to show a change in this respect"; "his condition as to property at a subsequent time", also, if "not too remote"; the trial Court's discretion to control as to time); 1873, Body *v.* Jewson, 33 Wis. 402, 411 (insolvency at time of action, inferred from prior insolvency).

For *insolvency* as involving *inability to lend* and probably non-lending, see *ante*, § 224.

[7] 1881, Murdock *v.* State, 68 Ala. 567 (marriage-relation at the time of a trial for burglary, not evidence of the same relation at the time of the burglary; unsound); 1861, Erskine *v.* Davis, 25 Ill. 251, 256 (the single state indicates subsequent singleness; coverture indicates subsequent but not prior coverture; unsound).

[8] 1875, Daniels *v.* Hamilton, 52 Ala. 105 (former residence in a State, as making amenable to process, admitted); 1906, Winkelman *v.* White, 147 Ala. 481, 42 So. 411 (domicile of a non-resident mortgagor, presumed to continue); 1842, Prather *v.* Palmer, 4 Ark. 456 (residence as affecting bond for costs; residence 17 years before, admitted); 1854, Swift *v.* Swift, 9 La. An. 117 (absence from the State during five years after a party's death, inferable from absence after that period).

Compare the citations *post*, § 1312.

[9] 1849, Barelli *v.* Lytle, 4 La. An. 557 (office as justice on June 29, 1848; inference of prior incumbency on June 5, 1848, held not allowable).

[10] 1895, Brown *v.* Wren, 2 Q. B. 391 (partnership in April, 1892, evidence of its continuance in June, 1893, and Feb., 1894); 1886, Louisville & N. R. Co. *v.* Jones, 108 Ind. 565, 9 N. E. 476 (speed of a train at one place, admitted to show the speed at a place just beyond); 1919, Tyrrell *v.* Goslant, 93 Vt. 63, 106 Atl. 585 (speed of an automobile at a point a mile away from the place in question, admitted).

mination that in the case in hand the contingencies of change were too many to allow the prior or the subsequent condition of things to be of probative value; or that no presumption of continuity (*post*, § 2530), in the strict sense, will be enforced.

§ 383. **Style of Handwriting or Spelling, as evidenced by Specimens.** It has been noted already (*ante*, § 90) that, in proving a document to have been written by A, two distinct modes offer themselves, — first, testimony by a person who saw A write it, and, secondly, testimony of some other sort. The first mode is not concerned in any way with the character or style of A's handwriting; the witness testifies merely to seeing the act done, just as he would testify to seeing a blow struck or hearing a remark made. By the second mode there is merely a resort to A's type or character or habit of handwriting, and an inference from the type to the genuineness of the disputed writing. This evidential fact, the type of the handwriting, involves an inference from a kind of habit or skill (of handwriting) to an act done (the specific writing), and the nature of that inference has been already explained (*ante*, § 99). But this skill or style or habit of handwriting has in its turn to be evidenced. This may be done by either testimonial or circumstantial evidence; *i.e.* by the direct testimony of one who is familiar with A's style of writing, or by separate instances of his writing used circumstantially to show the general type. The former mode concerns the Qualifications of Witnesses to Handwriting (dealt with *post*, §§ 569, 693). The latter mode is here involved; the general process being the same as that of evidencing any human quality or trait by specific instances of its exhibition.

What are the necessary requirements of relevancy in evidencing a style of handwriting by specific instances?

(1) The first requirement is, of course, that the specimens should be those of the person whose handwriting-style is to be proved, *i.e.* that they should be *genuine*. This is rather a necessary preliminary assumption than a principle of relevancy; just as, to prove A's character, it is obviously only A's and not B's conduct that can have any bearing. But it is precisely this preliminary assumption that has vitally affected the history of the law on this subject; for when specimens of handwriting are offered as A's, since they must thus first be shown to be A's, this may introduce new issues which will complicate and prolong the trial, and perhaps thus involve an incidental burden which will cost more than the evidence is worth. These considerations of Auxiliary Policy (§ 43), which are independent of the principle of Relevancy, thus become of radical importance.

(2) The requirement of the principle of relevancy is that the specimens offered shall be such as are capable of affording an inference of the normal and general type or style of the writing. Various considerations might be thought of as affecting this capability. (*a*) The 'ex parte' *selection* of the specimens may be improper, as possibly resulting in only one aspect of the style. This suggestion has never found any acceptance; for while the variations of

a person's style may be numerous, they are usually not; the difficulty of collecting misleading ones is great; any serious false impression could be easily exposed; and, finally, our whole system of proof is that of an 'ex parte' selection and offering of evidence. (*b*) The specimens may have been written at a time when there was a clear inducement to deceive, *e.g.* at the trial. This consideration is usually given much weight, and may suffice to exclude specimens so written. (*c*) The specimens may have been written so long ago that they do not represent the person's present style. This argument has never been considered as important; for, if the person's present style is different, it can easily be shown. (*d*) The specimens offered may not be numerous enough to illustrate the average or normal type. But one specimen usually does represent the type with sufficient accuracy; and, if it does not, the opponent may easily show this by counter-specimens. This objection has never prevailed.

Such are the considerations involved in the principle of Relevancy. If this alone were involved, there would have been no obstacle to the free use of this mode of proof, and no other limitations than the few simple ones above mentioned. But the considerations of Auxiliary Policy already specified, as well as others (in particular, the Opinion rule), the survival of certain earlier limitations arising at a time when proof by type of handwriting was looked on with suspicion, and the confusion of usage as to certain ancient and modern terms, all combined to introduce additional restrictions, more or less arbitrary in themselves, and not connected with any principle of relevancy. It would be impossible to understand or to expound the law of to-day without having in mind this historical development and these additional principles. Accordingly, the state of the law as affected by all of them can best be examined in one place, under the Opinion rule (*post*, §§ 1991–2027).

The collateral considerations above mentioned were seldom thought to apply to such traits as a person's mode of *spelling*, grammatical use of words, and the like; and not only could such a usage be freely used to show the authorship of a document, but the usage in its turn could be proved by specimens, without the above limitations historically peculiar to specimens of handwriting. For convenience, the precedents are dealt with at the same place with proof of handwriting by specimens (*post*, § 2024).

SUB-TITLE II (*continued*): EVIDENCE TO PROVE A HUMAN QUALITY OR CONDITION

TOPIC IX: EVIDENCE TO PROVE EMOTION (MOTIVE, FEELING, PASSION)

CHAPTER XIV.

§ 385. **Theory of Motive.** It has been already observed (*ante*, § 117) that the term "motive," as commonly used, does not serve to discriminate the two different processes to which it may be applied. (1) It may be attempted, first, to infer, from the existence in A of a desire or inclination to do act X, that this desire, urging him on, probably resulted in the doing of the act; as when it is argued that, because A desired and wished to get rid of B, he probably did do something towards getting rid of B. (2) Secondly, in proceeding in turn to evidence this desire or other emotion, certain circumstances may be offered as tending to show its existence; as when the argument is to the existence of this desire in A (*a*) from an injury which B has done to A, or (*b*) from A's outward conduct expressing such a desire, or (*c*) from the prior or subsequent existence of such a desire. The former process involves the evidencing of a Human Act, and has already been dealt with (*ante*, §§ 117–119). The latter process involves the evidencing of a Human Quality or Condition, and is the present subject. Under the former

head, questions of evidence are rare; the rulings upon evidence are concerned usually with the latter process.[1]

§ 386. **Discriminations between Motive and Intent or Design or Character.** Whatever the psychological distinctions may be, the discriminations between Emotion and other human attributes or conditions are not always accurately observed practically in judicial language, nor are they easy to observe. At one point the line is not easy to draw between Emotion and Design (*ante*, § 237), at another point between Emotion and Disposition (*ante*, § 192), at another between Emotion and Intent or Belief (*ante*, §§ 245, 300). Hence, in classifying the precedents it cannot be supposed that they will always be found just where they would be expected; the absence of an accepted terminology, and the difficulties in the application of any terminology, necessarily leave a margin of uncertainty.

§ 387. **Kinds of Inference.** The modes of inference circumstantially to a human quality or condition, as already pointed out (*ante*, § 190), may be of three kinds, all of which come into use in the present subject: (*a*) From circumstances tending to excite, stimulate, or bring into play the emotion in question; (*b*) From outward conduct expressing and resulting from the emotion in question; (*c*) From the prior or the subsequent existence of the emotion in question, as indicating its existence at the time in issue. The first of these is a Prospectant indication (*ante*, § 43); the second is a Retrospectant indication; the third is of both sorts. Each sort of inference has its own dangers and difficulties.

a. CIRCUMSTANCES TENDING TO EXCITE AN EMOTION.

§ 389. **General Principle; Knowledge of the Circumstances.** It must be remembered that this mode of argument is equally available in civil as well as in criminal cases. One is perhaps apt to think of "motive" as a matter involved in criminal cases only. But a recollection of the process involved — that of inferring the existence of some emotion, from which in turn the doing of an act is to be inferred — shows that this process may be equally a feature of proof in civil cases, though not as frequently as in criminal cases.

The general inquiry is, *What circumstances tend probably to excite a given emotion?* Obviously, the whole range of human affairs is here involved. It would be idle to attempt to catalogue the various facts of human life with reference to their potency in exciting a given emotion. Such an attempt would exhibit two defects. It would be pedantic, because it is impossible to suppose that the operation of human emotions can be reduced to fixed rules, and that a given fact can have an unvarying quantity of emotional potency. It would be useless, because the emotional effect of any fact must depend so

§ 385. [1] From the point of view of logic and psychology as applicable to argument before the jury (not the rules of Admissibility), see the materials collected in the present author's "Principles of Judicial Proof, as given by Logic, Psychology, and General Experience, and illustrated in Judicial Trials" (1913), §§ 29, 101–115.

often on the surrounding circumstances that no general formula could provide for the infinite combinations of circumstances. Courts have therefore always been agreed that in general no fixed negative rules can be made; that no circumstance can be said beforehand to be without the power of exciting a given emotion; and that, in general, any fact may be offered which by possibility can be conceived as tending with others towards the emotion in question:

1850, PARSONS, J., in *Johnson* v. *State*, 17 Ala. 627: "[The commission of the murder by some one having been established,] every ground from which a motive could arise may be proved against him [the defendant]. . . . With regard to the grounds from which a motive may be inferred, we may remark that the law has never limited them and never can limit them in number or kind."

1868, SANDERSON, J., in *Lyon* v. *Hancock*, 35 Cal. 376: "Malice, like fraud, is generally to be inferred from facts and circumstances. Hence the plantiff [in this case] is entitled to prove any facts or circumstances which tend, even in the slighest degree, to show malice on the part of the defendant. For the same reason, the defendant is entitled to prove any facts and circumstances which tend, in the slightest degree, to show a contrary motive. No fact or circumstance can therefore be properly excluded from the jury unless the Court is satisfied to a moral certainty that the jury can draw no rational presumption from it."

1854, PARKER, J., in *Hendrickson* v. *People*, 10 N. Y. 13, 31: "Considerable latitude is allowed on the question of motive. Just in proportion to the depravity of the mind would a motive be trifling and insignificant which might prompt the commission of a great crime. We can never say the motive was adequate to the offence; for human minds would differ in their ideas of adequacy according to their own estimate of the enormity of the crime; and a virtuous mind would find no motive sufficient to justify the felonious taking of human life." [1]

There is but one limitation that can be thought of as necessary and universal, namely, the *circumstance* said to have excited the emotion *must be shown* to have probably *become known* to the person; because otherwise it could not have affected his emotions:

1897, DALE, C. J., in *Son* v. *Terr.*, 5 Okl. 526, 49 Pac. 923: "A motive cannot operate to influence until the facts which create the motive exist. The facts upon which a motive is based cannot operate upon the mind until they are known by the party against whom the motive is assigned. If one person should contemplate and undertake a great wrong against another, — such a wrong as would induce in the mind of the person against whom it was directed a motive to kill, — and yet such contemplated wrong was unknown to the party, it cannot be justly said that a motive to kill could exist, because the party wronged had no knowledge of the facts which would be necessary to create the motive." [2]

§ 389. [1] *Accord:* 1893, Moore *v.* U. S., 150 U. S. 57, 61, 14 Sup. 26 (approved in the following case); 1895, Goldsby *v.* U. S., 160 U. S. 70, 16 Sup. 216 (a watch-charm taken from the robbed person by a companion of the accused).

[2] *Georgia:* 1907, Sasser *v.* State, 129 Ga. 541, 59 S. E. 255; *Indiana:* 1871, Cheek *v.* State, 35 Ind. 492, 494 (the deceased's plan to help a third person to elope with the defendant's wife, admissible, if known to the defendant, to show hot blood); *Iowa:* 1884, State *v.* Shelton, 64 Ia. 333, 338, 20 N. W. 459 (murder; intimacy between the defendant's paramour and the deceased; knowledge by the defendant required); *Kentucky:* 1899, Pence *v.* Com., — Ky. —, 51 S. W. 801; *Michigan:* 1900, People *v.* Morgan, 124 Mich. 527, 83 N. W. 275 (deceased's right to a life-insurance policy; but here the ruling is erroneous on the facts, as Montgomery, C. J., diss., points out); 1908, Bachinski *v.* Bachinski, 152 Mich. 693, 116 N. W. 556 (whether a daughter was intentionally omitted from her father's will made when she was 11 years old; her conduct as a

Nevertheless, Courts are often called upon to rule upon the admissibility of various circumstances. It is to their reproach that they heed the majority of these calls. There is in most of the rulings no reason for the slightest doubt of the propriety of the evidence. The extreme vagaries and the desperate pugnacity of many of those who take on themselves the defence of criminals have raised questions which ought to have been silently ignored by the Courts, — a treatment which would tend much to the discouragement of crime and the lightening of the profession's burden of precedents.

The *criminality* of the circumstances involved in proof of the motive has no doubt often been the ground of objection, the character-rule (*ante*, § 194) being invoked in exclusion. But it has already been seen (*ante*, § 216) that the fact that the circumstance offered involves also *another crime* by the defendant charged is in itself no objection, if the circumstance is relevant for the present purpose.

A natural arrangement of the precedents would be according either to the various circumstances offerable or to the various emotions to be proved. Practically, however, it is not possible to attempt a consistent grouping on either principle; the precedents are therefore arranged in part on each principle.

§ 390. **Motives for Murder.** The circumstances which might excite a desire to kill are innumerable. It must be understood that the rulings of the Courts cover only those circumstances which counsel have cared to question, and that nowadays the fact that counsel care and dare to question a circumstance is not necessarily an indication that there is the slightest rationality in the question. The annals of trials illustrate many other circumstances judicially recognized as capable of becoming motives; and the absence of a ruling by a Supreme Court upon a particular circumstance casts no doubt upon its propriety. Among the instances most commonly offered for adjudication, the following may be noted:

Circumstances involving the *sexual passion*, in one aspect or another, and usually operating through the emotion of jealousy, may lead to a desire to kill:[1]

prostitute at 18, excluded); 1913, People *v.* Auerbach, 176 Mich. 23, 141 N. W. 869 (murder; insurance on deceased's life for wife's benefit, as a motive for defendant, who might expect to marry her; held inadmissible, for lack of evidence of defendant's prior knowledge); *New York:* 1873, Stokes *v.* People, 53 N. Y. 176 (murder; an indictment for blackmailing procured by the deceased against the defendant, held inadmissible to show hostility, as the defendant had not known of it); 1898, People *v.* Fitzgerald, 156 N. Y. 253, 50 N. E. 846; *Texas:* 1899, Barkman *v.* State, 41 Tex. Cr. 105, 52 S. W. 73; 1921, Powers *v.* State, 88 Tex. Cr. 457, 227 S. W. 671 (murder; information to defendant, as to letters of deceased to defendant's wife, and insulting words, admitted to show his state of mind); *Virginia:* 1912, Mullins *v.* Com., 113 Va. 787, 75 S. E. 193 (murder); *Wisconsin:* 1909, Spick *v.* State, 140 Wis. 104, 121 N. W. 664 (the knowledge need not be directly evidenced; the trial Court's discretion controls; good opinion by Marshall, J.); 1920, State *v.* Barber, — Wis. —, 179 N. W. 798 (assault with intent to rape P., a boarder; defendant's wife, the only other inmate, was absent; her statement of intention not to return that night, held inadmissible, because not communicated to the defendant).

Contra, as to robbery: 1915, New *v.* Smith, 94 Kan. 6, 145 Pac. 880 (pointing out that the victim's possible possession of money suffices to tempt to robbery).

§ 390. [1] *Alabama:* 1850, Johnson *v.* State, 17 Ala. 625 (wife-murder; the fact admitted that in the preceding year he had attempted to carry on a liaison with an unmarried woman near by); 1899, Gafford *v.* State, 122 Ala. 54, 25 So. 10 (deceased's adulterous relations with the defendant's sister, admitted to show the

1894, *State* v. *Reed*, 53 Kan. 767, 774, 37 Pac. 174 (approving the language of counsel): "It has been universally conceded, since David wrote to Joab, 'Set ye Uriah in the forefront of the hottest battle, and retire ye from him, that he may be smitten and die', that the man who covets his neighbor's wife has a motive for desiring the death of his neighbor."

1863, THOMPSON, J., in *Com.* v. *Ferrigan*, 44 Pa. 386 (murder of a paramour's husband): "I agree that a solitary instance of illicit intercourse, especially if at a considerable distance in time from the period of homicide, . . . if received at all, should only be so with great caution, and where a probability existed that it would throw light on the motive of the

deceased's probable aggression; Tyson and Haralson, JJ., diss.); 1903, Caddell *v.* State, 136 Ala. 9, 34 So. 183 (wife-murder; defendant's relations with a paramour, admitted); 1909, Rollings *v.* State, 169 Ala. 82, 49 So. 329 (murder; bad character of defendant's wife, without other evidence, excluded); 1914, Spicer *v.* State, 188 Ala. 9, 65 So. 972 (wife-murder; defendant's relations with other women, admitted);

Arkansas: 1879, Edmonds *v.* State, 34 Ark. 720, 730 (murder of a paramour; violence of the defendant, a few days before, to their child in the deceased's presence, admitted to show his feelings towards the deceased); 1909, Ware *v.* State, 91 Ark. 555, 121 S. W. 927 (murder; defendant's seduction of deceased's daughter, unknown to deceased, excluded);

California: 1895, People *v.* Gress, 107 Cal. 461, 40 Pac. 752 (the defendant's efforts to induce the deceased's wife to leave the deceased, excluded, because the killing was admitted and self-defence was the issue; this seems erroneous, because on the question whether the defendant was the aggressor, his prior motive to kill the deceased would be useful); 1900, People *v.* Brown, 130 Cal. 591, 62 Pac. 1072 (defendant's relations with the deceased's wife, admitted); 1904, People *v.* Wright, 144 Cal. 161, 77 Pac. 877 (certain adulterous relations excluded, following People *v.* Gress); 1905, People *v.* Cook, 148 Cal. 334, 83 Pac. 43 (murder of K. for indecent proposals to defendant's daughter; incestuous relation of defendant and his daughter, admitted; People *v.* Gress, *supra*, discredited on this point);

Connecticut: 1831, State *v.* Watkins, 9 Conn. 47, 52 (wife-murder; the relation of husband naturally suggests an inference of a desire to preserve, not destroy, the wife; to rebut this, the fact is admissible that the husband has been living in adulterous intercourse with another; Hosmer, C. J.: "Love extinguished by adultery gives way to hatred, and a desire to be free from the burden of a wife who is no longer the object of regard"); 1868, State *v.* Green, 35 Conn. 203 (wife-murder; the fact was admitted, to rebut the inference of affection, that the defendant was before married to another woman still living, and was therefore not the lawful husband of the deceased; following State *v.* Watkins);

Georgia: 1897, Shaw *v.* State, 102 Ga. 660, 29 S. E. 477 (train-wrecking; the defendant's illicit overtures to another woman, admitted to show a motive for wrecking the train, on which his wife was); 1901, Robinson *v.* State, 114 Ga. 56, 39 S. E. 862 (raped condition of the deceased, admitted); 1905, Gossett *v.* State, 123 Ga. 431, 51 S. E. 394 (murder; the defence being that the killing was done on sight of the deceased seducing the accused's daughter, the prosecution was allowed to prove the daughter's lewd character and the accused's knowledge of it, but not particular acts of her unchastity);

Idaho: 1904, State *v.* Levy, 9 Ida. 483, 75 Pac. 227 (relations with prostitutes);

Illinois: 1889, Farris *v.* State, 129 Ill. 521, 526, 21 N. E. 821 (subsequent rape of a wife, as indicating a motive for killing her husband half an hour before, not admitted; clearly wrong); 1894, Simons *v.* People, 150 Ill. 66, 75, 36 N. E. 1019 (murder of paramour; the relations between them, as shown by the defendant's letters, admitted); 1910, People *v.* McMahon, 244 Ill. 45, 91 N. E. 104 (murder of defendant's house-servant by poison; the servant being pregnant, by the defendant as alleged, the prosecution's offer to show the defendant to be on bad terms with his wife was rejected; quite unsound; no authority whatever cited); 1917, People *v.* Ahrling, 279 Ill. 70, 116 N. E. 764 (wife-murder; that defendant committed incest with his daughter aged 13, excluded);

Indiana: 1877, Binns *v.* State, 57 Ind. 46, 52 (pendency of a suit for divorce admitted to show a motive in the husband for wife-murder; but the merits of the dispute, as shown in the decree of divorce, excluded); 1893, Pettit *v.* State, 135 Ind. 393, 415, 34 N. E. 1118 (wife-murder; the wife's affection, relevant to show his state of mind); 1897, Hinshaw *v.* State, 147 Ind. 334, 47 N. E. 158 (wife-murder; the defendant's improper relations with another woman, admitted); 1908, Lawson *v.* State, 171 Ind. 431, 84 N. E. 974 (defendant woman's adultery, on a charge of husband-murder, admitted); 1910, Porter *v.* State, 173 Ind. 694, 91 N. E. 340 (wife-murder; defendant's illicit relations with other women, admitted);

Iowa: 1858, State *v.* Hinkle, 6 Ia. 380, 384 (wife-poisoning; the defendant's illicit relations with another woman, before the wife's death, admitted as indicating that "he would be more likely to desire her death"); 1880, State *v.* Kline, 54 Ia. 183, 6 N. W. 184 (assault with intent to kill; the fact admitted that the defendant had seduced the assaulted

prisoner. Something must be necessarily left to the discretion of the judge in such a case. But a different case is presented when it is proposed to prove a continuous illegal intercourse down to the death of the slain. . . . He is a poor judge of human motives and impulses who cannot see, in such a relation as is proposed to be proved here between the de-

woman and had solicited her to procure an abortion);
Kansas: 1894, State *v.* Reed, 53 Kan. 767, 774, 37 Pac. 174 (quoted *supra*);
Kentucky: 1896, Jackson *v.* Com., 100 Ky. 239, 38 S. W. 422 (murder of a paramour; the presence of an advanced fœtus, admitted as indicating a motive);
Louisiana: 1898, State *v.* Reed, 50 La. An. 990, 24 So. 131 (the keeping of a paramour, as a source of quarrel with the deceased, admitted); 1904, State *v.* Brown, 111 La. 696, 35 So. 818 (murder; deceased's admissions of adultery with defendant's wife, not admitted, on the facts, to show the deceased's motive for aggression, on a plea of self-defence);
Maryland: 1912, Meno *v.* State, 117 Md. 435, 83 Atl. 759 (abortion by the alleged seducer; the woman's intercourse with a third person as evidencing the latter's paternity, not admitted for defendant);
Massachusetts: 1869, Com. *v.* Madan, 102 Mass. 1, 4 (similar to Binns *v.* State, *supra*); 1910, Com. *v.* Howard, 205 Mass. 128, 91 N. E. 397 (wife-murder; the defendant's recent attempt to persuade his wife to an abortion, admitted with other circumstances to show a desire to get rid of her as a burden; also letters between the defendant and another woman showing an intimacy);
Michigan: 1873, Templeton *v.* People, 27 Mich. 502 (attempt at wife-murder; improper relations between the defendant and another married woman, admitted);
Minnesota: 1881, State *v.* Lawlor, 28 Minn. 216, 219, 9 N. W. 698 (an altercation at a drinking-saloon in which the deceased threw beer upon a woman L., and the accused then shot the deceased; the fact that L. was the defendant's paramour, admitted to show a motive for resenting her treatment);
Mississippi: 1896, Webb *v.* State, 73 Miss. 456, 19 So. 238 (seduction of the deceased admitted to show a motive for murder); 1901, Ouidas *v.* State, 78 Miss. 622, 29 So. 525 (illicit relations with the deceased's wife, admitted);
Missouri: 1897, State *v.* Duestrow, 137 Mo. 44, 38 S. W. 554 (wife-murder; the defendant's possession of a paramour, admitted); 1900, State *v.* Callaway, 154 Mo. 91, 55 S. W. 444 (similar);
Nebraska: 1879, St. Louis *v.* State, 8 Nebr. 405, 411, 1 N. W. 371 (wife-murder; criminal intimacy with another woman, before and after wife's death, admitted); 1896, Dixon *v.* State, 46 Nebr. 298, 64 N. W. 962 (abortion; the defendant's recent intercourse with the woman admitted, as showing an intimacy rendering the deed more probable);
Nevada: 1876, State *v.* Larkin, 11 Nev. 314, 328 (murder; the relations of the deceased to a certain woman, admitted to show motive);
New Jersey: 1900, State *v.* Abatto, 64 N. J. L. 658, 47 Atl. 10 (illicit relations with the deceased's wife, admitted);
New York: 1858, People *v.* Stout, 4 Park. Cr. 71, 115, 128 (murder; the defendant's criminal connection with the deceased's wife, admitted, though she was the defendant's sister and could never marry him; "in case the deceased was effectually disposed of and silenced, their fears of exposure and detection would naturally be lessened"); 1880, Pierson *v.* People, 79 N. Y. 424, 435 (defendant's marriage to the widow of the murdered man, admitted, as showing the desire to possess her as a motive for the killing); 1893, People *v.* Harris, 136 N. Y. 423, 437, 449, 33 N. E. 65 (wife-murder; defendant's admission of two former secret marriages, contracted to overcome the scruples of his victims, admitted as showing his motive to conceal the secret marriage with the deceased; adulterous intercourse of the defendant and a plan with his paramour to murder her future husband, admitted to show a motive); 1893, People *v.* Osmond, 138 N. Y. 80, 86, 33 N. E. 739 (wife-murder; illicit relations of the defendant's wife and her paramour, unknown to defendant, not admitted); 1895, People *v.* Buchanan, 145 N. Y. 1, 39 N. E. 846 (illicit relations of the defendant with the deceased, admitted); 1897, People *v.* Scott, 153 N. Y. 40, 46 N. E. 1028 (wife-murder; relations of the defendant with a paramour, admitted); 1897, People *v.* Sutherland, 154 N. Y. 345, 48 N. E. 518 (murder of a paramour; her letters, received by him, showing her view of their relations, receivable to indicate his motive; Bartlett and Martin, JJ., diss.; the ruling is of course correct, and the dissent is inexplicable); 1899, People *v.* Benham, 160 N. Y. 402, 55 N. E. 11 (wife-murder; illicit relations with another woman, admitted); 1903, People *v.* Montgomery, 176 N. Y. 219, 68 N. E. 258 (wife-murder by one having a paramour; the paramour's character for unchastity, excluded; erroneous, because, under the principle of § 68, *ante*, her character made more probable her adultery with the defendant);
Oklahoma: 1913, Miller *v.* State, 9 Okl. Cr. 255, 131 Pac. 717 (illicit relations as a motive for murder);
Oregon: 1906, State *v.* Martin, 47 Or. 282, 83 Pac. 849 (killing of the father of a girl M.: that defendant had seduced M., admitted as showing motive); 1909, State *v.* Hembree, 54 Or. 463, 103 Pac. 1008 (wife-murder; incest with the daughter, and the wife's discovery of it, as a motive, allowed);
Pennsylvania: 1863, Com. *v.* Ferrigan, 44 Pa. 386 (quoted *supra*); 1878, Turner *v.* Com., 86

ceased's wife and the prisoner, that it might lead to the perpetration of the crime charged, or who would deny that it would probably shed light on the motive. History is full of such examples."

The expediency of preventing the *discovery* of a *former crime*, or of *evading an arrest* or a persecution for it, may lead to the desire to kill: [2]

Pa. 54, 70 (adultery by the defendant with the deceased, 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.);
Vermont: 1896, State *v.* Chase, 68 Vt. 405, 35 Atl. 336 (the defendant's adultery with the deceased's wife, admitted);
West Virginia: 1906, State *v.* Legg, 59 W. Va. 315, 53 S. E. 545 (wife's murder of husband; the wife's adultery, admitted);
Wisconsin: 1879, Mack *v.* State, 48 Wis. 271, 276, 4 N. W. 449 (husband-murder; criminal intimacy with a discharged employee, admitted to show motive).

Compare the citations *post*, § 398 (sexual passion at other times).

For the principle that the *criminality* of conduct showing motive is no objection, see *ante*, §§ 216, 305, 363.

[2] ENGLAND: 1830, R. *v.* Clewes, 4 C. & P. 222 (the fact was received of the murder of a third person by the deceased and of the defendant's ill-will to the third person, and his hiring the deceased to do the act, as furnishing a motive for destroying the deceased).

UNITED STATES: *Federal:* 1906, Thompson *v.* U. S., 144 Fed. 14, 18, C. C. A. (counterfeiting notes; defendant's admission that he was liable to arrest as an abortionist, admitted as showing a motive for the use of counterfeit money); *Alabama:* 1881, Marler *v.* State, 68 Ala. 580, 584 (the deceased's importance as a witness against the defendant in a pending divorce suit, admitted to show a motive for murder); s. c. 67 Ala. 55 (admitting also his desire to get rid of his wife by divorce); 1917, Hodge *v.* State, 199 Ala. 318, 74 So. 373 (murder of a sheriff; defendant's violation of liquor law, admitted to show motive); *Arkansas:* 1839, Dunn *v.* State, 2 Ark. 229 (the previous killing of E., whose murderers W. had attempted to discover and bring to justice, admitted as indicating a motive for the killing of W.); *California:* 1899, People *v.* Valliere, 123 Cal. 576, 56 Pac. 433 (that defendant, at the time of the alleged assault upon a jailer, was in jail under conviction, admitted to show motive); *Colorado:* 1905, Zipperian *v.* People, 33 Colo. 134, 79 Pac. 1018 (deceased's information against defendant for burglary, admitted); *Columbia* (District): 1921, McHenry *v.* U. S., — D. C. App. —, 276 Fed. 761 (murder; confession of a recent robbery, admitted to evidence motive for killing an officer); *Iowa:* 1895, State *v.* Seymore, 94 Ia. 699, 63 N. W. 661 (that defendant had reason to fear that the deceased, a partner in crime, would inform on him, admitted); *Kentucky:* 1898, Riggs *v.* Com., 103 Ky. 610, 45 S. W. 866 (that the deceased had made an accusation against the defendant, admitted; but not the truth of the accusation; this seems unsound); 1919, Music *v.* Com., 186 Ky. 45, 216 S. W. 116 (murder of an officer; prior robbery, admitted to show motive); *Louisiana:* 1861, State *v.* Mulholland, 16 La. An. 376 (that the deceased was killed while arresting the accused for another killing, admitted); 1896, State *v.* Fontenot, 48 La. An. 305, 19 So. 111 (that a person suspected the accused of stealing his wood and had engaged the deceased to watch it, admitted); 1910, State *v.* McKowen, 126 La. 1075, 53 So. 353; *Massachusetts:* 1920, Com. *v.* Feci, 235 Mass. 562, 127 N. E. 602 (former thefts by defendant, disclosed by deceased, as a motive for murder); *Missouri:* 1904, State *v.* Lewis, 181 Mo. 235, 79 S. W. 671 (that the deceased officer was killed while searching defendant's house to discover money robbed from a bank a month before, admitted); 1906, State *v.* Spaugh, 200 Mo. 571, 98 S. W. 55 (prior assault, as a motive for murdering the sheriff seeking to arrest, admitted); *Montana:* 1899, State *v.* Geddes, 22 Mont. 68, 55 Pac. 919 (the deceased's former complaint against defendant for assault, admitted; but not the facts of the assault); 1899, State *v.* Welch, 22 Mont. 92, 55 Pac. 927 (same principle applied to the same offence by another defendant); *North Carolina:* 1881, State *v.* Morris, 84 N. C. 756, 761 (murder; the fact that the defendant had been indicted for larceny, while the deceased, who was implicated, had been allowed to become State's evidence, admitted); *Oklahoma:* 1897, Son *v.* Terr., 5 Okl. 526, 49 Pac. 923 (that the deceased was trying to implicate the defendant in certain robberies, admitted); *Texas:* 1899, Barkman *v.* State, 41 Tex. Cr. 105, 52 S. W. 73 (murder; that deceased had testified against the defendant at an inquest on another death, admitted); *Utah:* 1900, State *v.* Morgan, 22 Utah 162, 61 Pac. 527 (murder of one of a sheriff's posse; defendant's prior commission of robbery, for which the posse were pursuing him, admissible to show motive to resist); 1918, State *v.* De Weese, 51 Utah 215, 172 Pac. 290 (wife-murder; defendant's autobiography recounting a burglar's career, admitted to evidence motive); *Virginia:* 1920, Williams *v.* Com., 128 Va. 698, 104 S. E. 853 (murder of police-officer: fact of police-search to arrest for another offence, admitted).

1896, BARTHOLOMEW, J., in *State* v. *Kent*, 5 N. D. 516, 67 N. W. 1052 (wife-murder; the alleged motive was a fear that the wife was about to discover the facts of his murder of his first wife 20 years before, his robbing of a bank, and the falsity of his present name and pretensions; proof of these past misdoings was received): "Obviously, this theory of the motive would be greatly strengthened by proof that he had committed the specified crimes in Ohio. While it is true that, in the case where proof of a collateral crime has been admitted for the purpose of showing motive, the relation between the two crimes was usually such as to indicate that the latter was committed in order to prevent an investigation into and an exposure of the former crime, that it was feared would be followed by prosecution and punished, yet we can discover no reason in principle for the limitation of the rule to that class of cases strictly. Any strong incentive must furnish an equally cogent reason for the admission of such testimony. . . . Whoever reads the record in this case, and particularly Kent's letters, will be irresistibly impressed with the thought that Kent at all times assumed high moral grounds, with an exalted standard of personal purity. There is evidence tending to show that he claimed for himself a higher social position than he was willing to concede to his wife. Under these circumstances, it would be intolerably galling to him to have his wife learn that he was in fact a felon, that he had married her under an assumed name, and that during all these years he had led a life of duplicity and hypocrisy. . . . Nor can we sanction the views of the learned counsel that these collateral crimes were too remote in time to furnish any motive for the commission of the crime here charged. Motive may or may not be affected by the lapse of time. Ordinarily a man who had committed a murder 20 years in the past would be just as much concerned to prevent exposure and punishment for that crime as though it were but one year in the past. And in this case, if the discovery by Mrs. Kent, at the time of her death, of these dark and criminal spots in her husband's life, would have been just as galling and humiliating to him as if discovered the first year of their married life, then his motive to prevent such discovery would be just as strong at the former time as at the latter."

So, also, and sometimes hardly to be discriminated, the conduct of the deceased in *opposing* or *injuring* or trying to injure the defendant, may furnish a motive.[3]

The defendant's *relations with a third person* having a desire to kill the deceased may induce him to coöperate, through the sympathy either of

[3] *Ala.* 1877, Commander v. State, 60 Ala. 1, 7 (anticipated litigation as a motive for murder, admitted; but details as to the merits of the dispute, excluded); 1921, Nickerson v. State, 205 Ala. 684, 88 So. 905 (murder; deceased's filing of a criminal charge against defendant, admitted); *Ga.* 1906, Hayes v. State, 126 Ga. 95, 54 S. E. 809 (murder; indictment and judgment against the accused for gaming, the deceased having testified thereon against him, admitted); *Ky.* 1892, Martin v. Com., 93 Ky. 193, 19 S. W. 580 (murder; that the defendant had been indicted for robbery at the deceased's instance, admitted, but not the details of the fact); 1895, Com. v. Gray, — Ky. —, 30 S. W. 1015 (the facts as to a legal dispute existing between the defendant and the deceased, admitted); *N. Y.* 1875, Murphy v. People, 63 N. Y. 591 (litigation pending between the defendant and G., and the purpose of it, admitted to show a motive for the murder of H., also concerned in the suit and present with G. at the time of the killing); *Or.* 1909, State v. Finch, 54 Or. 482, 103 Pac. 505 (murder; the deceased's preferment of various charges against the defendant, admitted); *Tenn.* 1843, Stone v. State, 4 Humph. 27, 35 (murder; the fact admitted that the defendant had maltreated his wife, and that she was harbored by the deceased; *Wis.* 1909, Spick v. State, 140 Wis. 104, 121 N. W. 664 (deceased an informer upon a prior crime of defendant).

It will be noticed that the existence of a *previous prosecution* or *litigation* may appear, not merely as involving conduct of the opponent tending to excite the defendant's hostility, but also as involving conduct of the defendant expressing his hostility (*post*, § 395). Compare the similar principle applied to evidence of a *witness' bias* (*post*, §§ 949, 950, 967).

friendship or of domestic ties, or by reason of pecuniary hire or of fraternal pledges: [4]

1868, SANDERSON, J., in *Lyon* v. *Hancock*, 35 Cal. 372, 376 (the defendant had caused the arrest of the female plaintiff for throwing a brickbat at him from a window; to prove that she was the assailant, he offered the fact of the hostility of the plaintiff's husband and of herself against the defendant): "The presence of Mrs. Lyons in the street, and the absence of all other persons by whom the act might have been committed, were strong probabilities that the brickbat was cast by her. Taking in connection, does the fact, if such was the fact, that her husband entertained towards the defendant feelings of hostility, and had in her presence made threats against him, constitute another probability against her? Would she have been less likely to have cast the brickbat had the relationship between her husband and the defendant been friendly? . . . Suppose, upon coming to the street, the defendant had found two women, instead of one, of equal repectability and character, one of whom must have cast the brickbat, one the wife of his friend, the other of his enemy; would not the friendship of the one and the enmity of the other constitute probabilities to be taken into account in determining which perpetrated the act? Other probabilities being equal, as we have supposed, no one would hesitate to say that the act had been committed by the wife of the defendant's enemy and not by the wife of his friend."

Finally, a most common circumstance is the deceased's *possession of money or property*, as leading to the accused's desire to kill.[5]

The usual employment of these and other circumstances (as above) is by *the prosecution*, as evidencing the defendant's probable desire to injure and thus his probable doing of the injury. But where *the defendant* admits the act, he may wish to offer on his own behalf some of the foregoing kinds of circumstances, as *tending to show hot blood*, and thus to mitigate the degree of the crime. Here, however, the number and kind of circumstances that

[4] 1883, Bell *v.* State, 74 Ala. 421 (that others of the defendant's family disliked the injured person, excluded; unsound); 1891, Story *v.* State, 68 Miss. 609, 629, 10 So. 47 (the defendant never having seen the deceased until the day before, the instigation of a third person was shown as the motive); 1877, Hester *v.* Com., 85 Pa. 139, 155 (the fact was admitted that the defendant and others concerned were members of the Ancient Order of Hibernians, otherwise there known as Molly Maguires, the order being a combination for the purpose of assisting each other in crimes, each member taking an oath to commit any offence ordered; the membership thus supplying a motive for crimes otherwise apparently motiveless; this great trial, published in pamphlet form, illustrates the wide ramifications of motive-evidence); 1879, McManus *v.* Com., 91 Pa. 57, 66 (murder of a miner; the defendant's membership in the Molly Maguires and his subjection to the oath of the society, admitted to show a probable motive).

[5] 1884, R. *v.* Flannagan, 15 Cox Cr. 403, 411, Butt, J. (insurance-money); 1893, Moore *v.* U. S., 150 U. S. 57, 61, 14 Sup. 26 (murder; the deceased's possession of land claimed by the defendant's wife, admitted to show motive); 1895, Byers *v.* State, 105 Ala. 31, 16 So. 716 (possession of money); 1893, Graves *v.* People, 18 Colo. 170, 32 Pac. 63 (the defendant being in charge of property of the deceased, the fact of his having duly accounted for it was held admissible in explanation); 1919, People *v.* Strause, 290 Ill. 259, 125 N. E. 339 (murder; certain contract transactions, not admitted on the facts); 1903, Bess *v.* Com., 116 Ky. 927, 77 S. W. 349 (insurance-money, personalty, and defendant's arson, etc., admitted); 1881, State *v.* Crowley, 33 La. An. 782, 785 (possession of money); 1854, Hendrickson *v.* People, 10 N. Y. 13, 31 (wife-murder: disappointment with the father-in-law's will, admitted); 1868, Kennedy *v.* People, 39 N. Y. 245, 253 (possession of money "suggests a motive for committing a robbery, and so a motive to take the life of the deceased if that would facilitate the theft or contribute to its concealment"); 1901, State *v.* Sheppard, 49 W. Va. 582, 39 S. E. 676; 1903, Keffer *v.* State, 12 Wyo. 49, 73 Pac. 556.

Distinguish the mooted question of the *accused's lack of money* as indicating a motive (*post*, § 392).

might naturally excite hot blood are much more limited.[6] Distinguish from this the effort to show, on a plea of insanity, that the defendant was under an hallucination as to the deceased's conduct (*ante*, § 228). There, obviously, the argument involves proof that the conduct had no existence, and that no reason existed for the belief in it; here it must be shown, either that it existed and came to the defendant's knowledge, or that he had been told that it existed or otherwise obtained reason to believe in it. The present argument is identical with the one (*ante*, § 231), admitting circumstances which, when known to a person, tend to bring on insanity.

§ 391. **Motive for Other Deeds.** The circumstances that may serve as motives for other deeds are innumerable; and the rulings, though naturally few, can hardly be classified except according to the crimes involved.[1]

[6] 1881, Combs *v.* State, 75 Ind. 215, 217 (information to the defendant about rumors as to the deceased's misconduct, excluded, because their tenor was not shown); 1862, Maher *v.* People, 10 Mich. 212, 217, 224 (to determine whether the killing was done in hot blood, the fact was admitted that the defendant was told, a few moments before, of his wife's adultery with the deceased); 1872, Hurd *v.* People, 25 Mich. 405, 412 (immediately precedent assaults by the deceased, admitted, as bearing on the defendant's provocation or fear of harm); 1860, Sanchez *v.* People, 22 N. Y. 117, 152 (information likely to result in passion reducing the degree of homicide, admitted); 1896, People *v.* Barberi, 149 N. Y. 256, 43 N. E. 635 (the preceding relations between the deceased and his mistress the defendant, admitted as showing a state of mind on her part consistent with a lesser degree of homicide).

This kind of evidence may of course be *rebutted;* 1921, Bryan *v.* Com., —Va.—, 109 S. E. 477 (murder of H.; defence, provocation by defendant's wife's confession of illicit relations with H.; the prosecution was allowed to show defendant's long prior knowledge of his wife's unchaste character and relations with other men).

§ 391. [1] *Arson* (compare also the citations *post*, § 392); 1876, Hinds *v.* State, 55 Ala. 145, 148 (lawsuit as a motive for arson, admitted); 1878, McAdory *v.* State, 62 Ala. 154, 158 (hostility to a bailor of property, admitted to show a motive for arson of the bailee's house); 1888, Long *v.* State, 68 Ala. 36, 38, 43, 5 So. 443 (that the defendant's divorced wife lived in the burned house and associated with its owner, admitted); 1896, Simpson *v.* State, 111 Ala. 6, 20 So. 572 (that the owner of the premises had recently refused to rent them to the defendant, excluded; unsound); 1919, State *v.* Taylor, 93 N. J. L. 159, 107 Atl. 423 (falsifying records of jury service; the character of a co-conspirator as an habitual drunkard, etc., not admitted to show that it was not probable that defendant would "make such a combination with such a man"); 1900, State *v.* Battle, 126 N. C. 1036, 35 S. E. 624 (arson; ill-will towards owner's agent, not of itself admissible to show motive; Clark, J., diss., in a weighty opinion); 1921, Dumas *v.* State, — Okl. Cr. —, 201 Pac. 820 (arson; of warehouse; fictitious drafts for goods, admitted to show motive); 1881, State *v.* Hunnett, 54 Vt. 83 (to show the alleged motive, hostility to the defendant's former wife, who had an interest in the building, the fact was rejected of the wife's petition for divorce on the ground of cruelty; and of other stages of the dispute; the fact of hostile feeling was held admissible, but not facts "calculated to inflame the minds of the jury against the respondent").

Suicide (compare also the citations *ante*, § 144): 1699, Spencer Cowper's Trial, 13 How. St. Tr. 1187 (murder of a woman; to disprove the theory of suicide, the Court allowed the deceased's reputation to be considered, as indicating that she had no shameful reason for destroying herself); 1876, Continental Ins. Co. *v.* Delpeuch, 82 Pa. 234 (belief in spiritualism, not admitted to show the likelihood of suicide).

Sundry Crimes and Wrongs: Alabama: 1895, McTeers *v.* Perkins, 106 Ala. 411, 17 So. 547 (near relationship, as bearing on the good faith of a conveyance, admitted); 1920, Richardson *v.* State, 204 Ala. 124, 85 So. 789 (murder; to show deceased's supposed motive in approaching his child in custody of his wife who was defendant's daughter, deceased's answer in his wife's divorce action was admitted, alleging that the wife was not a suitable person and thus permitting the inference that he would seek to obtain the child by force or fraud); *Connecticut:* 1834, Austin *v.* Austin, 10 Conn. 221, 224 (divorce for adultery; defence, fraudulent connivance with the co-respondent; the husband's harsh feelings towards his wife, not admitted as tending to show the fact of connivance); 1920, State *v.* Costa, 95 Conn. 140, 110 Atl. 875 (grudge against W., admitted as showing motive for assaulting C., through mistaking C. for W.); *Indiana:* 1851, Carter *v.* State, 2 Ind. 618 (on a charge of administer-

§ 392. **Pecuniary Circumstances as creating a Motive (Poverty, to show a Crime, or negative a Loan; Market Value, to show a Sale-Price).** In several ways the pecuniary circumstances, of one or another person or trying, may tend to show the excitement of a motive in some person. It will be convenient to distinguish the situations according as the evidence deals with (1) the pecuniary *condition* of A as exciting a *motive in B;* (2) the pecuniary *condition* of A as exciting a *motive in himself;* (3) the pecuniary *value* of a thing as exciting a motive to contract with a person; (4) pecuniary conditions in sundry aspects.

(1) (*a*) The *possession of money* by A may tend to show that B desired to *rob* or to *kill* him (*ante*, § 390). (*b*) The *lack of money* by A may tend to show that B would be unwilling to trust his promises, and therefore probably did not trust him; in particular, that B would be unwilling to *lend* A *money*,[1] or to *sell goods* to A, or to sell to him as principal[2]

ing drugs with intent to produce abortion, the fact of the administration of ergot having been introduced, it was held admissible to show that the popular opinion was that ergot would produce abortion, as evidence of the probable purpose of its use); *Iowa:* 1886, State *v.* Schaffer, 70 Ia. 372, 30 N. W. 639 (larceny; the search for and discovery of other stolen goods with the goods in question, admitted as showing the motive for making the search; the sheriff's possession of another warrant against the defendant, admitted as showing a motive for a thorough search for the defendant, the sheriff having testified that the defendant had absconded); 1895, Bailey *v.* Bailey, 94 Ia. 598, 63 N. W. 341 (character of the wife, as indicating the husband's reason for cessation of the affection supposed to have been alienated); 1905, State *v.* Koller, 129 Ia. 111, 105 N. W. 391 (adultery; the defendant's wife's violence, etc., to him, admitted in his favor); *Maryland:* 1874, Hays *v.* State, 40 Md. 633, 650 (abortion; the reputation of the house where the parties went, as one of ill-fame, admissible as indicating the likelihood of such a place being chosen for such an act); 1879, Robinson *v.* State, 53 Md. 151 (burglary of M.'s house; to show the defendant's real motive for presence there, the fact was admitted that M.'s wife was a lewd woman with whom he had formerly had intercourse; 1893, Benglesdorf *v.* Hanaway, 90 Md. 217, 44 Atl. 1011 (whether a certain statement had been made by plaintiff; that the facts were contrary to the alleged statement, not admissible as indicating that the statement was not made); *Massachusetts:* 1854, York *v.* Pease, 2 Gray 282 (a quarrel between the defendant and the next friend of the plaintiff, in an action by an infant for slander, admitted); *Michigan:* 1871, Strang *v.* People, 24 Mich. 1, 4, 10 (rape; defendant's statements to the complainant, admitted to show her fear); *Missouri:* 1883, State *v.* Grant, 79 Mo. 113, 137 (murder; the defendant's theft of butter, admitted to show the officer's reason for arresting).

For the principle that the *criminality* of conduct showing motive is no objection, see *ante*, §§ 216, 305, 363.

§ **392.** [1] 1905, Security Trust Co. *v.* Robb, 142 Fed. 78, 84, C. C. A. (conversely, the defendant's possession of ample means may evidence the plaintiff's lack of good faith in making a demand for security); 1860, Marcy *v.* Barnes, 16 Gray Mass. 161, 162 (whether the defendant's name was on a note before it came into the plaintiff's hands or was fraudulently put there afterwards; the fact of inquiries made by the plaintiff, before taking the note, as to the standing of the defendant and the other maker, and of his being informed that the defendant was responsible financially but the other maker worthless, admitted, as showing the improbability of the plaintiff's having taken the note without the defendant's name); 1896, Cochrane *v.* W. D. Co., 64 Minn. 369, 67 N. W. 206 (insolvency of the alleged borrower, admitted).

[2] 1896, Plumb *v.* Curtis, 66 Conn. 154, 33 Atl. 998 (here the person in question had already bought as agent in similar transactions, and the person's lack of assets was admitted as tending to show that a change in the course of dealings had not occurred); 1858, Lee *v.* Wheeler, 11 Gray Mass. 236, 239 (poverty and lack of credit of W., admitted to show that the defendant gave credit to the defendant, not to W.).

Contra: 1821, Wheeler *v.* Packer, 4 Conn., 102, 106 (money paid on the credit of the defendants; to show that the money was paid, not on their credit but on the credit of the plaintiff's son, the defendants offered to show that the plaintiff's son had sufficient funds to be answerable, while the defendants were "entirely poor and unable to pay any part of it"; excluded, as "too vague" and "leading to interminable inquiries"; ruling unsound).

or to sell to him absolutely;[3] or to sell to him in good faith.[4]

(2) (*a*) The *lack of money* by A might be relevant enough to show the probability of A's desiring to *commit* a *crime* in order to obtain money. But the practical result of such a doctrine would be to put a poor person under so much unfair suspicion and at such a relative disadvantage that for reasons of fairness this argument has seldom been countenanced as evidence of the graver crimes, particularly of violence: [5]

1863, BIGELOW, C. J., in *Com. v. Jeffries*, 7 All. 548, 559, 566 (false pretences by representing that the defendant had an order for goods from an undisclosed principal; the fact of the defendant's insolvency at the time, as known to him, was offered): "It is doubtless true that in a large class of cases the poverty or pecuniary embarrassments of a party accused of crime cannot be shown as substantive evidence of his guilt. The reason for the exclusion of such evidence is that in those cases there is no certain or known connection between the facts offered to be proved and the conclusion which is sought to be established by it. It does not follow, because a man is destitute, that he will steal, or that when embarrassed with debt and incapable of meeting his engagements he will commit forgery. . . . Evidence of the pecuniary condition of the accused in such a case [as this] is not offered to show that he was under a peculiar temptation to commit the offence, or was more likely to cheat or defraud because he was in embarrassed circumstances, but for the purpose of showing the natural and necessary consequences of his act which the law presumes he intended. . . . If at the time of the transaction he was deeply insolvent, and was cognizant of his condition, the necessary consequence of his act was to deprive the vendor of his property without recompense or the chance of payment, and leads to the just and almost unavoidable inference that it was done with an intent to defraud."

Nevertheless in cases of merely peculative crime (such as larceny or embezzlement), and in civil cases where the issue is whether the defendant *borrowed money* or not, the fact that he was in need of it at the time is decidedly relevant to show a probable desire to obtain it and therefore a probable borrowing or purloining; and there is here not the same objection from the standpoint of possible Unfair Prejudice: [6]

The following seems to belong here: 1911, Dougherty *v.* White, 2 Boyce, 25 Del. 316, 80 Atl. 137 (action for work and labor, amounting to $900, against a deceased's estate; that the plaintiff, at the time of the supposed credit, borrowed money on notes for the testator, admitted to disprove his claim).

[3] 1887, Buswell T. Co. *v.* Case, 144 Mass. 350, 11 N. E. 549 (lack of credit of M., admitted to show that of two orders by him the plaintiff accepted that of a conditional and not an absolute sale).

[4] 1862, Cook *v.* Mason, 5 All. Mass. 212 (writ of entry for land conveyed to the defendant in fraud of creditors; the defendant's bad pecuniary credit at the time of the transfer, admitted to show that it would not "have enabled him to get credit . . . if the sale had been in good faith"); 1875, Sweetser *v.* Bates, 117 Mass. 466, 468 (same; admitted to show that the grantor would not have conveyed "in good faith in sole reliance upon her [the grantee's] future ability to pay").

[5] *Accord:* 1896, Reynolds *v.* State, 147 Ind. 3, 46 N. E. 31 (robbery); 1863, Com. *v.* Jeffries, 7 All. Mass. 548, 559, 566 (in general; quoted *supra*); 1905, Com. *v.* Tucker, 189 Mass. 457, 76 N. E. 127 (Com. *v.* Jeffries approved).

Contra: 1845, Tawell's Trial, Eng., Woodall's Celebrated Trials, I, 188 (admitted; but the editor cites a contrary ruling at another trial shortly before). But when a defendant, under the principle of par. (*b*), *infra*, seeks to show that his possession of money deprived him of any motive for crime, the fact may of course be *disproved* by the prosecution; 1881, Fulmer *v.* Com., 97 Pa. 503 (larceny; the fact of lack of money, admitted for the prosecution to rebut the defendant's evidence that he had plenty of money).

[6] *Accord:* 1905, Dimmick *v.* U. S., 135 Fed. 257, 70 C. C. A. 141 (larceny by a clerk of the mint; that he was in debt while there, admitted); 1898, Bridges *v.* State, 103 Ga. 21, 29 S. E. 859 ("financial embarrassment" as tending to show a motive for embezzlement,

1849, BELL, J., in *Stevenson* v. *Stewart*, 11 Pa. 309 (admitting, in rebuttal of a defence of forgery to a note. the fact that about the time of the alleged date the defendant was trying to borrow money): "Among the most common topics of inquiry is the pecuniary capacity of the supposed lender, and the necessitous condition of the alleged borrower; and these inquiries are legitimate. It is surely competent for the defendant to show . . . that the defendant was himself possessed of money and therefore not driven to the necessity of using his credit. If so, why should not the plaintiff be at liberty to prove that about the critical time the defendant was seeking to borrow? Standing unsupported, neither line of evidence would be sufficient to rebut the adverse allegation; but yet all must feel that in a doubtful case the facts I have supposed to be made out by the defendant would go far in his favor."

(*b*) On the other hand, the fact that a person was in *possession of money* tends to negative his desire to obtain it by crime or by borrowing, and is always admissible, the foregoing objection not being here applicable.[7]

Two inferences, involving other principles, must be here distinguished: (a) The inference that A probably did not lend money to B because A had no money to lend; this is inferring that A did not do an act because he had not the Means or Capacity to do it (*ante*, § 89); (b) the inference that A probably took money because after the time alleged he had large sums while before it he had little or none; this is inferring an act from the Traces of it (*ante*, § 154).

(3) The *market value* of an article bought may be received to show the *probable price agreed upon;* because the actual value would move the buyer to wish to obtain it for not more than that amount, and hence a serious difference between the actual value and the price alleged by the vendor would

admitted); 1877, Harvey *v.* Osborn, 55 Ind. 535, 545 (which of two persons, joint makers of a note, was the surety for the other; the debt of one to the other admitted as showing him to be the principal); 1882, Costello *v.* Crowell, 133 Mass. 352, *semble* (financial embarrassment of the alleged maker of a note, admissible to show the likelihood of borrowing, the genuineness being disputed; on the other hand, to explain away financial embarrassment as a circumstance indicating a probable borrowing from the plaintiff, the fact of the defendant's ability to borrow at two banks was not received; the latter ruling seems erroneous); 1853, Covanhovan *v.* Hart, 21 Pa. 495, 502 (deed alleged to be in fraud of creditors; to show that the defendant had really made the advance for which the deed was said to be given in payment, the fact was admitted of the grantor's need of money at the time); 1872, Com. *v.* Yerkes, Phila. Com. Pleas, 29 Leg. Intell. 60, 12 Cox Cr. 208, 217, 225 (larceny and false pretences, by obtaining a check without consideration; the fact was admitted "that at the time he was sorely pressed for money and therefore had the strongest motive to commit the larceny"; Finletter, J., diss.); 1892, Befay *v.* Wheeler, 84 Wis. 135, 140, 53 N. W. 1121 (larceny of cash in bank by a bookkeeper; his default to the bank and falsified accounts just prior, admitted to show motive).

[7] 1865, R. *v.* Grant, 4 F. & F. 322 (indictment for burning the defendant's own house in order to obtain the insurance; the fact admitted, for the defence, of the defendant's easy circumstances, prompt payment of bills, etc.; Pollock, C. B.: "Surely it was material to show that her circumstances were such as not to raise any temptation to the act"); 1851, Stauffer *v.* Young, 39 Pa. 455, 461, 462 (little need of money, admitted to negative the borrowing of a large amount); 1871, Chahoon's Case, 20 Gratt. Va. 733, 738, 791 (forgery of the signature of H. on a bond; H.'s good pecuniary condition, admitted to negative the probability of his borrowing); 1871, Sands' Case, ib. 800, 803, 821 (similar); 1905, State *v.* Moyer, 58 W. Va. 146, 52 S. E. 30 (embezzlement); 1898, Knopke *v.* Ins. Co., 99 Wis. 289, 74 N. W. 795 (evidence of a sum lost in a fire should be of a sum large enough to deter from arson to gain the insurance).

Contra: 1897, Reynolds *v.* State, 147 Ind. 3, 46 N. E. 31 (robbery; the defendant's possession of money, excluded, practically overruling Cavender *v.* State, 126 Ind. 50, 25 N. E. 875).

throw discredit on the latter's claim. In the same way, where the price is not an issue, but the *specific article* is, a serious difference between the value of the article in question and the concededly agreed price tends to support an allegation that the article in question is not the one agreed upon:

1841, PUTNAM, J., in *Bradbury* v. *Dwight*, 3 Metc. 31, 33: "The presumption which arises from the uniform conduct of men under a given state of facts enters essentially into almost every cause to be tried. Very few cases are established by positive proof. If the fact, alleged by one party and denied by the other, be unusual, unaccountable, and not warranted by the circumstances which attended the transaction, it will not be likely to obtain credit with the jury. If (to come home to the question) the wood, which was standing on the defendant's lot, was worth far more than $1.25 a cord — and we must now take the fact to be so — is it reasonable to suppose and presume that he would have sold it at that reduced price? . . . The [below] rejected evidence would indeed only raise a presumption,[8] which might be rebutted by some particular circumstances that might have operated upon the defendant to sell for less than the known value. But this would not affect the admissibility of the evidence."

It is usually said that this evidence is receivable where the price or the identity of the article is disputed, or where the other evidence is conflicting, or where there is no direct evidence. On the whole, however, this limitation seems unnecessary; for either it is superfluous, since the question never can arise unless there is a dispute, or else it is stating the result of other principles (*post*, § 2430) so far as it means that a written contract could not be varied by such parol evidence. [9]

[8] *I.e.* a mere inference.

[9] *Federal:* 1898, Jefferson v. Burhans, 29 C. C. A. 481, 85 Fed. 952 (agreement for commissions for services; question left undecided);
Alabama: 1901, Timothy v. State, 130 Ala. 68, 30 So. 339 (value of land, admitted to show the probable price agreed on);
Iowa: 1877, Johnson v. Harder, 45 Ia. 677, 679 (price of land sold; value admissible "where there is a conflict in the direct evidence"; it "should be admitted with great caution, and limited to its strictly legitimate province; the danger is that it will be used to affect the sympathy of the Court or jury to secure the release of an improvident party from the trade actually made");
Massachusetts: 1841, Bradbury v. Dwight, 3 Metc. 31 (the terms of a lost written contract for the sale of timber being in dispute, the value per cord was received to show the probable terms); 1862, Rennell v. Kimball, 5 All. 356, 365 (whether the vendor of a share in a ship had agreed to pay for repairs then making; the value of the vessel at the time, the condition of the repairs, etc., admitted "to show that the plaintiff [vendee] would not have been likely to give so high a price as he did unless the vessel were to be put in good repair without expense to him"); 1865, Parker v. Coburn, 10 All. 82, 84 (value of land sold; general principle affirmed); 1871, Upton v. Winchester, 106 Mass. 330 (same; value of oak plank sold); 1871, Brewer v. R. Co., 107 Mass. 277, 278 (dispute as to the kind and quality of wood bargained for; value of the kind of wood delivered, admitted to show, as compared with the price agreed on, that such a price would not have been promised for such wood); 1879, Norris v. Spofford, 127 Mass. 85 (same; dispute as to which of two horses was sold); 1900, Copeland v. R. Co., 177 Mass. 186, 58 N. E. 639 (principle applied);
Michigan: 1875, Campau v. Moran, 31 Mich. 281 (contract to put in piling for $200; upon an issue as to the kind of work called for, evidence of the greater cost of the kind claimed by the defendant was held relevant for that purpose, but not to show that the work was properly done according to contract); 1892, Baughart v. Hyde, 94 Mich. 49, 51, 53 N. W. 915 (sale of chattels; excess of value over the alleged price, admitted); 1897, Raymond v. Day, 111 Mich. 443, 69 N. W. 832 (insurance commissions; other pecuniary arrangements between the parties, admitted to show the probable price); 1897, Shakespeare v. Baughman, 113 Mich. 571, 71 N. W. 875 (legal services; value not admitted on the facts to show the probable price; the rule is not confined to uncorroborated parties' testimony; prior rulings in this State examined); 1900, Stevens v. Beardsley, 122 Mich. 671, 81 N. W. 921 (rental agreement in dispute; the depre-

(4) In *sundry* other ways, not calling for special doubt or discrimination, pecuniary circumstances may properly be admitted as evidencing a motive for some one's action.[10]

ciation of rent of other business houses, admitted, but not the rent paid by another tenant of the same owner for another house); 1901, Grabowsky *v.* Baumgart, 128 Mich. 267, 87 N. W. 891 (contract to buy stock; value admitted as evidence of the price agreed on);
Minnesota: 1862, Kumler *v.* Ferguson, 7 Minn. 442, 445 (dispute as to the consideration for a conveyance; the value of the land at the time, received); 1875, Schwerin *v.* De Graff, 21 Minn. 354 (same principle; value of services in grading); 1875, Miller *v.* Lamb, 22 Minn. 43 (same principle; consideration of a conveyance); 1893, Saunders *v.* Gallagher, 53 Minn. 422, 55 N. W. 600 (same principle; services in sawing logs); 1894, Zelch *v.* Hirt, 59 Minn. 360, 362, 61 N. W. 20 (same principle; condition and value of a horse bought, to show the terms of payment);
Nebraska: 1896, Blomgren *v.* Anderson, 48 Nebr. 240, 67 N. W. 186 (contract of hiring, the compensation alleged by the defendant to be board and lodging only; the fact admitted of the plaintiff's being offered $1.25 a day, as showing that he would not be likely to make such a contract as the former); 1909, Landis & Schick *v.* Watts, 84 Nebr. 671, 121 N. W. 980 (value of services, here excluded, because of an account stated; Root, J., diss.);
New Hampshire: 1860, Swain *v.* Cheney, 41 N. H. 232, 234 (drawing lumber; "the common price for conveying that precise kind of lumber over the same road and at the same time", admitted); 1869, Moore *v.* Davis, 49 N. H. 45, 56 (preceding case approved);
New York: 1889, Weidner *v.* Phillips, 114 N. Y. 458, 461, 21 N. E. 1011 ("When the fact as to the [terms of the] agreement was in dispute, the real value was an element for the jury to consider in determining which version of the story was the correct one"; here, the sale of marble); 1889, Rubino *v.* Scott, 118 N. Y. 662, 22 N. E. 1103 (same; value of services as broker);
North Carolina: 1897, Short *v.* Yelverton, 121 N. C. 95, 28 S. E. 138 (action for goods sold; denial of any purchase; defendant introduced the alleged real purchaser as witness who stated the alleged price; plaintiff offered to prove that he paid as much as that when buying the goods, as showing improbability of selling at the same price; excluded, Clark, J., diss.; the dissent being clearly correct);
Ohio: 1871, Allison *v.* Horning, 22 Oh. St. 138, 142 (excess of value of work over the alleged price, admitted to show the probable price agreed on);
Pennsylvania: 1871, Rauch *v.* Scholl, 68 Pa. 234 ("It is not an unfair presumption that he was to receive no more than the market value of the stone under his contract");
Vermont: 1861, Kidder *v.* Smith, 34 Vt. 294 (market value of a mare, admitted to show the probable price); 1906, Green *v.* Dodge, 79 Vt. 73, 64 Atl. 499 (market value of a lease, admitted to show the terms agreed on); 1916, Lamonda *v.* Parizo, 90 Vt. 381, 98 Atl. 981 (amount promised for a farm; price at sale to a third person, etc., admitted);
Washington: 1901, Wheeler *v.* Buck, 23 Wash. 679, 63 Pac. 566 (whether a specific rate of commission for sales was agreed for; rate of commissions allowed by other merchants for similar goods to the same party, admitted); 1901, Dimmick *v.* Collins, 24 Wash. 78, 63 Pac. 1101 (work on harvesting a crop; the value and condition of the crop, admitted to show the probable price; "the law assumes that men make fair bargains"; good opinion by Mount, J.); 1901, Coey *v.* Darknell, 25 Wash. 518, 65 Pac. 760 (following Dimmick *v.* Collins); 1913, Ffolliott *v.* Lord, 76 Wash. 30[illegible], 136 Pac. 126 (contract for car rentals; market costs, etc., offered on the present principle, excluded; foregoing cases ignored; three judges diss.);
Wisconsin: 1883, Kvammen *v.* Mill Co., 58 Wis. 399, 17 N. W. 222 (lath-sawing; evidence of the usual price of services of a different kind, excluded; the general question not decided); 1888, Valley L. Co. *v.* Smith, 71 Wis. 304, 306, 37 N. W. 412 (value admitted to show contract-price); 1888, Bell *v.* Radford, 72 Wis. 402, 39 N. W. 482 (price agreed for horses, received, there being a dispute as to the price); 1893, Mygatt *v.* Tarbell, 85 Wis. 457, 467, 55 N. W. 1031 (same principle; value of shares of stock sold); 1907, Anderson *v.* Arpin H. L. Co., 131 Wis. 34, 110 N. W. 788 (services in piling lumber, etc.; good opinion by Marshall, J.); 1921, Kunitz *v.* Ruske, 173 Wis. 639, 182 N. W. 347 (work on a house; reasonable value, admitted, provided there is "a direct conflict as to the contract price");
Contra: 1887, Seibert *v.* Householder, Pa., 10 Atl. 784 (terms of a contract as to price; evidence of what others were charging, excluded).

For the admissibility of *specific sales* of other property, as evidence of the value of the property in question, see *post*, § 463.

[10] 1900, Tarbell *v.* Forbes, 177 Mass. 238, 58 N. E. 873 (whether a bequest to stepchildren was in a will as executed; the testatrix' inheritance of an estate from her father, not admitted to show the probability of her leaving it to brothers rather than stepchildren; chiefly because of multiplicity and confusion

§ 393. **Legal Duty or Liability as creating a Motive.** The existence of a legal duty or liability is often of more or less probative value to show a fulfilment of it, because of the motive for action (or non-action) which it may inspire. But the variety of duties and of their surrounding circumstances is such that no specific rules can be laid down.[1] So far as any definite rule exists for a limited class of cases, it takes the shape of the presumption that official duties and legal proceedings were duly fulfilled (*post*, § 2534); but even this presumption is of uncertain and intermittent force.

b. CONDUCT EXHIBITING AN EMOTION.

§ 394. **General Principle.** Every one of the human qualities or conditions with which the foregoing chapters have been concerned may be evidenced by conduct exhibiting it (*ante*, § 190). The interpretation of that conduct proceeds always from experience as to the inferences to be drawn from particular kinds of conduct. Questions of evidence rarely arise over such inferences, so far as the evidence of Emotions is concerned, probably because these interpretations are fairly plain and indubitable. Courts have done little more than enunciate the general relevancy of Conduct to show Emotion:

1850, SHAW, C. J., in *Com.* v. *Webster*, 5 Cush. 295, 316: "The ordinary feelings, passions, and propensities under which parties act, are facts known by observation and experience; and they are so uniform in their operation that a conclusion may be safely

of issues); 1883, Bathrick *v.* Detroit Post, 50 Mich. 629, 633, 16 N. W. 172 (poverty of the woman as bearing on the probability of seduction, admitted); 1885, Gaston *v.* Merriam, 33 Mich. 271, 277, 22 N. W. 614 (whether a deed's record was correct; the fact that the grantor did not own the property described but did own other property noted in the "reception-book", admissible); 1920, Bank of Union *v.* Stack, 179 N. C. 514, 103 S. E. 6 (whether a note was delivered on condition of a release of mortgage by M.; the insolvency of M., admitted as bearing on the probability of such an agreement).

§ 393. [1] 1917, *Re* Fletcher, Reading *v.* Fletcher, 1 Ch. 147, 155 (merger of leasehold and reversion; Astbury, J.: "When it is proved that a person was interested in preventing a merger, or under a duty to do so, subsequent dealings may no doubt be taken into consideration"); 1898, Miller *v.* Dill, 149 Ind. 326, 49 N. E. 272 (general rumor of C.'s pregnancy, admitted, to show probability of defendant's execution of a note said to have been given in compromise of an action for slander by C. against defendant for declaring her pregnant); 1849, Boston *v.* Weymouth, 4 Cush. Mass. 538, 541 (settlement of a pauper; the mere assessment of a tax upon him held no evidence that he paid the tax); 1894, Tremblay *v.* Harnden, 162 Mass. 388, 38 N. E. 972 (injury at a machine; that a defendant was insured against accidents, not admissible to show that he would be less careful); 1911, Bock *v.* Wall, 207 Mass. 506, 93 N. E. 821 (whether a dam had been maintained at a height for 20 years; a deed of C. covenanting so to maintain it, admitted); 1921, Sanderson Co. *v.* Carroll, — Mass. —, 130 N. E. 81 (action for money due from a sub-contractor under B.; issue whether defendant's contract was with B. or with plaintiff; the fact that defendant had already paid the full amount to B., excluded; unsound); 1899, German-American Bank *v.* Stickle, 59 Nebr. 321, 80 N. W. 910 (genuineness of accommodation-note-signature disputed; the fact that the defendant had made a previous note, of which this was said to be a renewal, admitted as tending to show execution); 1896, Welch *v.* Ricker, 69 Vt. 239, 39 Atl. 200 (evidence that the defendant was jointly interested with I. in a farm, received to show the probability of an agreement to become jointly liable with I. for goods furnished the farm); 1907, Virginia-Carolina C. Co. *v.* Knight, 106 Va. 674, 56 S. E. 725 (defendant's insurance against accidents to employees, not admissible to show that he would be less careful).

Compare the cases cited *post*, §§ 949, 969. *Religious* or *moral duty* may also evidence a motive: 1918, Reynolds *v.* Maryland Casualty Co., 274 Mo. 83, 201 S. W. 1128 (issue of suicide; that the assured "was a believer in God, a member of the Episcopal Church, and active in its Sunday school work," admitted).

drawn that, if a party acts in a particular manner, he does so under the influence of a particular motive."

1854, SCOTT, J., in *Austin* v. *State*, 14 Ark. 560: "The jury were sitting in judgment upon an act which in point of law was to be essentially characterized by the motive of the heart which prompted it. These in the order of Providence are hidden and beyond the reach of human law, until developed by acts of commission or of omission which present them to its judgment in determining the quality of the act brought in question. Every act, then, of either class, which in the range of probability could cast a ray of light upon the motive which produced the homicide in question, was legitimately within the range of the investigation, although occurring at an antecedent time or at another place."

Occasionally, specific conduct is passed upon.[1] But the questions that arise in connection with conduct involve usually the principles of the ensuing topics; *i.e.* prior or subsequent conduct is offered as showing the emotion at that prior or subsequent time, and the then emotion is thus offered as showing emotion at the time in issue; the doubt or objection being not as to the first of the two inferences, but as to the second.

c. PRIOR AND SUBSEQUENT EMOTION.

§ 395. **General Principle.** Where an Emotion is offered as evidencing an Act (*ante*, § 117), it is offered as existing at the time of the act; *e.g.* that A killed B, is inferred as probable from A's desire at that time to kill B. Where A's emotion is in issue, as in the case of malice in defamation, it is also predicated as existing at a specific time; and this will usually be the case wherever Emotion enters, either evidentially or as in issue. Thus, the existence of the same Emotion at a prior or a subsequent time can enter only as evidential of its existence at the time in issue; and then is presented the question how far it is thus evidentially available. The nature of the inference, it will be seen, is distinct from those of the two preceding sorts (*i.e.* from extraneous circumstances tending to the excitement of the emotion, and from conduct exhibiting the inward inspiration for the conduct). Here the argument is from an emotional condition once existing to its subsequent or prior

§ 394. [1] 1846, R. *v.* Gandfield, 2 Cox Cr. 43 (to explain his conduct in not disclosing a burglary, the witness, claiming that he had been afraid, was allowed to state his directions to his wife not to tell; Erle, J.: "conversations that explain a man's conduct are admissible"); 1890, Wims *v.* State, 90 Ala. 623, 8 So. 566 (calling a vile name, admitted); 1858, Dunham's Appeal, 27 Conn. 192, 196 (the feelings between testatrix and her sisters being material, a declaration of a sister as to the testatrix, "She is too ugly to die yet", was admitted to show the sister's feelings); 1895, State *v.* Seymore, 94 Ia. 699, 63 N. W. 661 (that deceased and defendant were not on speaking terms, admitted); 1895, State *v.* Hutchison, 95 Ia. 566, 64 N. W. 612 (that defendant, charged with a rape assault, made faces at the child during the trial, admitted); 1886, State *v.* Baldwin, 36 Kan. 10, 12 Pac. 318 (a state of despondency or cheerfulness as bearing on the probability of suicide, admitted); 1885, State *v.* Goodwin, 37 La. An. 713 (maliciously sending a threatening letter; conduct showing a *bona fide* desire to give the receiver an opportunity to clear himself of the charge threatened to be made, admitted); 1869, Blake *v.* Damon, 103 Mass. 209 (the defendant's state of mind towards the plaintiff being material, the fact of insulting remarks to the plaintiff was admitted to show the defendant's state of mind); 1872, Blackburn *v.* State, 23 Oh. St. 146, 149, 165 (a melancholy disposition more than six years before, admitted to show suicide).

For a *testator's conduct and expressions*, as evidencing his state of affections and of susceptibility to influence, see *post*, § 1739.

For a *witness' conduct and expressions*, as evidencing his bias, see *post*, §§ 950–952.

prolongation. The peculiar opportunity for error here is that the prior existing emotion may have been brought to an end before the time in issue, and that the subsequent existing emotion may have been first produced since the time in issue.

Practically this inference is of course usually associated with two others in a way which may obscure the real evidential question. For example, to show that A struck his wife, the fact is offered that he beat her five years before; here three steps of inference are involved: (1) the beating five years before evidences a then violent emotion towards her; (2) the violent emotion five years ago evidences a continuance of the emotion to the time in issue; (3) the violent emotion at the time in issue evidences the operation of the emotion in the act of striking as charged. Now as to the first and the third of these inferences (*i.e.* the inferences dealt with *ante*, § 394, and *ante*, § 117) there is and can be no question; it is as to the second that a question may arise; and it is with that question that we are here concerned. The superficial circumstance that the inference is presented along with others should not prevent us from perceiving its nature however obscured.[1]

§ 396. **Hostility in general; Feeling at other Times.** Where an emotion of hostility at a specific time is to be shown, the existence in the same person of the same emotion at another time is in general plainly admissible.[1]

§ 395. [1] From the point of view of logic and psychology as applicable to argument before the jury (not the rules of Admissibility), see the materials collected in the present author's "Principles of Judicial Proof, as given by Logic, Psychology, and General Experience, and illustrated in Judicial Trials" (1913), §§ 101–115.

The use of *subsequent* emotion sometimes encounters a judicial doubt, as the ensuing citations reveal. This may be due to the crude catchwood, "Presumptions reach forward, not backward" (Averett *v.* Averett, 189 App. Div. 250, 178 N. Y. Suppl. 405). Where did this groundless formula arise?

§ 396. [1] The cases are as follows: CANADA: 1919, R. *v.* Law, 19 Man. 259 (anonymous libel: various acts of malicious mischief done by the accused to the libellee's family, not admitted to show ill-will as making probable the defendant's authorship); 1907, R. *v.* Sunfield, 15 Ont. L. R. 252 (murder).

UNITED STATES: *Alabama:* 1860, McManus *v.* State, 36 Ala. 285, 292 (expressions of hostility against the deceased, half an hour after the fatal blow, admitted to negative sudden passion); 1877, Faire *v.* State, 58 Ala. 74, 79 (murder; previous malice admissible); 1877, Commander *v.* State, 60 Ala. 1, 7 (murder; previous litigation between the parties, admitted); 1878, Hudson *v.* State, 61 Ala. 333, 337 (arson of a mill; previous quarrels and lawsuits about it, admitted to show motive); 1879, Gray *v.* State, 63 Ala. 66, 73 ("previous threats, previous altercations, or prior combats", between the parties, admitted to show ill-will at the time of the killing; but the fact only, not the details of the dispute); 1883, McAnally *v.* State, 74 Ala. 17 ("the fact of such difficulty, and its gravity on the contrary", admissible; its merits or the particulars, not; "the tendency would be to divert the minds of the jury . . . to the merits of the former quarrel"); 1884, Tesney *v.* State, 77 Ala. 33, 38 (the defendant's prior unwillingness to go to the place where the deceased was later met and killed, admitted); 1900, Longmire *v.* State, 130 Ala. 66, 30 So. 413 (after the State's improper examination into particulars of a prior difficulty, the defendant was allowed to show all the particulars in rebuttal); 1904, Spraggins *v.* State, 139 Ala. 93, 35 So. 1000 (prior declarations of the defendant, that he would not fight fair, admitted); 1904, Kroell *v.* State, 139 Ala. 1, 36 So. 1025 (particulars of a former difficulty allowed on redirect examination for the State, the defendant having gone into them on the cross-examination); 1904, Gordon *v.* State, 140 Ala. [illegible] 36 So. 1009 (murder; previous difficulties not admitted for the defendant); 1904, [illegible] State, 140 Ala. 52, 37 So. 159 (a difficulty with deceased before the killing, and the defendant's expressions of animus immediately after, admitted); 1904, Pitts *v.* State, 140 Ala. 70, 37 So. 101 (deceased's curses, in a prior difficulty, excluded, under the rule forbidding details); 1905, Dunn *v.* State, 143 Ala. 67, 39 So. 147 (particulars of a prior difficulty, excluded); 1905, Sanford *v.* State,

What that *limit of time* should be must depend largely on the circumstances of each case, and ought always to be left to the discretion of the trial Court;

1871, LOCHRANE, C. J., in *Pound* v. *State*, 43 Ga. 88, 133: "No general rule can be distinctly traced over this disputed ground of judicial controversy. All we may assert, within the principle recognized, is that there must be some link of association, something

143 Ala. 78, 39 So. 370 (prior difficulty of deceased with a third person; particulars admitted on the facts to show motive; but the particulars of a prior difficulty between deceased and defendant were excluded); 1906, Patterson *v.* State, 146 Ala. 39, 41 So. 157 (particulars of a prior difficulty, excluded); 1906, Stallworth *v.* State, 146 Ala. 8, 41 So. 184 (similar); 1906, Morris *v.* State, ib. 66, 41 So. 274 (murder; expressions of hostility, admitted); 1908, Robinson *v.* State, 155 Ala. 67, 45 So. 916 (after the State shows prior difficulties, the defendant cannot show their details); 1913, Smith *v.* State, 183 Ala. 10, 62 So. 864 (details of prior threats sometimes admissible; later expressions of defendant's hostility, admitted); 1915, Moss *v.* State, — Ala. —, 67 So. 367 (rule of Robinson *v.* State, applied); 1921, Thornton *v.* State, — Ala. App. —, 90 So. 66 (assault with intent; particulars of prior difficulties, not admitted for defendant);

Arkansas: 1855, Atkins *v.* State, 16 Ark. 568, 581 (prior expressions of malice against the deceased, admitted); 1889, Billings *v.* State, 52 Ark. 303, 306, 310, 12 S. W. 574 (a casual altercation with the deceased some years before, excluded as not connected);

California: 1905, Arnold's Estate, 147 Cal. 583, 82 Pac. 252 (hostility of a legatee charged with undue influence:

Connecticut: 1862, State *v.* Alford, 31 Conn. 40, 43 (assault and battery; defence that the collision was accidental; to disprove this, the fact was admitted that the defendant and her family, though living in the same apartment-house, did not afterwards visit or inquire after the assaulted person, who was confined to her bed); 1878, State *v.* Riggs, 39 Conn. 498, 501 (a hostile feeling on the part of the defendant, not admitted as showing that he was "more likely to be the author of the libel in question"); 1917, Verdi *v.* Donahue, 91 Conn. 448, 99 Atl. 1041 (malicious prosecution; subsequent conduct of defendant, admitted);

Florida: 1898, Rawlins *v.* State, 40 Fla. 155, 24 So. 65 (threats "within a period not too remote", admissible); 1903, Sylvester *v.* State, 46 Fla. 166, 35 So. 142 (merits of a quarrel between deceased and defendant, excluded);

Georgia: 1871, Pound *v.* State, 43 Ga. 88, 123, 133 (murder; the fact that the defendant once refused to speak to the deceased a few months before, excluded); 1897, Daniel *v.* State, 103 Ga. 202, 29 S. E. 767 (deceased's hostility at a remote time, not shown continuous, excluded); 1900, Horton *v.* State, 110 Ga. 739, 35 S. E. 659 (isolated quarrel about six years before, excluded); 1906, Graham *v.* State, 125 Ga. 48, 53 S. E. 816 (defendant's hostile language before and after the homicide, admitted); 1906, Green *v.* State, 125 Ga. 742, 54 S. E. 724 (wife-murder; acts of ill treatment to the wife, not too remote, admissible); 1921, Wilson *v.* State, — Ga. —, 110 S. E. 8 (murder; details of prior difficulties, admitted on the facts);

Illinois: 1880, Tracy *v.* People, 97 Ill. 104 (to show that a person's entry into premises was not to avenge an insult, the fact admitted of his friendly presence there shortly before);

Iowa: 1878, State *v.* Westfall, 49 Ia. 328 (murder; the issue being who was the aggressor, the fact that one party had often tried to avoid quarrelling was admitted); 1880, State *v.* Moelchen, 53 Ia. 310, 314, 5 N. W. 186 (homicide; a quarrel received);

Kansas: 1893, State *v.* Sortor, 52 Kan. 531, 34 Pac. 1036 (prior quarrels admitted, but not the details);

Kentucky: 1895, Com. *v.* Gray, — Ky. —, 30 S. W. 1015 (murder; the deceased and the defendant had compromised a quarrel, and then the quarrel had broken out again; the details of the compromise received to see "which party was in the right and which in the wrong" in the quarrel; unsound); 1896, Tuttle *v.* Com., — Ky. —, 33 S. W. 823 (expressions of ill-will to the deceased seven months before; admitted); 1920, Morgan *v.* Com., 188 Ky. 458, 222 S. W. 940 (homicide; prior violence between the parties admitted); 1922, Frazier *v.* Com., 194 Ky. 240, 238 S. W. 769 (homicide; details of previous difficulties not admissible for the accused);

Louisiana: 1854, State *v.* D'Angelo, 9 La. An. 46 (murder; former quarrels received); 1856, State *v.* Jackson, 12 La. An. 679 (same); 1880, State *v.* Cooper, 32 La. An. 1084 (same; particulars may be shown to explain away malice); 1882, State *v.* McNeely, 34 La. An. 1022 (same; but here previous threats and the dangerous character of the deceased were admitted); 1884, State *v.* Birdwell, 36 La. An. 859, 861 (same);

Maine: 1906, Lenfest *v.* Robbins, 101 Me. 176, 63 Atl. 729 (trespass for assault; the defendant allowed to explain that the hostility "was not on his side");

Massachusetts: 1852, Com. *v.* Vaughan, 9 Cush. 594 (to show a motive for burning a barn, the fact was received that the same person had before begun a criminal prosecution against the owner; but no counter-explana-

which draws together the preceding and subsequent acts, something which presents cause and effect in the transaction. . . . As if A, jealous of his wife, finds B with her, and forbids him speaking to her, and afterward meets B and her together, though weeks and even months have elapsed, the previous difficulty, though slight, would be proper evidence to go to the jury in case of homicide. But if A afterwards met B, and upon a new cause of quarrel, distinctly separate from the first, the difficulty sprang up, the acts relative to the first ought to be excluded as not throwing light upon the homicide, and the fact of unfriendly feelings existing is all which would be permitted."

tion of probable cause was allowed, since the fact of ill-will, and not its propriety, was alone involved); 1892, Com. *v.* Holmes, 157 Mass. 240, 32 N. E. 6 (hatred towards a murdered person; time of the former hatred to be in the discretion of the trial Court); 1901, Com. *v.* Storti, 177 Mass. 339, 58 N. E. 1021 (quarrel two years before in Italy, admitted on the facts);

Michigan: 1871, Josselyn *v.* McAllister, 22 Mich. 300, 304 (malicious prosecution; anger of the defendant when arrested in the present suit, not admitted, to show malice in the former suit by him); 1871, Druce *v.* Wheeler, 22 Mich. 439, 444 (trespass; other conduct showing malice, admissible as affecting damages); 1896, Tyler *v.* Nelson, 109 Mich. 37, 66 N. W. 671 (ill-feeling by defendant, as showing whether his collision with plaintiff was negligent or not; admitted);

Mississippi: 1904, Schrader *v.* State, 84 Miss. 593, 36 So. 385 (murder of C.; a prior quarrel between C. and A., a friend of the defendant, admitted); 1904, Thompson *v.* State, 84 Miss. 758, 36 So. 389 (murder; prior difficulties, etc., excluded on the facts); 1905, Brown (Tom) *v.* State, 85 Miss. 511, 37 So. 957 ("where the State itself introduces the previous difficulty, the defendant should be permitted to show the details and character of such difficulty", — in this case, "in order to show who was the aggressor in the difficulty resulting in the killing"); 1906, Brown (Tom) *v.* State, 88 Miss. 166, 40 So. 737 (same case; held by the majority, per Calhoun, J., that "the nature and character of previous difficulties" is admissible for the accused, even when the State does not first introduce the subject, on the theory of uncommunicated threats, *ante*, § 111; the trial Court is rebuked for not following "the plain statement" in the former opinion; but the truth is that the trial Court did follow it literally, and that the Supreme Court itself is in error in confusing the principle and precedents for uncommunicated threats of the deceased, *ante*, § 111, with the present principle; the opinion of Whitfield, C. J., specially concurring, takes the correct ground, and admits the details of the prior quarrel "so far as essential to show the common motive"); 1905, Hughes *v.* State, — Miss. —, 38 So. 33 (details of a prior quarrel not connected with the present affray, not admitted for the defendant; preceding authorities not cited); 1906, Brown (Leora) *v.* State, 87 Miss. 800, 40 So. 1009 (homicide; another difficulty between the families of the parties thirty minutes before, admitted; following Brown (Tom) *v.* State, *supra*);

Missouri: 1899, State *v.* Hudspeth, 150 Mo. 12, 51 S. W. 483 (murder; plea of self-defence; defendant's efforts to secure a peaceable settlement of the quarrel, excluded);

Nebraska: 1920, Schreiner *v.* Hutter, 104 Nebr. 539, 177 N. W. 826 (action for abuse of process; former utterances of ill-will, admitted to show bad faith);

Oklahoma: 1904, Wells *v.* Terr., 14 Okl. 436, 78 Pac. 124 (former difficulty, admitted to show malice of defendant); 1906, McHugh *v.* Terr., 17 Okl. 1, 86 Pac. 433 (assault with intent to kill; details of a prior difficulty, admitted for the defendant on the facts);

Oregon: 1874, State *v.* Garrand, 5 Or. 216 (defendant's threats to shoot a witness, just after the affray, for inquiring what was the matter, admitted to show malice; 1906, State *v.* Martin, 47 Or. 282, 83 Pac. 849 (killing of the father of a girl M.; prior difficulty with the deceased, over the seduction of M. by defendant, admitted);

South Carolina: 1904, State *v.* Adams, 68 S. C. 421, 47 S. E. 676 (prior difficulty admitted, but not the details); 1905, State *v.* Thrailkill, 71 S. C. 136, 50 S. E. 551 (details of a quarrel, just preceding, with a third person, admitted for the State);

Tennessee: 1899, Fitts *v.* State, 102 Tenn. 141, 50 S. W. 756 (accused's expressions after the killing, admitted);

Texas: 1898, Holley *v.* State, 39 Tex. Cr. 301, 46 S. W. 39 (former animosity, admissible, and the language expressing it, but not details of quarrels); 1921, Medford *v.* State, 89 Tex. Cr. 1, 229 S. W. 504 (murder; prior quarrels admitted;

Washington: 1905, State *v.* Armstrong, 37 Wash. 51, 79 Pac. 490 (details of prior quarrels admitted for the State in rebuttal of similar evidence for the accused);

West Virginia: 1901, State *v.* Sheppard, 49 W. Va. 582, 39 S. E. 676 (defendant's expression of feelings towards deceased, after arrest, held admissible).

Subsequent hostility is equally receivable;[2] that it arose only subsequently is matter for explanation by the opponent. The *details* of the conduct evidencing the hostility of a defendant should not ordinarily be gone into; they are irrelevant, even if they show that the hostility was justifiable, and they may, if offered against a defendant, cause unfair prejudice.[3] A *friendly feeling* at another time is equally receivable.[4] No further generalization of rules seems feasible.

Distinguish here certain other uses of similar evidence; in particular (1) *former threats* of a *defendant* as involving a Design to injure (*ante*, § 105); (2) *former threats* of a *deceased* as involving a Design to injure (*ante*, § 110) or as creating a Belief in probable aggression (*ante*, § 247); (3) *previous prosecution* or *litigation* as creating a Motive for injury (*ante*, § 390); and (4) *former assaults* to show Intent (*ante*, § 363); (5) *former hostility of a witness* to show Bias (*post*, § 951); (6) the application of the Hearsay rule to an *accused's expressions of regret or explanation*, see (*post*, § 1732); and (7) the use of *prior assaults* to show *intent* (*ante*, §§ 363, 364).

§ 397. **Same: Hostility to Wife or Paramour.** The precedents dealing with instances of hostility to a wife or a paramour form a numerous group by themselves, though the principle and its application are precisely the same as in the foregoing general instances.[1] The *limit of time* over which the evidence

[2] Ala., Conn., Or. 1922, Kane *v.* Oehler, — Mont. —, 205 Pac. 245 (malice of one converting a fence; subsequent conduct admitted).

[3] Ala., Mass.; but La. is *contra*. Compare the citations *post*, §§ 951, 952 (details of a quarrel, in impeaching a witness).

But the details of prior quarrels as showing the hostility of the *deceased*, on a charge of homicide, are not open to the same objection, and may be received on the principle stated in the opinion of Whitfield, C. J., in Brown *v.* State, Miss., cited *supra*, n. 1.

[4] Ill., Ia.

§ 397. [1] The cases are as follows: *Federal:* 1895, Thiede *v.* Utah, 159 U. S. 510, 16 Sup. 62 (wife-murder; the fact admitted of the wife having been seen at various times with black eyes, bruises, tears, etc.);
Alabama: 1850, Baalam *v.* State, 17 Ala. 451, 453 (wife-murder: that the deceased and the defendant had quarrelled and separated about a year before, admitted); 1850, Johnson *v.* State, 17 Ala. 626 (wife-murder: cruelty to her by the defendant for a time previous, admitted);
California: 1882, People *v.* Kern, 61 Cal. 244 (violent domestic conduct a month before, admitted); 1898, People *v.* Barthleman, 120 Cal. 7, 52 Pac. 112 (defendant's hostile expressions, received); 1898, People *v.* Chaves, 122 Cal. 134, 54 Pac. 596 (prior violence, admitted);
Connecticut: 1834, Austin *v.* Austin, 10 Conn. 221 (divorce for adultery; defence, a luring and connivance by her husband; his relation to her being in itself some evidence against this, the wife offered evidence of his repeated unkindness to her; rejected, as not relevant);
1868, State *v.* Green, 35 Conn. 203, 208 (wife-murder; the defendant's marrying again within five weeks after the death, admitted as showing his feelings toward the deceased at the time of her death);
Georgia: 1878, Shaw *v.* State, 60 Ga. 249, 250 (wife-murder; former quarrels between the parties, admitted); 1905, Roberts *v.* State, 123 Ga. 146, 51 S. E. 374 ("a long course of ill-treatment and cruelty", admitted); 1905, Campbell *v.* State, 123 Ga. 533, 51 S. E. 644 (husband-murder; the wife's prior expressions of ill-feeling, held admissible);
Illinois: 1893, Painter *v.* People, 147 Ill. 463, 35 N. E. 64 (murder of a paramour; former quarrels admitted); 1905, Parsons *v.* People, 218 Ill. 386, 75 N. E. 993 (wife-murder; prior quarrels, disagreements, and expressions of ill-feeling, admitted); 1919, People *v.* Laures, 289 Ill. 490, 124 N. E. 585 (murder of lover of fiancée; former and present marital relations of defendant, admitted to show motive);
Indiana: 1883, Doolittle *v.* State, 93 Ind. 272, 274 (assault and battery on a wife; previous ill-feeling between them, admitted); 1884, Koerner *v.* State, 98 Ind. 7, 10, 24 (same; previous quarrels, beatings, and threats during several years, admitted to show malice);
Iowa: 1895, Bailey *v.* Bailey, 94 Ia. 598, 63 N. W. 341 (prior quarrels, between husband and wife, admitted, to diminish damages in an action for alienation of affections);

may range depends much on the circumstances of each case, and no fixed rule can be laid down:

1851, NASH, J., in *State* v. *Rash*, 12 Ired. 382, 384 (wife-murder): "On behalf of the prisoner it is said that the State was permitted to go too far back for its facts, and by that means the general ch racter of the prisoner was brought before the jury to speak against him. Not so. In the domestic relation, the malice of one of the parties is rarely to be proved but from a series of acts; and the longer they have existed and the greater the number of them, the more powerful they are to show the state of the feelings. A single expression and a single act of violence are most frequently the result of temporary passion, as evanescent as the cause producing them. But a long-continued course of brutal conduct shows a settled state of feeling inimical to the object."

1881, COLT, J., in *Com.* v. *Abbott*, 130 Mass. 472 (the fact of a husband's bad treatment of his wife and quarrels with her from 1873 to 1877, to show a motive for killing her in 1880, the two having lived together in the meantime, was excluded): "It is difficult, in dealing with this description of evidence, to define as matter of law, the precise limits which must practically control its admission. . . . [It was proper] to prove such a state of ill-feeling on the part of the husband, existing at the time of the homicide, as would

Kansas: 1908, State v. Moore, 77 Kan. 736, 95 Pac. 409 (wife-murder; former cruelty and brutality, extending over seven years, excluded, but too strictly);
Louisiana: 1912, State v. Simon, 131 La. 520, 59 So. 975 (wife-murder, prior violent acts of defendant admitted);
Massachusetts: 1881, Com. v. Abbott, 130 Mass. 472 (quoted *supra*); 1892, Com. v. Holmes, 157 Mass. 233, 239, 32 N. E. 6 (wife-murder; a course of violent conduct at various times during eight or nine years, admitted; an interval of cessation, or even of reconciliation, does not necessarily exclude the preceding conduct); 1919, Com. v. Russ, 232 Mass. 50, 122 N. E. 176 (wife-murder);
Mississippi: 1902, Raines v. State, 81 Miss. 489, 33 So. 19 (acts and words of violence, extending over the previous ten years, excluded; grossly erroneous);
Missouri: 1879, State v. Nugent, 71 Mo. 136, 140 (maltreatment of the wife, for the preceding two months, by cutting, shooting, and threatening her, admitted to show deliberateness and malice) 1900, State v. Callaway, 154 Mo. 91, 55 S. W. 444 (murder; former violence, admitted); 1908, State v. Page, 212 Mo. 224, 110 S. W. 1057 (murder; deceased's wife as paramour); 1908, State v. McNamara, 212 Mo. 150, 110 S. W. 1067 (wife-murder; lust for another woman); 1911, State v. Whitsett, 232 Mo. 511, 134 S. W. 555 (threat two years before, admitted); 1916, State v. Shoemaker, — Mo. —, 183 S. W. 322 (husband-murder),
Nevada: 1896, Gardner v. Gardner, 23 Nev. 207, 45 Pac. 139 (divorce; husband's cruelty after suit begun, admitted to throw light on his previous acts);
New Jersey: 1913, State v. Overton, 85 N. J. L. 287, 88 Atl. 689 (murder of paramour and child; defendant's expressions eight months before, admitted);
New Mexico: 1905, Miera v. Terr., 13 N. M. 192, 81 Pac. 586 (paramour-murder; a threat of three years before, admitted);
New York: 1899, People v. Bernham, 160 N. Y. 402, 55 N. E. 11 (wife-murder; quarrels two years before, admitted); 1913, People v. Harris, 209 N. Y. 70, 102 N. E. 546 (husband's intimacy with a prostitute, during separation from his wife, not admitted on the facts, on his trial for the killing of the wife);
North Carolina: 1853, State v. Langford, Busbee 436, 442 (domestic quarrels, admitted); 1851, State v. Rash, 12 Ired. 382 (wife-murder; a long course of ill-treatment, admitted to show hostile feeling); 1912, State v. Wilkins, 158 N. C. 603, 73 S. E. 992 (wife-murder; prior quarrels, admitted);
Pennsylvania: 1879, Sayres v. Com., 88 Pa. 291, 292, 303, 309 (wife-murder by shooting; to show ill-feeling and malice, evidence admitted that the defendant had thrown her down stairs two years before); 1900, Com. v. Birriolo, 197 Pa. 371, 47 Atl. 355 (former violence, admitted); 1921, Com. v. Jones, 269 Pa. 589, 113 Atl. 57 (wife-murder; defendant's prior quarrels and threats, admitted; "the length of time intervening . . . does not affect the relevancy of the testimony");
Texas: 1919, Bibb v. State, 86 Tex. Cr. App. 112, 215 S. W. 321 (character of defendant's wife 8 years before, admitted, the issue being as to defendant's motive in attacking an alleged seducer);
Virginia: 1901, O'Boyle v. Com., 100 Va. 785, 40 S. E. 121 (murder of a paramour; defendant's violence to her in the preceding year, admitted);
Wisconsin: 1884, Boyle v. State, 61 Wis. 440, 444, 21 N. W. 289 (wife-murder; previous acts of abuse admitted, to "show that his disposition carried him at times to . . . personal violence upon her").

furnish him with a motive for the commission of the crime. But the difficulty is that the ill-feeling here offered to be shown was not of such a character as to afford a reasonable ground for the inference that it existed at the time of the murder. . . . The whole evidence fails to show such deeply seated and enduring hostility on the part of the husband as to lead to the presumption that without further manifestation and under the concealment of kindly relations, it continued to exist and so increase in power as to furnish a motive for the commission of the crime."

Here also, subsequent as well as prior emotion is receivable;[2] and the evidence has application occasionally in civil as well as in criminal cases.[3] No more detailed generalizations present themselves.

Distinguish the use of prior assaults to evidence Intent (*ante*, §§ 363, 364).

§ 398. **Sexual Passion at other Times.** The prior or subsequent existence of a sexual passion in A for B is relevant, on the same principle and to the same extent as in the foregoing topics, to show its existence at the time in issue. The circumstance that the prior or subsequent conduct exhibiting the passion is criminal does not alter the case nor affect the admissibility of the evidence (*ante*, § 216). But the different ways in which this evidence may be employed need to be discriminated, so that the present principle in its operation may not be confounded with others having different limitations. The precedents may be divided into three groups: (1) cases involving Adultery, Bigamy, Fornication, Criminal Conversation, Sodomy, Indecent Liberties and Incest; (2) cases involving Seduction, Bastardy, and Breach of Promise of Marriage; (3) cases involving Rape, and (4) cases involving carnal knowledge under the age of consent ("Statutory Rape").[1]

[2] Conn., Nev.

[3] Ia., Nev.

For the principle that the *criminality* of conduct showing motive is no objection, see *ante*, §§ 216, 305, 363.

§ 398. [1] The precedents are as follows, and will be dealt with in detail in the ensuing sections: 1. ***Adultery, Bigamy, Criminal Conversation, Fornication, Incest, Indecent Liberties, Sodomy*** (the issue is adultery, where not otherwise stated); ENGLAND; 1692, Duke of Norfolk *v.* Germaine, 12 How. St. Tr. 943 (crim. con.; at the end of the plaintiff's evidence, L. C. J. Holt: "Do you observe what you have proved? . . . You have not proved any lascivious conversation within these six years." Sol.-Gen.: "Pray, my lord, if your lordship pleases, this is the use we make in giving in evidence some things before, — to show the fact within the six years, their frequent meeting in a lascivious manner; and we make use of that before the sixth year to explain what use we make of it in matters done within the six years." L. C. J.: "For my part, I must declare, that these matters may be given in evidence to explain, but they are not to be given in evidence to any other purpose [*i.e.* damages]"; 1861, Boddy *v.* Boddy, 30 L. J. P. M. A. 23 (subsequent living together as showing previous adulterous inclination, admitted); 1900, Wales *v.* Wales, Prob. 63 (divorce for adultery; cohabitation subsequent to the date of the petition, admitted); 1910, Allen's Case, 4 Cr. App. 181 (incest in Nov. 1909; other incestuous acts between March and November, admitted); 1910, Ball's Case, 5 Cr. App. 238 (incest in 1910; incestuous acts in 1907, 1908, and 1909, excluded; "such evidence can only be receivable to show the *mens rea* in the doing of an act": the opinion ignores the distinction between moral character and specific incestuous passion); on appeal to the House of Lords, [1911] 1 K. B. 461, 6 Cr. App. 31, [1911] A. C. 47 (appeal allowed; evidence admitted, L. C. Loreburn pointing out the correct distinction); 1910, Ball's Case, 6 Cr. App. 89 (incest in December, 1909; incestuous acts some weeks later, admitted); 1913, Bloodworth's Case, 9 Cr. App. 80 (incest in 1912; intercourse in July, 1910, admitted); 1913, Barrow's case, 9 Cr. App. 236 (sodomy on July 18; sodomy on June 6 with the same boy, not admitted, because of insufficient evidence of the earlier act).

UNITED STATES: *Alabama:* 1848, State *v.* Crowley, 13 Ala. 172 (intercourse 18 months afterwards, excluded, as not fairly indicating prior relations; "what are such circumstances [of inference] cannot be laid down universally"); 1852, Lawson *v.* Swinney, 20 Ala. 65, 75 (intercourse before the statutory bar and after

the date of the indictment, admitted as on the facts sufficiently connected in time); 1860, McLeod *v.* State, 35 Ala. 395, 397 (familiarities before the statutory period, admitted); 1875, Alsabrooks *v.* State, 52 Ala. 24 (familiarities since the indictment; admissible, after other evidence offered as to the time charged); 1903, Hill *v.* State, 137 Ala. 66, 34 So. 406 (adultery; other intercourse before and after, admitted, if an act is otherwise evidenced within the period charged); 1903, Bickley *v.* Bickley, 136 Ala. 548, 34 So. 946 (divorce for adultery; illicit relations not long before marriage, admitted); 1917, Herbert *v.* State, 16 Ala. App. 213, 201 Ala. 480, 77 So. 83, 78 So. 386 (seduction; intercourse subsequent to the date charged, admitted; held not error, in the Court of Appends, distinguishing Pope *v.* State, 137 Ala. 56; held error, in the Supreme Court following Pope *v.* State; but Pope *v.* State should have been repudiated);

Arkansas: 1906, Adams *v.* State, 78 Ark. 16, 92 S. W. 1123 (incest; prior intercourse, beyond the period of limitations, admitted);

California: 1894, People *v.* Patterson, 102 Cal. 239, 244, 36 Pac. 436 (incest; prior intercourse for several years, admissible); 1904, People *v.* Stratton, 141 Cal. 604, 75 Pac. 166 (incest; like People *v.* Patterson, *supra*, but the Court's opinion forgets to cite it); 1904, People *v.* Koller, 142 Cal. 621, 76 Pac. 500 (incest; subsequent and prior acts of intercourse or improper familiarity, admissible; "the only case in this State which has been called to our attention" is People *v.* Stratton, *supra*); 1906, People *v.* Morris, 3 Cal. App. 1, 84 Pac. 463 (preceding case followed); 1910, People *v.* Harrison, 14 Cal. App. 545, 112 Pac. 733 (sodomy; a series of former acts between the same parties, admitted);

Columbia: (Dist.): 1906, Dodge *v.* Rush, 28 D. C. App. 149, 156 (crim. con.; prior conduct, admitted);

Florida: 1886, Brevaldo *v.* State, 21 Fla. 789, 795 (prior adultery admissible, provided some other evidence of adultery within the time charged is first offered),

Georgia: 1897, Bass *v.* State, 103 Ga. 227, 29 S. E. 966 (fornication; former lascivious familiarities, within "a comparatively recent period", admitted), 1900, Taylor *v.* State, 110 Ga. 150, 35 S. E. 161 (incest; intercourse previous to the statutory period, admissible), 1906, Lipham *v.* State, 125 Ga. 52, 53 S. E. 817 (incest, prior intercourse in another county and another State, admitted); 1906, Nobles *v.* State, 127 Ga. 212, 56 S. E. 125 (adultery, improper conduct in another county, admitted),

Hawaii: 1896, Republic *v.* Waipa, 10 Haw. 442, 445 (adultery; act of intercourse before the date charged, admitted to show their relations);

Illinois: 1897, Crane *v.* People, 168 Ill. 295, 48 N. E. 54 (adultery; prior and subsequent acts of improper familiarity and adultery, in another county, receivable, even before evidence of the substantive act is offered); 1913, People *v.* Turner, 260 Ill. 84, 102 N. E. 1036 (incest; prior acts, covering a period of 4½ years, beyond the statute of limitations, admitted);

Indiana: 1859, Lovell *v.* State, 12 Ind. 18 (incest; subsequent intercourse, excluded as irrelevant); 1884, State *v.* Markins, 95 Ind. 464 (incest; prior intercourse, as well as lascivious behavior, admitted, distinguishing the preceding case as involving merely subsequent conduct, and yet approving Thayer *v.* Thayer, Mass., which admits both); 1894, Lefforge *v.* State, 129 Ind. 551, 29 N. E. 34 (incest; prior acts of familiarity, admitted);

Iowa: 1886, State *v.* Briggs, 68 Ia. 416, 423, 27 N. W. 358 ("the fact that the parties had the disposition, and on previous occasions had been guilty of acts of intercourse, was of the highest importance in determining whether they did indulge at that time [charged]"); 1897, State *v.* Hurd, 101 Ia. 391, 70 N. W. 613 (incest; former acts of intercourse admitted); 1901, State *v.* More, 115 Ia. 178, 88 N. W. 322 (adultery; subsequent undue familiarities, admitted); 1906, State *v.* Judd, 132 Ia. 296, 109 N. W. 892 (incest; prior acts admitted); 1909, State *v.* Brown, — Ia. —, 121 N. W. 513 (adultery; adulterous relations up to the time of the indictment, admitted); 1912, State *v.* Heft, 155 Ia. 21, 134 N. W. 950 (incest; prior acts, admissible; subsequent acts, not decided); 1917, State *v.* Pelser, 182 Ia. 1, 163 N. W. 600 (incest; subsequent acts, admitted);

Kansas: 1914, State *v.* Ball, 93 Kan. 606, 144 Pac. 1012 (concubinage; the parties' cohabitation some seven years before, admitted;

Kentucky: 1901, Smith *v.* Com., 109 Ky. 685, 60 S. W. 531 (incest; similar act within a few months, admitted); 1908, Robards *v.* Robards, — Ky. —, 109 S. W. 422 (divorce for adultery; other acts prior and subsequent, admissible);

Louisiana: 1903, State *v.* DeHart, 109 La. 570, 33 So. 605 (incest; prior acts admitted),

Maine: 1881, State *v.* Witham, 72 Me. 531, 534 (adulterous intercourse before and after the time charged; admitted in discretion);

Maryland: 1898, Shufeldt *v.* Shufeldt, 86 Md. 519, 39 Atl. 416 (prior undue intimacy, received), 1917, Wagner *v.* Wagner, 130 Md. 346, 100 Atl. 364 (divorce for adultery; subsequent adultery here admitted to remove defense of condonation);

Massachusetts: 1833, Com. *v.* Merriam, 14 Pick. 518 (former improper relations with the defendant, admitted; "a woman who would so conduct herself would be more likely to commit the fact alleged against her than if her deportment had been modest and discreet"); 1854, Com. *v.* Horton, 2 Gray 355 (subsequent adultery with the same person in another county, excluded; no clear reason given); 1858, Com. *v.* Thrasher, 11 Gray 450

(adultery; prior acts for adultery and improper familiarity, admitted, "with the purpose of showing a disposition in the parties to commit such a crime and as bearing on the probability of its commission on the occasions alleged"; but subsequent acts rejected on the authority of Com. v. Horton); 1858, Com. v. Pierce, 11 Gray 447 (like Com. v. Thrasher); 1859, Com. v. Lahey, 14 Gray 92 (attempting to distinguish Com. v. Horton, 2 Gray 354, and following Com. v. Merriam); 1867, Com. v. Curtis, 97 Mass. 574 (prior and subsequent acts of sexual intimacy admitted, to show the adultery); 1869, Thayer v. Thayer, 101 Mass. 111 (divorce for adultery; adultery between the parties since the date of the libel, admitted; overruling Com. v. Thrasher and Com. v. Horton on this point; quoted *post*); 1873, Com. v. Nichols, 114 Mass. 288 (adultery in another county, admitted); 1888, Brooks v. Brooks, 145 Mass. 574, 14 N. E. 777 (divorce for adultery; indecent familiarities and sexual intercourse with the third person before marriage admitted as "tending to prove sexual intimacy with the same person" after marriage);
Michigan: 1858, People v. Jenness, 5 Mich. 305, 319 (incest; other acts of sexual intercourse and of familiarity, for five years preceding, admitted); 1881, People v. Carrier, 46 Mich. 442, 446, 9 N. W. 487 (enticement of a minor for prostitution, etc.; former illicit relations of the defendant with her admitted); 1893, People v. Skutt, 96 Mich. 449, 450, 56 N. W. 11 (incest; prior intercourse during eight years, admitted); 1900, Matthews v. Detroit J. Co., 123 Mich. 608, 82 N. W. 243 (improper conduct three months later, admitted); 1911, Merrill v. Leisenring, 166 Mich. 219, 131 N. W. 538 (alienation of affections; the parties' relations after suit begun, admitted); 1913, People v. Davis, 175 Mich. 594, 141 N. W. 667 (adultery; subsequent acts, excluded; ignoring Matthews v. Detroit Co.); 1920, People v. Luce, 210 Mich. 621, 178 N. W. 54 (indecent liberties; evidence of a similar offence with another child, not allowed to be shown in contradiction of defendant's denial on cross-examination); see the comments below, IV. *Rape under Age*, on People v. Brown, Mich., and People v. Palmberg, Mo.);
Missouri: 1907, State v. Pruitt, 202 Mo. 49, 100 S. W. 431 (incest; prior acts of intercourse and lascivious familiarity, admissible);
Nebraska: 1877, State v. Way, 5 Nebr. 283 (improper familiarities before and after the time charged, admissible); 1909, Peterson v. State, 84 Nebr. 76, 120 N. W. 1110 (incest; former acts here excluded, being offered by hearsay only);
New Hampshire: State v. Wallace, 9 N. H. 515 (previous improper conduct admitted, but treated rather as indicating a design); 1857, State v. Marvin, 35 N. H. 22, 28 (same); 1899, Burns v. Burns, 68 N. H. 33, 44 Atl. 75 (prior acts of familiarity, etc., admitted, 1909, Hoxie v. Walker, 75 N. H. 308, 74 Atl. 183 (alienation of affections of plaintiff's husband; defendant's hostile conduct to the husband two months after suit brought, held not improperly admitted in discretion);
New Jersey: 1899, State v. Snover, 64 N. J. L. 65, 44 Atl. 850 (adultery in another county, admitted); 1900, State v. Jackson, 65 N. J. L. 62, 46 Atl. 767 (other acts of adultery, admitted); 1900, State v. Snover, 65 N. J. L. 289, 47 Atl. 583 (prior adultery in another county, admitted); 1915, State v. Ruttberg, 87 N. J. L. 5, 93 Atl. 97 (fornication; acts of intercourse by defendant with another woman, excluded);
New Mexico: 1902, U. S. v. Griego, 11 N. M. 392, 72 Pac. 20 (adultery; conduct four years before, admitted);
New York: 1845, Lockyer v. Lockyer, 1 Edm. Sel. C. 108 (other improprieties, admitted); 1859, Stephens v. People, 19 N. Y. 549, 571 (wife-murder; the defendant's improper attachment to a third person being alleged as a motive, evidence of his feelings towards her nearly a year after the wife's death, admitted; "love and jealousy are generally conceded to be enduring passions"); 1922, Tuttle v. Tuttle, — N. Y. Sup. —, 191 N. Y. Suppl. 769 (divorce for adultery; subsequent relations of co-respondent with defendant, excluded);
North Carolina: 1882, State v. Kemp, 87 N. C. 538 (habitual illicit relations of the same persons more than two years before, admitted, as "shedding light upon the present relations if kept up"); 1883, State v. Pippin, 88 N. C. 646 (same); 1897, State v. Raby, 121 N. C. 682, 28 S. E. 490 ("facts that transpired since the finding of the indictment", admitted); 1899, State v. Beard, 124 N. C. 811, 32 S. E. 804 (fornication and adultery; other intercourse in another county, admitted);
Ohio: 1914, State v. Reineke, Oh., 106 N. E. 52 (incest; subsequent incestuous acts, admissible; distinguishing Rason v. State, unreported, which excluded such evidence in rape);
Oregon: 1904, State v. Eggleston, 45 Or. 346, 77 Pac. 738 (adultery; intercourse between the parties at other prior times, admitted);
Pennsylvania: 1799, Gardner v. Madeira, 2 Yeates 466 (crim. con.; admitting indecent conduct, etc., provided first some direct evidence is offered of the acts charged at the times specified); 1867, Sherwood v. Titman, 55 Pa. 77, 79 (crim. con.; improper intimacy between the defendant and the plaintiff's wife after the latter had left him, admitted, on the same principle as in Gardner v. Madeira); 1895, Com. v. Bell, 166 Pa. 405, 31 Atl. 123 (incestuous fornication; prior intercourse, barred by statute, admitted);
Rhode Island: 1899, Rose v. Mitchell, 21 R. I. 270, 43 Atl. 67 (alienation of wife's affections, intimacy of plaintiff's wife with defendant after separation, admitted as indicating prior state of feelings);

Tennessee: 1873, Cole *v.* State, 6 Baxt. 242 (improper familiarities between the persons, before the statutory period and after prosecution begun, held admissible);
Texas: 1870, Richardson *v.* State, 24 Tex. 142 (cohabitation for a "series of months", admitted); 1893, Burnett *v.* State, 32 Tex. Cr. 86, 22 S. W. 47 (incest; prior and subsequent intercourse, admissible); 1893, Wood *v.* State, 32 Tex. Cr. 476, 478, 24 S. W. 284 (slander charging incest; incest a few months before, admitted); 1898, Duncan *v.* State, 40 Tex. Cr. 591, 51 S. W. 372 (fornication; acts more than two years previous, excluded, except "under peculiar circumstances"; no authority cited); 1904, Clifton *v.* State, 46 Tex. Cr. 18, 79 S. W. 824 (incest; a series of subsequent acts, including some covered by other indictments, excluded; Burnett *v.* State, *supra*, overruled, on the authority of Smith *v.* State, *infra*, *Rape under Age*, and no other of the above cases cited; this opinion merits the censure of the Texas bar; it not only overthrows exact precedents, but in so doing it introduces, upon the scantiest consideration, a heretical and inferior rule, and creates unnecessary difficulties in the proof of this crime); 1905, Wiggins *v.* State, 47 Tex. Cr. 538, 84 S. W. 821 (rape and incest; prior acts of intercourse, excluded; Clifton *v.* State not cited); 1905, French *v.* State, 47 Tex. Cr. 571, 85 S. W. 4 (adultery; rule of Clifton *v.* State applied, but now held to admit acts of intimacy short of criminal intercourse, if not too remote); 1906, Gillespie *v.* State, 49 Tex. Cr. 530, 93 S. W. 556 (Clifton *v.* State followed; here excluding prior acts more than ten years before); 1909, Barrett *v.* State, 55 Tex. Cr. 182, 115 S. W. 1187 (incest; prior and subsequent acts admissible, following Burnett *v.* State); 1909, Skidmore *v.* State, 57 Tex. Cr. 497, 123 S. W. 1129 (incest; prior intercourse excluded; Davidson, P. J., this time again obtaining the upper hand, and declaring that as "Barrett *v.* State was decided upon the authority of Burnett *v.* State", which "had been overruled in Clifton *v.* State and followed in subsequent cases", and that as Clifton *v.* State "is correct", "the Barrett case therefore is overruled"; Ramsey, J., diss.; thus the seesaw goes on, certainly no such persistency of dissent has been recorded outside of the Federal Supreme Court); 1914, Vickers *v.* State, 75 Tex. Cr. 12, 169 S. W. 669 (incest; Barrett Case followed, admitting prior intercourse for a period of years); 1922, Rodriguez *v.* State, — Tex. Cr. —, 236 S. W. 726 (incest; subsequent intercourse received; prior rulings reviewed; rule of Skidmore *v.* State repudiated);
Utah: 1885, U. S. *v.* Musser, 4 Utah 153, 7 Pac. 389 (bigamous cohabitation; cohabitation with the same women before the date charged, admitted to show "his inclination and disposition to cohabit with the women"); 1886, U. S. *v.* Groesbeck, 4 Utah 487, 11 Pac. 542 (similar); 1887, U. S. *v.* Peay, 5 Utah 263, 14 Pac. 342 (similar); 1887, U. S. *v.* Smith, 5 Utah 232, 14 Pac. 291 (similar); 1901, State *v.* Neel, 23 Utah 541, 65 Pac. 494 (illicit intercourse; prior acts of familiarity, admitted in corroboration); 1912, State *v.* Hansen, 40 Utah 418, 122 Pac. 375 (adultery; subsequent acts inadmissible; State *v.* Hilberg, *infra*, followed);
Vermont: 1876, State *v.* Bridgman, 49 Vt. 202, 209 (adultery; "a great many acts of familiarity and several acts of adultery" within seven years, admitted; also other acts at a subsequent time); 1878, State *v.* Colby, 51 Vt. 291, 293, 296 (obscure); 1879, State *v.* Potter, 52 Vt. 33, 40 (adultery; acts seven years before, admitted);
Washington: 1903, State *v.* Wood, 33 Wash. 290, 74 Pac. 380 (incest; other prior acts of intercourse between them, admitted); 1905, State *v.* Nelson, 39 Wash. 221, 81 Pac. 72 (similar); 1914, State *v.* Jones, 80 Wash. 588, 142 Pac. 35 (seduction; subsequent acts of intercourse, admitted);
Wisconsin: 1858, Ketchingman *v.* State, 6 Wis. 426 (another adultery admitted, but under a second count); 1895, Porath *v.* State, 90 Wis. 527, 63 N. W. 1061 (familiarities, admitted).

II. ***Seduction. Breach of Marriage Promise,*** and ***Bastardy:*** ENGLAND: 1877, Verdin *v.* Wray, 2 Q. B. D. 611 (bastardy; acts of familiarity, before the probable time of begetting, with the alleged father, admitted); UNITED STATES: *Ind.* 1890, Ramey *v.* State, 127 Ind. 243, 26 N. E. 818 (bastardy; acts of intercourse prior to the alleged time of conception, admitted to show "the probability of intercourse having taken place at subsequent times"); 1905, Walker *v.* State, 165 Ind. 94, 74 N. E. 614 (bastardy; the defendant, alleging that B. was the father, was allowed to introduce the relatrix' admissions that she and B. had had intercourse on occasions prior to the time of conception); *Ia.* 1898, State *v.* Hughes, 106 Ia. 125, 76 N. W. 520 (defendant's statement, a week later, that he was going to the prosecutrix's house for intercourse, admitted); *Kans.* 1917, State ex rel. Botts *v.* Stout, 101 Kan. 600, 168 Pac. 853 (bastardy; defendant's indecent liberties with other women, excluded); *Ky.* 1919, Cline *v.* Com., 186 Ky. 429, 216 S. W. 594 (seduction; rape of prosecutrix by defendant some months later, not admitted, on the facts); *Md.* 1853, Keller *v.* Donnelly, 5 Md. 213, 219 (seduction; the defendant's relations with the daughter five years later, admitted as throwing light on their relations at the time alleged); *Mich.* 1876, People *v.* Clark, 33 Mich. 112, 115 (seduction; previous acts of intercourse, but not subsequent ones, admitted); 1900, People *v.* Jamieson, 124 Mich. 164, 82 N. W. 835 ("acts of intercourse and undue familiarity" before and after the alleged time of conception, admissible); 1902, People *v.* Elco, 131 Mich. 519, 91 N. W. 755 (seduction;

intimate relations of the parties after pregnancy ascertained, admitted); *N. Car.* 1897, State *v.* Robertson, 121 N. C. 551, 28 S. E. 59 (seduction; later intercourse between the parties, admitted); *S. Dak.* 1912, State *v.* Holter, 30 S. D. 353, 138 N. W. 953 (seduction; subsequent acts, admitted); *Tex.* 1919, Ice *v.* State, 84 Tex. Cr. 418, 208 S. W. 343 (seduction; subsequent intercourse, admitted on the facts; prior cases explained); *Vt.* 1865, Thayer *v.* Davis, 38 Vt. 163 (bastardy; intercourse three years before, admitted, as showing a familiarity making the alleged intercourse more probable); *Wash.* 1914, State *v.* Tilden, 79 Wash. 472, 140 Pac. 680 (seduction; prior intercourse admitted).

Compare the additional cases cited *post*, § 401.

III. ***Rape*** (the evidence offered is, where not otherwise mentioned, of former intercourse between the parties, to show the woman's probable consent; compare also the cases cited *ante*, § 357);

ENGLAND: 1870, R. *v.* Cockcroft, 11 Cox Cr. 410, Willes, J.; 1871, R. *v.* Holmes, 12 Cox Cr. 141 (indecent conduct admitted; but not passed upon); 1887, R. *v.* Riley, 16 Cox Cr. 191 (Coleridge, L. C. J.: "It renders it more likely that she would or would not have consented"); and cases cited *ante*, § 200.

UNITED STATES: *Ala.* 1887, McQuirk *v.* State, 84 Ala. 435, 438 (admitted); 1889, Barnes *v.* State, 88 Ala. 204, 207, 7 So. 38 (rape; "prior acts of undue intimacy", received to show the complainant's probable consent); *Ark.* 1855, Pleasant *v.* State, 15 Ark. 624, 643 (admitted); *Cal.* 1896, People *v.* Rangod, 112 Cal. 669, 44 Pac. 1071 (question reserved); *Ill.* 1873, Shirwin *v.* People, 69 Ill. 56, 59, *semble* (admissible); *Ind.* 1880, Eyler *v.* State, 74 Ind. 49, 51 (admissible); 1888, Bedgood *v.* State, 115 Ind. 275, 278, 17 N. E. 621 (same); *Iowa:* 1919, Wildeboer *v.* Petersen, 187 Ia. 1169, 175 N. W. 349 (civil action for rape; prior acts of familiarity, admitted for the plaintiff); *Mich.* 1882, Hall *v.* People, 47 Mich. 636, 11 N. W. 414 (friendly relations of the parties, not improper, admitted to show that the defendant would probably seek to obtain intercourse by persuasion, not by force); 1888, People *v.* McLean, 71 Mich. 310, 38 N. W. 871 (admissible); *Mont.* 1898, State *v.* Bowser, 21 Mont. 133, 53 Pac. 179 (rape; the relationship between defendant and prosecutrix, admitted, to indicate that the latter resisted as much as could be expected); *N. H.* 1861, State *v.* Forschner, 43 N. H. 89 (admissible; put on the ground of character); 1863, State *v.* Knapp, 45 N. H. 151, 156 (rape; the defendant's indecent solicitations of the prosecutrix six months before, admitted as involving "a motive or passion that would render the commission of the act charged more probable"); *N. Y.* 1838, People *v.* Abbot, 18 Wend. 194 (admissible); 1857, People *v.* Jackson, 3 Park. Cr. 398 (same); 1874, Woods *v.* People, 55 N. Y. 516 (same); *N. Car.* 1846, State *v.* Jefferson, 6 Ired. 305 (that she had been his concubine, or had suffered him to take liberties, admitted); *Oh.* 1858, McCombs *v.* State, 8 Oh. St. 643, 646, *semble* (admissible); 1862, McDermott *v.* State, 13 id. 331, *semble* (same); *Vt.* 1894, State *v.* Hollenbeck, 67 Vt. 34, 30 Atl. 696 (the complainant's friendliness beforehand, admitted); *Wis.* 1893, Proper *v.* State, 85 Wis. 615, 628, 55 N. W. 1035 (rape; previous indecent assaults upon the complainant, admitted to show a desire to gratify his passions with her); 1902, Bannen *v.* State, 115 Wis. 317, 91 N. W. 964 (rape; prior relations of the parties, admitted to show probable consent).

IV. ***Rape under Age of Consent***: ENGLAND: 1913, Shellaker's Case, 9 Cr. App. 240 (carnal knowledge of a girl under 16, prior to the six months limited by statute, admitted as evidence of an "amatory passion"); 1913, The King *v.* Shellaker, [1914] 1 K. B. 414 (carnal knowledge under 16; previous acts of intercourse, admitted; St. 1885, 48–9 Vict., c. 69, § 5, limiting time of prosecution, held not to exclude conduct more than six months earlier); 1914, Rogers' Case, 10 Cr. App. 276 (carnal knowledge of a girl under age; a previous similar offence, held admissible).

UNITED STATES: *Arkansas:* 1920, Howell *v.* State, 141 Ark. 487, 217 S. W. 457 (carnal knowledge of a female under 16; defendant's intercourse with her after 16, admitted); 1918, Crawford *v.* State, 132 Ark. 518, 201 S. W. 784 (rape under age; other similar offences, admitted on the facts);

California: 1903, People *v.* Edwards, — Cal. —, 73 Pac. 416 (rape under age; prior intercourse, and prior and subsequent improper familiarity, between the two, admitted "to prove the adulterous disposition of the defendant"; 1909, People *v.* Soto, 11 Cal. App. 431, 105 Pac. 420 (other acts before and after, admissible);

Colorado: 1919, Laycock *v.* People, 66 Colo. 441, 182 Pac. 880 (rape under age; other acts with the female, admitted);

Connecticut: 1907, State *v.* Sebastian, 81 Conn. 1, 69 Atl. 1054 (rape under age: intercourse three months later, admitted);

Idaho: 1904, State *v.* Lancaster, 10 Ida. 410, 78 Pac. 1081 (rape under age; prior acts of intercourse between the parties, admitted); 1911, State *v.* Henderson, 19 Ida. 524, 114 Pac. 30 (statutory rape; other intercourse before and after, admitted);

Illinois: 1910, People *v.* Everham, — Ill. —, 93 N. E. 373 (rape of a daughter under age; other acts with the same daughter, *semble*, admissible); 1911, People *v.* Gray, 2 51 Ill. 431, 96 N. E. 268 (rape under age; other intercourse with prosecutrix, admitted; also postal cards sent by defendant to her); 1912, People *v.* Gibson, 255 Ill. 302, 99 N. E. 599 (rape under age on C.; testimony of other young girls to the defendant's similar acts to

them ranging over six months, excluded, also testimony of P. that at the same place and occasion and in the presence of C. defendant did the same act to P.; the latter ruling is absurd; such offences might almost as well be given immunity); 1919, People *v.* Findley, 286 Ill. 368, 121 N. E. 608 (rape under age; prior acts in another county, admitted); 1918, Barker *v.* State, 183 Ind. 263, 120 N. E. 593 (carnal knowledge of a female child; defendant's prior intercourse with the child, admitted);

Iowa: 1902, State *v.* King, 117 Ia. 484, 91 N. W. 768 (another act of intercourse a week or so later, admitted); 1893, People *v.* Abbott, 97 Ia. 484, 486, 56 N. W. 862 (admitted, to show their "relations" and "opportunity"); 1905, State *v.* Sheets, 127 Ia. 73, 102 N. W. 415 (rape under age; assault on other girls in the same place and the same day, admitted); 1910, State *v.* Neubauer, 145 Ia. 337, 124 N. W. 312 (lascivious conduct with a male minor; former similar acts with the same minor, admitted);

Kansas: 1904, State *v.* Borchert, 68 Kan. 360, 74 Pac. 1108 (other acts of intercourse between the parties, admitted); 1905, State *v.* Oswalt, 72 Kan. 84, 82 Pac. 513 (subsequent intercourse inadmissible); 1906, State *v.* Stone, 74 Kan. 189, 85 Pac. 808 (carnal knowledge under age; subsequent as well as prior acts of intercourse, etc., admitted; State *v.* Borchert approved); 1911, State *v.* Brown, 85 Kan. 418, 116 Pac. 508 (rape under age; subsequent intercourse, admitted);

Louisiana: 1921, State *v.* Wichers, 149 La. 643, 89 So. 883 (rape under age; other acts between the parties, admitted); 1922, State *v.* Emory, 151 La. — , 91 So. 659 (carnal knowledge of a minor; prior conduct with another female, excluded);

Michigan: 1906, People *v.* Brown, 142 Mich. 622, 106 N. W. 149 (subsequent acts of intercourse, after the statutory age, excluded, approving People *v.* Etter, 81 Mich. 570, 45 N. W. 1109, and apparently disapproving People *v.* Jamieson, *supra*, par. II of this note; no principle is stated, and the opinion entirely ignores the reasoning applicable to the question, and tends to confuse the precedents in this State); 1915, People *v.* Coston, 187 Mich. 538, 153 N. W. 831 (rape under age; former similar acts with the complainant's sister, excluded);

Minnesota: 1912, State *v.* Schneller, 120 Minn. 26, 138 N. W. 937 (rape under age; prior acts, admitted; subsequent acts, not decided); 1916, State *v.* Shtemme, 133 Minn. 184, 158 N. W. 48 (carnal knowledge under age; similar prior and subsequent conduct with other females who were with the one in question, allowed); 1921, State *v.* McPadden, 150 Minn. 62, 184 N. W. 568 (rape under age; prior and subsequent intercourse between the two, admitted); 1922, State *v.* Friend, — Minn. —, 186 N. W. 241 (statutory rape; defendant's intercourse with other girls under 18, etc., not admitted on the facts);

Mississippi: 1914, Collier *v.* State, 106 Miss. 613, 64 So. 373 (rape on his own daughter aged 13; subsequent acts of rape during nearly a year, excluded; unsound, being misled by the Texas decisions);

Missouri: 1906, State *v.* Palmberg, 199 Mo. 233, 97 S. W. 566 (rape under age; subsequent acts are inadmissible, but prior acts are admissible; it is unfortunate that this Court, upon a careful consideration of the subject, should adopt this illogical and unpractical view, which makes the rule of evidence run counter to human nature; in selecting People *v.* Clark, Mich., *supra*, as its guide, it took a Court which has been the most inconsistent on this subject and one whose precedents are therefore of small value); 1920, State *v.* Belknap, — Mo. —, 221 S. W. 39 (statutory rape; other assaults on the child admitted to show intent); 1920, State *v.* Harris, — Mo. —, 222 S. W. 377 (statutory rape; other acts of intercourse, excluded; repudiating the ruling in State *v.* Belknap, *supra*; the opinion makes an effort to find constitutional authority for this; unsound; Williams, P. J., diss.);

Montana: 1903, State *v.* Peres, 27 Mont. 358, 71 Pac. 162 (other intercourse with the prosecutrix, admitted); 1915, State *v.* Harris, 51 Mont. 496, 154 Pac. 198 (statutory rape; other intercourse between defendant and complainant, admitted);

Nebraska: 1904, Blair *v.* State, 72 Nebr. 501, 101 N. W. 17 (rape under age; improper familiarities between the two, admitted); 1904, Woodruff *v.* State, 72 Nebr. 815, 101 N. W. 1114 (subsequent intercourse with the prosecutrix, admitted); 1908, Leedom *v.* State, 81 Nebr. 585, 116 N. W. 496 (rape under age; subsequent acts of intercourse, admitted);

New Mexico: 1918, State *v.* Whitener, 25 N. M. 20, 175 Pac. 870 (statutory rape; other similar acts between the parties, admitted);

New York: 1900, People *v.* Flaherty, 162 N. Y. 532, 57 N. E. 73 (intercourse under age of consent; other intercourse admissible only in corroboration, when other evidence of act charged is in the case); 1914, People *v.* Thompson, 212 N. Y. 249, 106 N. E. 78 (rape under age; subsequent acts of intercourse, held admissible);

Ohio: 1906, State *v.* Lawrence, 74 Oh. 38, 77 N. E. 266 (rape under age; the defendant's confessions of other acts of intercourse with the child more than two years later, excluded); 1910, Boyd *v.* State, 81 Ohio 239, 90 N. E. 355 (rape under age; intercourses between defendant and prosecutrix within two months before, admitted);

Oklahoma: 1905, Cecil *v.* Terr., 16 Okl. 197, 82 Pac. 654 (rape under age; prior acts of intercourse, admitted, but not subsequent

ones; the Court's assertion that "it is just as well settled that such subsequent acts" are inadmissible is wholly unjustifiable; only Michigan decisions are cited for this, and in that jurisdiction the precedents are confused and inconsistent); 1913, Morris *v.* State, 9 Okl. Cr. 241, 131 Pac. 731 (rape under age; subsequent acts, admitted; overruling Cecil *v.* Terr., *supra*); 1913, Allen *v.* State, 10 Okl. Cr. App. 55, 134 Pac. 91 (rape on the defendant's daughter aged 15; the prosecution's evidence that the girl had had a child by a negro was held improperly admitted; apparently this evidence was calculated to heighten the prejudice against the accused: moreover, the girl was apparently a degenerate and a maker of false charges); 1914, Flowers *v.* State, 10 Okl. Cr. 494, 138 Pac. 1041 (rape under age; other intercourse during the next three years, admitted); 1917, Penn *v.* State, 13 Okl. Cr. 367, 164 Pac. 992 (statutory rape; subsequent intercourse between the parties, admitted); 1918, Taylor *v.* State, 14 Okl. Cr. 400, 171 Pac. 739 (rape under age "continuous unlawful relation" between the parties, admitted); 1922, Marlow *v.* State, — Okl. Cr. —, 202 Pac. 1048 (rape under age; subsequent as well as prior acts of intercourse between the parties, admissible);

Oregon: 1897, State *v.* Robinson, 32 Or. 43, 48 Pac. 357 (other intercourse with the prosecutrix, admitted);

South Carolina: 1911, State *v.* Richey, 88 S. C. 239, 70 S. E. 729 (rape under age, prior and subsequent acts, admissible);

South Dakota: 1910, State *v.* Sysinger, 25 S. D. 110, 125 N. W. 879 (rape under age; former acts of intercourse, admitted); 1911, State *v.* Rash, 27 S. D. 185, 130 N. W. 91 (other intercourse with the prosecutrix, admitted); 1918, State *v.* Yeager, 41 S. D. 51, 168 N. W. 749 (rape under age; subsequent intercourse, admitted);

Tennessee: 1904, Sykes *v.* State, 112 Tenn. 572, 82 S. W. 185 (rape under age; prior and subsequent intercourse, admitted);

Texas: 1899, Rogers *v.* State, 40 Tex. Cr. 355, 50 S. W. 338 (other acts of intercourse between the parties, admissible to show the probability of the offence); 1903, Smith *v.* State, — Tex. Cr. —, 73 S. W. 401 (subsequent intercourse with the same woman, excluded; repudiating prior contrary rulings; Henderson, J., *semble*, diss.); 1903, Smith *v.* State, — Tex. Cr. —, 74 S. W. 556 (rape under age; prior intercourse in another county, excluded); 1904, Henard *v.* State, 46 Tex. Cr. 90, 79 S. W. 810 (rape under age; subsequent intercourse, excluded, following the foregoing cases; but the ruling is unsound on the facts, for the evidence tended to explain away a circumstance discrediting the prosecutrix); 1904, Henard *v.* State, 47 Tex. Cr. 168, 82 S. W. 665 (intimacy short of criminal intercourse is admissible); 1905, French *v.* State, 47 id. 571, 85 S. W. 4 (foregoing rule approved); 1911, Battles *v.* State, 53 Tex. Cr. 202, 109 S. W. 195, 63 Tex. Cr. 147, 140 S. W. 783 (rape under age; prior and subsequent intimacy, admissible; "it should be governed by the facts of each case" whether other acts of intercourse are admissible; prior cases examined, and a number declared to be overruled; Davidson, P. J., diss.); 1921, Crosslin *v.* State, 90 Tex. Cr. 467, 235 S. W. 905 (statutory rape; parties' prior acts of intercourse, admitted);

Utah: 1900, State *v.* Hilberg, 22 Utah 27, 61 Pac. 215 (subsequent acts are inadmissible; Bartch, C. J., diss. on this point, and properly); 1911, State *v.* Mattivi, 39 Utah 334, 117 Pac. 31 (rape under age; subsequent acts of intercourse, inadmissible; McCarty, J., diss. on this point; this would have been a good opportunity to repudiate the unsound precedent of State *v.* Hilberg);

Vermont: 1905, State *v.* Willett, 78 Vt. 157, 62 Atl. 48 (rape under age; other acts of intercourse before and since, admitted);

Washington: 1903, State *v.* Carpenter, 32 Wash. 254, 73 Pac. 357 (rape on a daughter under age; that the defendant had on several occasions attempted to induce another daughter to have intercourse with him, excluded; unsound; no authorities cited); 1903, State *v.* Fetterly, 33 Wash. 599, 74 Pac. 810 (other acts of intercourse between the parties, admitted); 1906, State *v.* Marselle, 43 Wash. 273, 86 Pac. 586 (rape under age; defendant's attempt to seduce another girl, excluded); 1906, State *v.* Mobley, 44 Wash. 549, 87 Pac. 815 (rape under age; other acts of intercourse, admitted); 1921, State *v.* Sigler, 116 Wash. 581, 200 Pac. 323 (rape under age; other acts of the sort with the girl, admitted); 1922, State *v.* Crowder, — Wash. —, 205 Pac. 850 (statutory rape; subsequent acts between the parties, and the details, admitted);

West Virginia: 1921, State *v.* Driver, 88 W. Va. 479, 107 S. E. 189 (attempt at rape under age; prior attempts on the same female, held admissible "to show the lustful disposition of the defendant"; which is unsound in statement, though correct in result);

Wisconsin: 1902, Lanphere *v.* State, 114 Wis. 193, 89 N. W. 128 (rape under the age of consent, the girl being in fact willing; other intercourse admitted); 1905, Grabowski *v.* State, 126 Wis. 447, 405 N. W. 805 (indecent liberties; prior liberties, admitted); 1910, Robinson *v.* State, 143 Wis. 205, 126 N. W. 750 (rape under age; lascivious approaches to other minor females, admitted, on the facts, to rebut a defence).

For *pregnancy*, as evidence, see *ante*, § 168, n. 3.

§ 399. **Same: General Principles.** The process of argument here involves (*ante*, § 395) three steps, namely, (*a*) from the Emotion to the Act charged, (*b*) from a prior or subsequent Emotion to this Emotion at the time charged, and (*c*) from Conduct to the prior or subsequent Emotion. The evidence as offered takes the reverse order; it consists in conduct, and from this the first inference is to the then emotion, from this next to the emotion at the time charged, and from this to the act charged. All these steps are implied in the offer of such evidence, and questions may arise as to any one of the steps; and, though the second is the only legitimate subject of the present treatment (the first and the third involving respectively the principles of § 117 and § 394, *ante*), it is convenient to deal with them all in this place.

(*a*) That a sexual desire of A for B is relevant to show the probability of A's doing that which will realize this desire cannot be and is not questioned; and no evidential difficulties arise at this point:

1869, COLT, J., in *Thayer* v. *Thayer*, 101 Mass. 113: "The evidence by which the act of adultery is proved is seldom direct. . . . When adulterous disposition is shown to exist between the parties at the time of the alleged act, then mere opportunity, with comparatively slight circumstances showing guilt, will be sufficient to justify the inference that criminal intercourse has actually taken place."

1876, WHEELER, J., in *State* v. *Bridgman*, 49 Vt. 210: "The offence charged in this case cannot ordinarily be committed till the restraints of natural modesty and the safeguards of common deportment and conventionality have been overcome by gradual approaches and the relations of the parties have been changed from those usually existing between the sexes to the most intimate. . . . Thus it appears that the true relation of the parties to each other in this respect is very material and proper to be shown."

1884, ELLIOTT, C. J., in *State* v. *Markins*, 95 Ind. 465: "It is a rule of elementary logic, as well as of rudimentary law, that evidence which tends to establish facts rendering it antecedently probable that a given event will occur, is of material relevancy and strong probative force. It is more probable that incestuous intercourse will take place between persons who have conducted themselves with indecent familiarity than between those whose behavior has been modest and discreet."

(*b*) That this desire at a *prior or subsequent time* is relevant to show the probable existence of the same desire at the time in issue is equally clear:

1799, HUME, B., in *Brown* v. *Smith*, Hume (Sc.) 32 (action for filiation of an illegitimate child, the time of intercourse being in doubt): "It is reasonable for the judge to consider the situation and circumstances of the parties at a later period; . . . and if these are still such as to afford them the like temptations and opportunities of meeting, . . . it is natural to presume that such an intercourse once commenced does not cease while those opportunities continue."

1852, GOLDTHWAITE, J., in *Lawson* v. *Swinney*, 20 Ala. 76: "The fact to be established by the evidence is that the parties lived together in a certain condition; and if this particular condition of life was proved to exist, both anterior and subsequent to the time alleged in or covered by the indictment, an inference might often be correctly drawn as the existence of this condition during the intermediate period."

1869, COLT, J., in *Thayer* v. *Thayer*, 101 Mass. 113: "It is true, that the fact to be proved is the existence of a criminal disposition at the time of the act charged; but the indications by which it is proved may extend, and ordinarily do extend, over a period of time both anterior and subsequent to it. . . . When once an adulterous disposition in two

persons towards each other is shown to exist, a strong inference arises that it has had and will have continuance, the duration and extent of which may be usually measured by the power which it exercises over the conduct of the parties. It is this character of permanency which justifies the inference of its existence at any particular point of time from facts illustrating the preceding or subsequent relations of the parties. . . . The limit, practically, to the evidence under consideration is that it must be sufficiently significant in character and sufficiently near in point of time, to have a tendency 'to lead the guarded discretion of a reasonable and just man' to a belief in the existence of this important fact to be proved. If too remote or insignificant, it will be rejected, in the discretion of the judge who tries the case."

The *limits of time* over which the evidence may range must depend largely on the circumstances of each case,[1] and should be left to the discretion of the trial Court.[2] A *subsequent* existence of the desire is equally relevant with a prior one. It is true that the contingencies of error are different; *i.e.* in the former case, the desire may have been first induced by intervening circumstances, in the latter it may have been ended by them; but the strength of these contingencies is no greater in one instance than in the other. If for example the parties have been intimate during the entire year 1890, and an act of adultery is charged on July 1, an adulterous desire on Dec. 31 carries no less persuasive weight than an adulterous desire on Jan. 1. That there is any distinction is generally repudiated.[3]

(*c*) The conduct receivable to prove this desire at such prior or subsequent time is *whatever would naturally be interpretable* as the expression of sexual desire:

1899, GARRISON, J., in *State* v. *Snorer*, 64 N. J. L. 65, 44 Atl. 850: "Adultery, from its inherit stealth, is seldom provable apart from circumstances by which the disposition of the parties towards each other may be judged. This disposition develops gradually, and has a duration and progress that generally, if not always, antedate opportunity. Hence the total proof of adultery is not to be circumscribed by the time and space of a single act, but rather is to be extended as widely as the demonstration of the moral qualities involved may require. The discreet limit of such proof is the character of the conduct sought to be shown, — a point of which time, rather than geography, is apt to be the significant feature."

Sexual intercourse is the typical sort of such conduct, but indecent or otherwise *improper familiarities* are equally significant.[4] That the intercourse is also itself criminal is no objection.[5]

§ 400. **Same: Discriminations in regard to Adultery and Incest.** The foregoing principles apply equally to the sexual desire in all aspects. But

§ 399. [1] See instances in Eng., Mass., N. Y., N. C., Tex., Vt.; and the evidence may antedate the statutory period of limitation, as in Eng., Ala., Pa., Tenn.

[2] Mass., quoted *supra*; Me.

[3] Ala., Me., Md. (seduction), Mass., Nebr. (seduction), N. Y., Pa., Tenn., Vt. *Contra*, Ind., Mich. (seduction).

[4] As in Eng., Ala., Ind., Mass., Mich., Nebr., N. H., N. Y., Pa., Vt., Wis.

[5] Colt, J., in Thayer v. Thayer, 101 Mass. 113: "[If it were an objection,] evidence tending to establish an independent crime is to be rejected, although all acts which are only acts of improper familiarity are to be admitted in proof. There is no sound distinction to be thus drawn. There is no difference between acts of familiarity and actual adultery committed, when offered for the purpose indicated, except in the additional weight and significance of the latter fact. . . . There is no one act by which the moral status of the parties is more clearly defined"; see also the full discussion *ante*, § 216.

for each sort of acts in which it becomes relevant, certain discriminations need to be made.

Where *adultery* (civil or criminal) or *incest* is charged, the use of the evidence in question is to show a desire at the time charged, as indicating an act of intercourse, and thus the evidence is predicated of *the one charged* with that act. This distinction might become important where the sexual desire was evidenced, not by actual intercourse, but by solicitation or familiarities, which might be predicable of one only of the parties.[1]

§ 401. **Same: Discriminations in regard to Seduction, Bastardy, Breach of Promise, and Alienation of Affections.** Ordinarily, in seduction (whether an action by the parent or a criminal prosecution) and in bastardy, the act of intercourse being in dispute, the sexual desire at other times is offered as showing the probability of that act, and is predicated *of the man* charged with it; *i.e.* the use is the same as in the preceding subject, and is resorted to by the plaintiff or prosecutor. But in the statutory action (by the woman) or the criminal prosecution for seduction under promise of marriage, the prior willingness of the *woman* to have intercourse, as shown by acts, may be relevant *for the accused* to show the probability that she consented, on the occasion charged, without regard to any promise of marriage as an inducement.[1] The prior unchastity of the woman *with other persons*, as affecting her character and the parent's damages, raises a different question (dealt with *ante*, §§ 205, 210). So, too, the intercourse of the woman with third persons, in bastardy actions, as showing *another paternity* (*ante*, § 133), or as impeaching her *testimonial credit* (*post*, § 987).

In action for *breach of promise of marriage*, the present principle is more or less frequently involved, in inferring from the state of affections at one time to its state at another.[2] From this distinguish the question (*post*, § 1770) whether the woman's expressions and conduct of assent, occurring subsequently to the time of the man's alleged offer, are admissible under the verbal-act rule.

§ 400. [1] For other adulteries of the wife to *mitigate damages* in *crim. con.*, see *ante*, § 211.

§ 401. [1] 1908, Lauer *v.* Banning, 140 Ia. 319, 118 N. W. 446 (seduction is admissible to corroborate the woman's assertion of promise of marriage); 1876, People *v.* Clark, 33 Mich. 112, 116 (Marston, J.: "Where parties thus indulge their criminal desires, it shows a willingness upon her part that a person of chaste character could not be guilty of, and although a promise of marriage may have been made at each time as an inducement, it would be but a mere matter of form, and could not alone safely be relied upon to establish the fact that she would not have yielded had such a promise not been made"); 1876, Bowers *v.* State, 29 Oh. St. 542, 546 (same).

But it seems also to admit occasionally of an opposite inference: 1897, Smith *v.* Hall, 69 Conn. 651, 38 Atl. 386 (relations of the parties before the alleged promise, while the plaintiff was married to another, admitted, to show the probability of a promise).

[2] 1831, Honyman *v.* Campbell, 2 Dow. Ch. 265, 282 (conduct of courtship is some evidence of marriage); 1901, Hahn *v.* Bettingen, 84 Minn. 512, 88 N. W. 10 (prior attentions are admissible even while the defendant was married to another woman); 1896, Osmun *v.* Winters, 30 Or. 177, 46 Pac. 780 (breach of promise; malicious letters after suit begun, admitted to show malice in breaking the promise); 1840, Carskadden *v.* Poorman, 10 Watts Pa. 82, 85 (penalty for marrying a minor without the parent's assent; preceding favorable attitude of the father to the match, admitted to show probable consent).

In actions for *alienation of affections*, the existence of unhappy marital relations prior to the defendant's interference is material on the issue of damages; because the less affection there was to lose, the less the damage.[3] Here no evidential question is involved, except that of using the spouse's expression of feeling under an exception to the Hearsay rule (*post*, § 1730).

§ 402. **Same: Discriminations in regard to Rape.** (1) (a) Ordinarily, the evidence offered is of the *woman's prior improper conduct* with the defendant, as showing an inclination on her part to consent to his embraces, and thus negativing an essential element in the crime charged. For this purpose, her submission to improper familiarities may be as significant as her allowance of actual intercourse.[1] (b) From this is to be distinguished the use of the *woman's prior friendly feelings* toward the defendant, as showing that he would more probably have attempted to obtain his purpose by persuasion than by force;[2] the inference here is really of a different sort (*ante*, § 389). (c) The fact of the woman's *friendly feelings after* the supposed rape is conduct in the nature of an inconsistency, and so far as it impeaches her testimony, is admissible (*post*, §§ 1040, 1143). (d) The woman's prior *intercourse with a third person* involves the question of character, and has been examined from that point of view (*ante*, § 200); over such evidence of character there has been more or less controversy; but over the evidence in (a), *supra*, there has been none.[3]

(2) (a) Former conduct *predicated of the man* may serve to show a passion, inclining him to attempt further gratification of his passion for this woman; though this use is seldom emphasized, where the conduct consists in voluntary intercourse, the use in (1) (a), *supra*, being the more important. But upon the same principle, former *indecent solicitations* by the man, or other conduct short of actual intercourse with the woman, tend similarly to show such a passion, and are receivable;[4] though they would not have been, from the point of view of (1) (a), *supra*. (b) The defendant's former *rape* or *attempt at rape* of the *same woman* may, like the voluntary intercourse in (2) (a), equally indicate a desire for this woman. But it may also be treated as evidencing a *plan* or *design* to obtain intercourse with her, or to throw light on the *intent* of a proved assault upon her (*ante*, § 357). (c) The defendant's former *rape* or attempt at rape of a *third person* cannot be treated as indicating a passion or desire for the woman in issue, *i.e.* cannot legitimately involve the present principle; either it indicates a lustful character generally and is thus inadmissible (*ante*, § 194), or it indicates a plan or intent to rape (*ante*, § 357).

[3] 1916, Smith *v.* Rice, 178 Ia. 673, 160 N. W. 6 (collecting the cases).

§ 402. [1] *E.g.*, Eng., Ala., N. C.

[2] *E.g.*, Mich., Vt.

[3] The following passage shows how the latter may be received, but not the former: 1876, Wheeler, J., in State *v.* Bridgman, 49 Vt. 212: "Evidence of like intercourse between them is admissible on an indictment [of him] for rape, and evidence of like acts of intercourse between her and other men is not, . . . not because it is in any wise more lawful for a man to commit rape upon a woman with whom he has had such intercourse, but because from the relations between them it is less likely that the intercourse was forcible."

[4] *E.g.*, N. H., Or., Wis.

(3) In *rape under the age of consent*, the woman's consent is immaterial; the charge is therefore practically one of fornication. The evidence may be dealt with from the point of view of adultery and fornication (*ante*, § 400), where the intercourse was in fact voluntary; or it may be dealt with from the point of view of rape, where it was in fact forcible.[5]

Distinguish here the question whether under a statute limiting the offence to intercourse with a female of "previous chaste and virtuous character", such prior intercourse with the defendant negatives the statutory requirement.[6]

§ 403. **Defamation: Other Utterances as evidencing Malice.** The state of feelings, with reference to malice, of one who has uttered a defamatory statement, may become important, under the substantive law, in two ways: (1) as involving an *excess of a privilege* otherwise existing; (2) as affording ground for *aggravation of damages*.[1] The early notion that malice was also important in a third way, namely, as an essential element for the plaintiff's cause of action, is now generally repudiated.

For the purpose of showing this malice at the time of uttering the defamation charged, other utterances of the defendant may be offered; and the question arises whether and on what terms they are admissible. The 'nisi prius' rulings on this subject in England up to the middle of the 1800s fluctuated widely; and though the law was there clearly settled in 1851 by the House of Lords, the varieties of rulings in the previous period furnished no uniform guide for the earlier rulings in this country. Thus the numerous different distinctions for which there had been in England some authority were all reproduced here and there with new detailed varieties, in one or another jurisdiction in this country. All these variations rested upon some supposed reason; and it is essential to examine these reasons, as affording the key to the wide difference of rules which is still found in our different jurisdictions, and even in the precedents of a single jurisdiction. There are thus to be considered, first, the considerations of Relevancy, and, secondly, the considerations of Auxiliary Policy (*ante*, § 43).[2]

§ 404. **Same: Principle of Relevancy.** The probative value of other utterances as showing malice at the time charged rests on a double argument: (A) that the other utterance indicates malice at that time of utterance; and (B) that malice then indicates malice at the time charged.

(A) That the other utterance may indicate malice at that time is clear, on the general principle (*ante*, § 394) that all conduct, including language, is one of the legitimate sources of inference to the feeling that inspires it:

1863, SANFORD, J., in *Swift* v. *Dickerman*, 31 Conn. 285, 291: "It conduced to prove a fact from which a legitimate inference regarding the defendant's feelings and motives when he

[5] The cases have been placed separately, under par. IV, n. 1, § 398, *ante*.

[6] 1919, Branham *v.* State, 16 Okl. Crim. App. 308, 182 Pac. 525 (rape under age; prior intercourse of defendant with complainant, held not to amount to proof negativing complainant's "chaste and virtuous character")

§ 403. [1] But this way is not recognized in New York.

[2] The precedents are collected *post*, § 406.

spoke the words now sued for might be fairly deduced. Every uncalled for utterance of a defamatory charge is more or less indicative of the speaker's malice at the time of speaking. . . . His malice *then* was probable in this suit only for the sake of the inference which it authorized regarding his mental feelings when he spoke the words now declared on."

What are the limitations, if any, that result from this principle? [1]

(1) *Expressions of hatred*, ill-will, anger, and the like, not in themselves defamatory, are plainly receivable, as all concede.[2]

(2) An utterance *in itself defamatory* may (not necessarily does) also evidence such feelings, as is generally conceded. The suggestion that such an utterance *when privileged* is not thus evidential [3] has not been generally accepted, and seems unsound.

(3) Whether an *unproved plea of justification* (*i.e.* of truth) has such evidential force is questionable. It is certainly a repetition of the defamatory utterance; and, though a ' bona fide ' attempt to prove it would dispose of any notion of its malice, yet a total failure to attempt to prove it, coupled with the deliberate retention of it upon the record, may well be taken as at least evidence of malice. The English law came finally to receive for this purpose an unproved and unwithdrawn plea; [4] but legislation in several American States has repudiated this result; and perhaps it is wiser to require some additional circumstance strengthening the indication of malice.[5]

(4) The *subject* of the other utterances is in England not considered to be material; [6] for clearly a defamatory charge of a wholly different tenor may equally evidence a feeling of ill-will or malice. But in this country it is generally laid down (with varying phrases) that the other utterance must be upon the same subject.[7] Certainly it must be directed against the plaintiff,[8] or at least against a class of persons including him. But the limitation in the United States may be perhaps based on the doctrine of Unfair Surprise, to be referred to later.

(B) The second branch of the inference, that malice *then* indicates malice *at the time charged*, is merely another and legitimate application of the general principle already dealt with (*ante*, § 395). There can be and is no question as to the propriety of the argument:

1851, PARKE, B., in *Barrett* v. *Long*, 3 H. L. C. 395, 414: "We are all of opinion that under such a plea the publication of previous libels on the plaintiff by the defendant is admissible evidence to show that the defendant wrote the libel in question with actual malice against the plaintiff. A long practice of libelling the plaintiff may show in the most satisfactory manner that the defendant was actuated by malice in the particular

§ 404. [1] The precedents are collected *post*, § 406.

[2] Parke, B., in Wright v. Woodgate, Eng., Denman, L. C. J., in Simpson v. Robinson, Eng.

[3] N. J.

[4] Simpson v. Robinson, Eng. *Accord:* Me., Md., Mass., N. Y. Rejected: Mich.

[5] As in Conn. and Maine, and in the opinion of Mather, Sen., in King v. Root, N. Y.

[6] Wright v. Woodgate, Barrett v. Long, Hemmings v. Gasson, and others *passim*; *contra*, Finnerty v. Tipper, which would not be law.

[7] Cal., Conn., Mass., Minn., N. H., N. J., N. Y., Pa. (perhaps), S. C. (qualified), U. S., Vt., Va.

[8] Del., Mass.

publication, and that it did not take place through carelessness or inadvertence; and the more the evidence approaches to the proof of a systematic practice, the more convincing it is. The circumstances that the other libels are more or less frequent, or more or less remote from the time of the publication of that in question, merely affects the weight, not the admissibility, of the evidence."

1879, FOLGER, J., in *Daly* v. *Byrne*, 77 N. Y. 187: "It would tend to show malice to prove that libellous publications of the same nature were repeated from time to time after the first libel. Such articles, published after the commencement of the action, were not incompetent because of their essential nature, but because of a factitious and incidental consequence that might flow from the reception of them in evidence, to wit, that they might aggravate the damages, etc."

1885, BERRY, J., *Gribble* v. *Press Co.*, 34 Minn. 345, 25 N. W. 710: "We take the rule to be so maintained, not arbitrarily or as a mere matter of precedent, but because it rests upon a common-sense judgment of human nature and a practical knowledge of its motives and its ways. The fact that a given libel has been preceded and followed by others of like tenor from the same source is one from which, as men are constituted, a legitimate inference may be drawn as to the 'animus', the spirit, with which the given libel was published. It has a fair tendency to show that the given libel was not published by accident or mistake, or even under a sudden impulse, or heedlessly, but by design and with a deliberate purpose to injure and prosecute the person libelled."

(1) The *length of time* elapsing between the evidential utterance and that charged may of course affect the strength of the inference. The English Courts treat the lapse of time as never affecting the admissibility of the utterances;[9] but in this country a few Courts have sought to put some rational limitation to it.[10] The matter ought to be left entirely in the hands of the trial Court.

(2) That the evidential utterances occurred *subsequent* to that charged, and, in particular, after action or trial begun, is equally immaterial, from the point of view of probative value; but a limitation is here suggested by the ensuing considerations of Auxiliary Policy.

Thus the limitations that result from the point of view of Relevancy are merely: That (perhaps) an unproved and unwithdrawn plea of truth is not receivable; that (in this country) the subject of the other utterances must be the same; and that (in this country, perhaps) the evidential utterance must not be too remote in time.

§ 405. **Same: Principle of Auxiliary Policy.** The real and substantial support of the attempt to exclude the present class of evidence has always been found in certain considerations of Auxiliary Policy (*ante*, § 43). These considerations have apparently at no time succeeded in effecting a total exclusion of the evidence; for it has in no jurisdiction and by no judge been excluded (it would seem) absolutely. But they have resulted in various proposed limitations upon its use, — limitations intended to obviate the supposed evil of one or the other of these objections. The amusing yet confusing feature of their application has been that exactly opposite conclusions have been occasionally deduced from the same reason, so that if all the deductions

[9] Barrett v. Long, Eng.

[10] Mass., N. H. (the better phrasing).

were sound, the law would be in a paradoxical and unmanageable state. It will be necessary to note the various distinctions, and also to attempt to indicate the condition of the law in each jurisdiction upon each point; the latter effort necessarily assuming (what experience sadly teaches us is not always the fact) that the latest ruling represents the law of to-day.

(*a*) The first and chief argument is that other utterances, if allowed to go to the jury to show malice, will probably be used by them *improperly for awarding additional damages:* so that the plaintiff will obtain double damages, either for utterances already outlawed or already recovered for, or for utterances for which he may still sue and be paid as independent causes of action:[1]

1844, BRONSON, J., in *Root* v. *Lowndes*, 6 Hill 518, 519: "The plaintiff will be allowed to recover damages for an injury when the recovery will not be a bar to another action for the same cause. I know it is said that the judge must tell the jury not to give damages for the words which are not laid in the declaration. But suppose he does give that instruction; everybody knows that it will have little or no effect. However honestly the jury may intend to follow the guidance of the Court, it requires but a moderate acquaintance with the operations of the human mind to see that they will be misled by the introduction of such evidence. If, after proving the words laid imputing larceny, the plaintiff is allowed to prove other words imputing robbery or murder, it is past doubt that the latter words, whatever the judge may say to the contrary, will influence the jury in fixing the quantum of damage. . . . To tell the jury at one moment that the evidence is proper, and at the next that they must disregard it, involves a contradiction; and if the jury is composed of sensible men, they will either think lightly of the law or of those who administer it. But whatever they may think, they will give damages for the words not laid; and thus the defendant may suffer a double punishment for the same fault."

The answer to this argument is, first, that the jury can be cautioned not to apply the evidence improperly, a well-settled mode (*ante*, § 13) of dealing with evidence under the principle of multiple admissibility, and no more dangerous in this instance than in any other; and, secondly, that any attempt to carry out this objection logically will result either in a hopeless confusion of rules, or in mere unpractical refinements, or in the entire exclusion of useful and just evidence. The objection has been totally repudiated in England.[2]

(*b*) The other argument is that of *Unfair Surprise* and *Confusion of Issues* (*ante*, § 194; *post*, §§ 1849, 1904), which would exclude all utterances not charged in the declaration:

1844, BRONSON, J., in *Root* v. *Lowndes*, 6 Hill 518: "When the plaintiff does not go beyond the words laid in the declaration, I see no reason why he may not show that those words have been spoken on a dozen different occasions [because the judgment bars all the instances of utterance and there is no surprise]. . . . But very different considerations arise when we come to actionable words which are not laid in the declaration. To admit the proof of such words must be a surprise upon the defendant. It cannot be supposed that

[1] **405**. [1] See this argument also in Defries v. Davis, Symmons v. Blake, Eng. Barwell v. Adkins, Pearson v. Lemaitre, Barrett v. Long, pointing out the warning to the jury as the sufficient answer to the objection.

[2] Plunkett v. Cobbett, Rustell v. McQuister,

he will be prepared to try a matter of which the plaintiff has not complained. That is not all. If the plaintiff may prove the words, the defendant may justify as to those words, and thus the Court and jury will be led off from the point in controversy as presented by the pleadings, into the trial of an indefinite number of collateral issues." [3]

The answer to this argument is that it does not apply to matters evidential of a state of mind of the defendant relevant to the issue (*ante*, § 305); that it applies in strictness to character evidence and a few other well-known types; and that otherwise it would exclude any piece of evidence of which an opponent had not been specifically warned. It was early discountenanced in England,[4] and seems to have received little support in this country. The limitations, where they exist, are deduced usually from the preceding objection. What then are these proposed and competing limitations?

(1) It has been suggested that other *actionable* utterances be excluded.[5] to obviate the first objection above. The answer is that if the jury is bent on disregarding the instructions of the judge, they are just as likely to add to the damages for a non-defamatory utterance of hatred as for a defamatory one. The distinction has long been discarded in England,[6] and has been expressly repudiated in many jurisdictions here.[7]

(2) It has been suggested that at least other *actionable* utterances *not already recovered for* be excluded.[8] The answer is the same, that a jury that will disregard the instructions for the one class of words will so do equally for the other. The distinction did not become law in England,[9] and has not been accepted anywhere in this country.

(3) It has been suggested that just the contrary distinction be adopted, *i.e.* by excluding other *actionable* utterances *already recovered for*.[10] This is equally logical with the preceding one, though absolutely inconsistent with it; it is no less unpractical, and has been nowhere accepted.

(4) It has been suggested, from the same point of view as in (2) above, that *actionable* utterances *not barred by limitation* (and thus still available for other actions) be excluded.[11] The answer is still the same, that a jury is just as likely or unlikely to reckon improper damages for outlawed utterances as for others; and the distinction has generally been repudiated.[12]

(5) It has been suggested that just the contrary distinction be adopted, namely, by excluding other *actionable* utterances *barred by limitation*.[13] The answer is the same; and such a limitation is generally repudiated.[14]

[3] See this argument also in Finnerty *v.* Tipper, Eng., Shock *v.* M'Chesney, Pa.

[4] Mead *v.* Daubigny.

[5] Cook *v.* Field, Mead *v.* Daubigny, Defries *v.* Davis, Eng.; perhaps also in U. S. Fed.

[6] Buller, Scott *v.* Lord Oxford, Delegall *v.* Highley, Pearson *v.* Lemaitre, Barrett *v.* Long.

[7] Ala., Ind., Ia., Ky., N. H., N. J., N. C., Oh., Pa.; and of course where the broader limitations next mentioned are accepted, the present distinction is by implication abandoned.

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

[9] Barrett *v.* Long, and other cases *supra*.

[10] *I.e.* because they have been once paid for; advanced but repudiated in Conn.

[11] N. Y.

[12] Ala., Me., N. H., N. J., Oh., Pa., S. C., Va.

[13] Apparently no ruling has accepted this distinction.

[14] Barrett *v.* Long, Eng.; in this country, Ala., Ind., Me., N. H., N. J., N. Y., Oh., Pa., S. C., Va.

(6) It has been suggested that *subsequent* utterances — meaning, usually, utterances after *action* or *trial begun* — be excluded, chiefly for the first reason above, that they might be reckoned in the damages, although still available for another action;[15] the distinction being suggested by a confused notion that prior utterances would be barred by the present judgment. The latter notion is of course incorrect, for the judgment would bar only repetitions of the identical charge, if not only those set out in the declaration; and the former notion is unfounded, for the same reason as above, that a jury is just as likely to disregard instructions in the one case as in the other. The distinction seems to obtain in a few jurisdictions,[16] but has been generally repudiated.[17]

(7) It has been suggested that other *actionable* utterances be excluded entirely, *except* where the utterance charged is *equivocal* as to the feeling inspiring it,[18] — the apparent reason involving both of the above arguments, regarded as demanding exclusion except where there is absolute necessity. The distinction is plausible, but in practice would seldom exclude anything; and it is rarely advanced.[19]

The net result, then, of the arguments based on auxiliary policy is that on principle no limitations can be deduced from them, and that, except here and there, the various jurisdictions concur in repudiating all the suggested limitations.

§ 406. **Same: State of the Law in the Various Jurisdictions.** The precedents exhibit a variety of rules, involving the preceding distinctions, in the different jurisdictions.[1] Few Courts have passed upon all of the suggested points.

[15] Finnerty *v.* Tipper, Stuart *v.* Lovell, Pearce *v.* Ornsby, Eng.

[16] In this country, in Conn., N. Y., Tenn.; Folger, J., in Daly *v.* Byrne, 77 N. Y. 187: "[Libellous articles] published after the commencement of the action . . . [are excluded] because they might aggravate the damages found by the jury in this action while they also in themselves gave to the plaintiff the right to another action in which he might get damages again by reason of the publication of them."

[17] Rustell *v.* Macquister, Macleod *v.* Wakley, Chubb *v.* Westley, Defries *v.* Davis, Boyd *v.* Douglas, Barwell *v.* Adkins, Hemmings *v.* Gasson (qualified), Eng.; in this country, Ala., Ind., Ia., Ky., Me., Mass., Mich., N. H., N. J., N. C., Oh., Pa., S. C., Vt., Va., Wis.

[18] Stuart *v.* Lovell, Pearce *v.* Ornsby, Eng.; in this country, Ind., N. Y.

[19] Barrett *v.* Long, Eng., practically repudiates it; so also Oh., after originally accepting it.

§ 406. [1] ENGLAND: 1767, Buller, Nisi Prius, 7 ("After he has proved the words as laid, he may give evidence of other expressions made use of by the defendant, as proof of his ill-will towards him. . . . After verdict for the plaintiff and damages intire, where some of the words are not actionable, . . . if the words be in one count, the Court will intend that such as are not actionable were added only to show the malice of the party and that the damages were given for what were actionable"); 1785, Cook *v.* Field, 3 Esp. 133, Kenyon, L. C. J. (other utterances admitted, so far as not actionable in themselves, to show malice); 1791, Charlton *v.* Barret, Peake N. P. 22, Kenyon, L. C. J. (the same words at different times, admitted to show malice); 1792, Mead *v.* Daubigny, Peake N. P. 125 (other words admitted; objected to because of the surprise to the defendant; objection overruled, per Kenyon, L. C. J., because "the plaintiff may give evidence of *any* words used by the defendant, to show the spirit and temper by which he was actuated"; yet the evidence was limited to non-actionable words); 1793, Lee *v.* Huson, Peake N. P. 166, Kenyon, L. C. J. (other libellous writings admitted: objected to on the damages-ground); 1804, Plunkett *v.* Cobbett, 5 Esp. 136, Ellenborough, L. C. J. (another sale of the same libel to show absence of mistake; the jury being told not to reckon it in the damages); 1807, Rustell *v.* Macquister, 1 Camp. 49, Ellenborough, L. C. J. (other slanders spoken afterwards; objected to because the jury might con-

sider them in the damages; objection overruled, because the jury could be instructed not to do so); 1808, Scott *v.* Lord Oxford, Peake N. P. 127, note, Lawrence, J. (other actionable words, admitted to increase damages); 1808, Tate *v.* Humphrey, 1 Camp. 73, note, Graham, B. (action for perjury; the false charge in another form, admitted to show malice; affirmed by the Judges); 1809, Finnerty *v.* Tipper, 2 Camp. 72, Mansfield, C. J. (other libels from subsequent numbers of the same journal, rejected; partly because of surprise, partly because they did not "so far refer to the subject of the declaration" as to be useful; yet the former precedents, so far as cited, were approved); 1817, Stuart *v.* Lovell, 2 Stark. 93, Ellenborough, L. C. J. (subsequent libels, held inadmissible, because the 'animus' was not equivocal and they would merely serve to enhance the damages); 1828, Macleod *v.* Wakley, 3 C. & P. 311 (another libel only two days before the trial, admitted; Tenterden, L. C. J.: "However late anything takes place, it may be evidence of a previous intention as to a previous fact"); 1834, Chubb *v.* Westley, 6 C. & P. 436, Park, J. (subsequent articles attacking the plaintiff, admitted to show the 'animus'); 1835, Defries *v.* Davis, 7 C. & P. 112, Tindal, C. J. (subsequent utterances of the same slander, but not of any other actionable words, admitted; "it has been a very usual course of late to restrict the evidence in that way; and there is good sense in so doing, as the jury ought not to mix up the words in question with other words in considering the amount of damages"); 1835, Pearce *v.* Ormsby, 1 Moo. & Rob. 455 (repetition of the slander after action begun; rejected by Abinger, L. C. B., because improperly tending to aggravate the damages, and because no equivocal phrase needed explanation); 1835, Symmons *v.* Blake, 1 Moo. & Rob. 477 (other slanders to the same effect, rejected by Patteson, J., on the same grounds; "the damages in this cause may be increased by those words, and yet this record be no evidence in a subsequent action which may be founded upon them"; hence, other slanders are admissible for which damages have already been recovered); 1835, Wright *v.* Woodgate, 2 C. M. & R. 578, Parke, B. ("conduct or expressions of the defendant showing that he was actuated by a motive of personal ill-will are admissible"); 1836, Bond *v.* Douglas, 7 C. & P. 627, Abinger, L. C. B. (other libels published of the plaintiff on the same subject within a few days afterwards, admitted, "to show the 'animus'"); 1836, Tarpley *v.* Blabey, 2 Bing. N. C. 437 (preceding libels on the plaintiff admitted to show 'animus'); 1837, Delegall *v.* Highley, 8 C. & P. 444, 449, Tindal, C. J. (procuring another publication of the libel, admitted to show malice, though in itself actionable); 1838, Park, J., in Webb *v.* Smith, 4 Bing. N. C. 379 (admitting "other libels and slanders proceeding from the same defendant"); 1840, Barwell *v.* Adkins, 1 M. & Gr. 807, C. P. (a subsequent repetition of the charge, admitted to show malice in the original charge; the judge's instructions being sufficient to guard against giving damages for the repetition); 1843, Pearson *v.* Lemaitre, 5 M. & G. 700, 719, C. P. (repetitions of the libel admitted; Tindal, C. J., noting that "it may be difficult to reconcile all the nisi prius cases": "This appears to be the correct rule, viz., that either party may, with a view to the damages, give evidence to prove or disprove the existence of a malicious motive in the mind of the publisher of defamatory matter; but that if the evidence given for that purpose establishes another cause of action, the jury should be cautioned against giving any damages in respect of it; . . . and that evidence tending to prove it cannot be excluded simply because it may disclose another and a different cause of action"); 1848, Simpson *v.* Robinson, 12 Q. B. 511 (Denman, L. C. J.: "Acts although subsequent might indicate the existence of motives at a former time; . . . and every other part of his conduct showing the same disposition may equally be laid before the jury, — refusing to make reparation for unjustifiable slander may have that effect"; here the act was the "putting a justification on record which he does not attempt to prove and will not abandon"; approving of Warwick *v.* Foulkes, 12 M. & W. 507 (1848), where a plea repeating the charge in justification was not attempted to be proved, and where Parke, B., said, "Surely the plaintiff has a right to give evidence to show that the charge was not one lightly made and soon abandoned, but that it was seriously made, and persevered in to the last moment"; but disapproving that case so far as it seemed to allow the repetition to be used for increasing damages or for anything but inferring malice; also in effect overruling Wilson *v.* Robinson, 7 Q. B. 68 (1845), where the repetition was in an abandoned plea, so far as the Court there, including Lord Denman himself, while repudiating the use of the evidence merely to increase damages, seemed to ignore its use to show malice); 1845, Long *v.* Barrett, 7 Ir. L. R. 439 (other libels published in the same newspaper, more than six years before, received to show malice, the jury being warned to consider them for that purpose only); 1851, Barrett *v.* Long, 3 H. L. C. 395, 401, 407, 414 (statutory plea denying actual malice; previous publications by the defendant of the plaintiff, in the same journal, extending over 10 years, admitted; quoted *supra*); 1852, Camfield *v.* Bird, 3 C. & K. 56, Jervis, C. J. (other slanderous words, at a time not specified, admitted to show 'animus'); 1858, Hemmings *v.* Gasson, E. B. & E. 346 (the fact that the defendant, six months after the utterance of a libel, charging a breaking and entering, had publicly charged the plaintiff with dishonoring bills and had called him a rascal, was offered to show malice, but rejected: Campbell, L. C. J.: "We do not say the evidence was admissible. . . . But we think that the learned

judge should have pointed out more distinctly to the jury the length of time between the writing of the letter charged in the declaration and the subsequent expressions sought to be put in evidence").

CANADA: 1915, King *v.* Londerville, 25 D. L. R. 352, Lask. (slander; other words 'per se' actionable, admitted to show malice, on the general issue; Pearson *v.* Lemaitre followed); 1838, Rankine *v.* Clarke, Ber. N. Br. 303 (affidavit in a criminal case still pending, excluded); 1859, Tobin *v.* Shea, 3 Morris Newf. 257 (subsequent libels, admitted).

UNITED STATES: *Federal:* 1836, U. S. *v.* Crandell, 4 Cr. C. C. 683, 689, 692 (other uttered papers, admitted, "having relation to the libels charged" and not in themselves "substantive ground of prosecution"); 1901, Kansas City Star Co. *v.* Carlisle, 47 C. C. A. 384, 108 Fed. 344, 356, 362 (plea of justification, admissible, if not made in good faith; Sanborn, J., diss. on the ground that the issue of good faith is an improper one); 1913, Massee *v.* Williams, 6th C. C. A., 207 Fed. 222 (another utterance on the same day, admitted);

Alabama: 1845, Teague *v.* Williams, 7 Ala. 844 (repetition admissible, whether actionable or not, whether barred by statute or after suit begun; the jury not to consider it in giving damages); 1849, Scott *v.* McKinnish, 15 Ala. 666 (same); 1873, Sonneborn *v.* Bernstein, 49 Ala. 168, 170 (repetition after suit begun, admitted; no precedents cited); 1902, Riley *v.* State, 132 Ala. 13, 31 So. 731 (repetition subsequent to the time of the indictment, held admissible); 1904, Grant *v.* State, 141 Ala. 96, 37 So. 420 (prior utterances of a similar tenor, admitted); 1909, Cox *v.* State, 162 Ala. 66, 50 So. 398 'separate libellous letters, not admitted; foregoing cases not cited; a majority dissenting on this point); 1909, Butler *v.* State, 162 Ala. 71, 50 So. 400 (oral defamation; repetition since the date of indictment, admitted, solely to evidence malice, and not to evidence the uttering of the words charged; foregoing case not considered); 1913, Webb *v.* Gray, — Ala. —, 67 So. 194 (improved plea of truth, admissible, if not made in good faith, etc.);

California: 1875, Chamberlain *v.* Vance, 51 Cal. 75, 84 (similar utterances after action begun, admitted); 1888, Stern *v.* Loewenthal, 77 Cal. 340, 19 Pac. 579 (statements "at a different time", uttering a charge "of a different nature", excluded); 1892, Harris *v.* Zanone, 93 Cal. 59, 28 Pac. 845 ("other utterances of words of similar import", admissible); 1898, Westerfield *v.* Scripps, 119 Cal. 607, 51 Pac. 958 (repetition, or charge of similar import, receivable; plea of truth, without attempt to establish it, receivable); 1898, Hearne *v.* De Young, 119 Cal. 670, 52 Pac. 150 (repetition after suit begun, admissible); 1919, Scott *v.* Times-Mirror Co., 181 Cal. 345, 184 Pac. 672 (other libels "tending to show a malicious and vindictive attitude", admitted, though not of similar import; prior rulings analyzed);

Connecticut: 1786, Holmes *v.* Brown, Kirby 151 (other utterances after suit begun, excluded); 1837, Mix *v.* Woodward, 12 Conn. 262, 287, 292 (other utterances, but only of the same libel, admissible, the jury not to give damages for them; the dissent of Waite, J., at 288, did not affect this point); 1839, Flint *v.* Clark, 13 Conn. 361, 366 (same point); 1847, Williams *v.* Miner, 18 Conn. 464, 472 (same); 1863, Swift *v.* Dickerman, 31 Conn. 285, 290 (same; admissible though already recovered for); 1872, State *v.* Riggs, 39 Conn. 498, 501 (same as Williams *v.* Miner); 1879, Ward *v.* Dick, 47 Conn. 300, 304 (same; unproved plea of truth not admissible unless maliciously pleaded);

Delaware: 1854, State *v.* Jeandell, 5 Harringt. 475, 479 (other defamatory utterances, against the same person, prior to the one charged, admitted, but no others); 1909, Smith *v.* Singles, 6 Pen. Del. 544, 72 Atl. 977 (subsequent utterances admitted, even when plea of truth accompanies plea of not guilty);

Georgia: 1857, Adkins *v.* Williams, 23 Ga. 222 (prior utterances, admitted); 1897, Craven *v.* Walker, 101 Ga. 845, 29 S. E. 152 (repetition after suit brought, admissible);

Illinois: 1854, Sloan *v.* Petrie, 15 Ill. 425 (like the next case); 1866, Harbison *v.* Shook, 41 Ill. 141 (plea of justification not filed in good faith may evidence malice; the jury to decide upon good faith); Rev. St. 1874, c. 126, § 3 ("An unproved allegation of the truth of the matter charged shall not be deemed proof of malice unless the jury on the whole case find that such defence was made with malicious intent"); 1875, Hawver *v.* Hawver, 78 Ill. 412 (statute applied, construing an instruction); 1909, Ball *v.* Evening American Pub. Co., 237 Ill. 592, 86 N. E. 1097 (subsequent publication of similar "connected" libels, held admissible; whether admissible if unconnected, not decided, the opinion does not notice the numerous distinctions involved in the precedents of other Courts); 1910, People *v.* Strauch, 247 Ill. 220, 93 N. E. 126 (criminal libel; other libels by defendant; point not decided);

Indiana: 1831, Scott *v.* Mortsinger, 2 Blackf. 454, 457 (other words admitted, whether actionable or not, and whether after suit begun or not, under the general issue); 1834, M'Glemery *v.* Keller, 3 Blackf. 489 (same; the sole use being to show malice); 1836, Throgmorton *v.* Davis, 4 Blackf. 176 (words barred by statute, admissible); 1842, Burke *v.* Miller, 6 Blackf. 155 (admissibility of other words implied); 1843, McIntire *v.* Young, 6 Blackf. 498 (words since action begun, admitted; but admissibility said to be limited to cases where the malicious intent of the defendant is in doubt); 1844, Schoonover *v.* Rowe, 7 Blackf. 202 (admissible to show malice only); 1846, Forbes *v.* Myers, 8 Blackf.

74 (same): 1846, Teagle *v.* Deboy, 8 Blackf. 136 (like Burke *v.* Miller); 1847, Lanter *v.* McEwen, 8 Blackf. 496 (admissible, if the intent is equivocal, to show malice only); 1848, Burson *v.* Edwards, 1 Ind. 164 (like Forbes *v.* Myers); 1852, Hesler *v.* Degant, 3 Ind. 504 (words since suit begun, admitted to show malice only); 1854, Vincent *v.* Dixon, 5 Ind. 270 (rejected, because used in aggravation of damages); 1873, Meyer *v.* Bohlfing, 44 Ind. 239 (same); 1876, Downey *v.* Dillon, 52 Ind. 442, 450 (admitting defendant's former good feelings, but not for an unreasonable time previous; here conduct "always" exhibited was rejected);

Iowa: 1864, Beardsley *v.* Bridgman, 17 Ia. 292 (words uttered after suit begun, admissible to show malice, subject to a caution to the jury); 1868, Schrimper *v.* Heilman, 24 Ia. 505, *semble* (words uttered after suit begun, admitted); 1874, Ellis *v.* Lindley, 38 Ia. 461 (repetition admissible to show malice only); 1877, Prime *v.* Eastwood, 45 Ia. 640, 642 (repetition admitted); 1887, Hanners *v.* McClelland, 74 Ia. 320, 37 N. W. 389 (obscure); Code 1897, § 3593, Rev. C. § 8207 ("an unproved allegation of the truth of the matter charged shall not be deemed proof of malice unless the jury on the whole case finds that such defence was made with malicious intent"); 1902, Zurawski *v.* Reichmann, 116 Ia. 388, 90 N. W. 69 (assault by defendant on plaintiff, shortly afterwards, held admissible); 1902, Cushing *v.* Hederman, 117 Ia. 637, 91 N. W. 940 (utterance of similar words to another person, admitted);

Kentucky: 1822, Eccles *v.* Shackelford, 1 Litt. 36 (*semble*, only words not actionable are admissible); 1837, Allensworth *v.* Coleman, 5 Dana 315 (obscure); 1859, Letton *v.* Young, 2 Metc. 561 (admitting any language showing ill-will, actionable or not, after suit begun or not; the jury to be cautioned against including them in the damages); 1880, Campbell *v.* Bannister, 79 Ky. 208 (preceding case approved); 1901, Alcorn *v.* Powell, 22 Ky. 1353, 60 S. W. 520 (other similar utterances admitted);

Louisiana: 1828, Kendrick *v.* Kemp, 6 Mart. N. S. La. 500 (other words uttered within one year before suit begun, admitted);

Maine: 1839, Smith *v.* Wyman, 16 Me. 13 (repetition admitted, though after action begun; unproved plea of truth, admissible); 1851, White *v.* Sayward, 33 Me. 322 (subsequent utterances, admitted); 1853, True *v.* Plumley, 36 Me. 466, 478 (repetitions since suit begun, admitted); 1873, Harmon *v.* Harmon, 61 Me. 233 (utterance of the same charge at a time barred by statute, admitted); 1893, Conant *v.* Leslie, 85 Me. 257, 27 Atl. 147 (utterance of the same charge, before or after, but not of a different charge, admissible); Rev. St. 1916, c. 87, § 47 (unproved plea of truth is not a "proof of malice", unless the jury find that the defence was made with malicious intent);

Maryland: 1827, Duvall *v.* Griffith, 2 H. & G. 30 (another slander, admissible); 1834, Rigden *v.* Wolcott, 6 G. & J. 413, 419, *semble* (unproved plea of truth, admissible); 1902, Gambrill *v.* Schooley, 95 Md. 260, 52 Atl. 500 (other words actionable and forming the subject of a pending action, excluded);

Massachusetts: 1818, Jackson *v.* Stetson, 15 Mass. 48 (unproved plea of truth, admissible); 1825, Bodwell *v.* Swan, 3 Pick. 376 (other utterances admissible, provided they involve the same charge; utterances since action begun, admissible); St. 1826, c. 107, § 2 (plea of justification if unproved shall not "of itself be proof of the malice", but the jury "shall decide upon the whole case" whether it was pleaded with malicious intent); 1827, Hix *v.* Drury, 5 Pick. 296, 302 (the statute refers only to a plea of truth pleaded with a general issue as permitted by the statute; and not to a sole plea of truth); Mass. Rev. St. 1836, c. 100, § 19, Gen. L. 1920, c. 231, § 91 (plea of truth, "although not maintained by the evidence", is not "of itself" to be proof of malice); 1846, Goodrich *v.* Stone, 11 Pick. 486, 491 (repetition after action begun, admissible); 1848, Watson *v.* Moore, 2 Cush. 137 (other utterances admissible, if involving the same charge; the mere filing of a complaint in Court, no evidence); 1856, Baldwin *v.* Soule, 6 Gray 321 (repetition of the charge, admissible); 1866, Markham *v.* Russell, 12 All. 574 (prior and subsequent utterances of the same charge, admissible, though no damages could be awarded for them); 1869, Robbins *v.* Fletcher, 101 Mass. 116 (feeling of the defendant against a third person included in the alleged slander, admitted, as tending to prove its utterance; repetition of the slander, admissible to show malice); 1875, Clark *v.* Brown, 116 Mass. 508 (repetition admissible, but the jury should be cautioned not to increase the damages therefor); 1884, Com. *v.* Damon, 136 Mass. 449 (other utterances, admissible if "of such a nature as to indicate a persistent disposition of hatred or ill-will towards him, or if they appear to be a part of a settled purpose to bring him into public hatred, contempt, or ridicule, and are sufficiently near in time to afford a natural inference that the same state of mind existed when the publication complained of was made"); 1888, Sullivan *v.* O'Leary, 146 Mass. 322, 15 N. E. 775 (that the defendant had slandered other persons a few years before, excluded); 1915, Doane *v.* Grew, 207 Mass. 620, 108 N. E. 620 ("repetition of substantially the same slander may be shown");

Michigan: Comp. L. 1857, § 4548, Comp. L. 1915, § 12755 ("If the defendant in any action for slander or for publishing a libel shall give notice in his justification that the words spoken or published were true, such notice, though not maintained by the evidence, shall not in any case be of itself proof of the malice charged in the declaration"); 1868, Detroit Post Co. *v.* McArthur, 16 Mich. 446, 454 ("frequent

recurrence of similar libels", admissible to show "recklessness" supporting exemplary damages); 1877, Scripps *v.* Reilly, 35 Mich. 371, 384, 393 ("the recurrence of similar libels", apparently held admissible to show such reckless conduct of the defendant's newspaper as would justify punitory damages); S. C. 3 Mich. 10 (similar evidence held inadmissible; these two opinions are not clear, except in that they take a too liberal attitude towards the publishers of libel); 1877, Proctor *v.* Houghtaling, 37 Mich. 41, 45 (failure to prove a plea of truth, not admissible); 1893, Randall *v.* News Ass'n, 97 Mich. 136, 145, 56 N. W. 361 (another charge of same sort, admitted); 1894, Thibault *v.* Sessions, 101 Mich. 279, 286, 59 N. W. 624 (subsequent publications on the same subject, after suit begun, admitted); 1896, Botsford *v.* Chase, 108 Mich. 432, 66 N. W. 325 (former utterances, admissible); 1899, Jastrzemboki *v.* Marxhausen, 120 Mich. 677, 79 N. W. 935 (under the statute, an unsustained plea may still be considered as evidence of malice, though not alone sufficient); 1906, Smith *v.* Hubbell, 142 Mich. 637, 106 N. W. 547 (subsequent similar utterance, admitted);

Minnesota: 1885, Reitan *v.* Goebel, 33 Minn. 151, 22 N. W. 291 ("other slanderous words of similar import, and so connected with them as to amount to a continuance of the same slander", at least if before suit begun, admissible); 1885, Gribble *v.* Press Co., 34 Minn. 342, 25 N. W. 710 ("other publications . . . containing substantially the same imputation as that sued upon, whether made before or after the latter, or after suit brought", admissible only to show malice, and thus give ground for exemplary damages; here an utterance six years before was admitted); 1886, Larrabee *v.* Tribune Co., 36 Minn. 141, 142, 30 N. W. 462 (approving the preceding case; the utterances need not be repetitions, if they "refer to the same matter and make substantially the same imputation"); 1895, Frederickson *v.* Johnson, 60 Minn. 337, 62 N. W. 388 (prior utterances of the same import, admissible); 1902, Jacobs *v.* Cater, 87 Minn. 448, 92 N. W. 397 (words not actionable 'per se' nor imputing the same charge, held inadmissible); 1921, Linnehan *v.* Sheeran, 150 Minn. 171, 184 N. W. 835 (slander of plaintiff and his brother, charging them with stealing; similar charge repeated as of plaintiff's brother, admitted);

Missouri: 1906, Yager *v.* Bruce, 116 Mo. App. 473, 93 S. W. 307 (unproved plea of justification may be considered, but only if filed in bad faith);

Montana: 1916, Fowlie *v.* Cruse, 52 Mont. 222, 157 Pac. 958 (subsequent repetitions, admissible);

Nebraska: 1903, Bee Pub. Co. *v.* Shields, 68 Nebr. 750, 94 N. W. 1029 (subsequent similar utterances, admitted); 1912, Thomas *v.* Shea, 90 Nebr. 823, 134 N. W. 933 (prior actionable utterances; not decided);

New Hampshire: 1827, Mason *v.* Mason, 4 N. H. 114, *semble* (repetition admissible); 1839, Chesley *v.* Chesley, 10 N. H. 337 (repetition admissible, even of actionable utterances); 1855, Symonds *v.* Carter, 32 N. H. 458 ((1) the other words may have been spoken at any time, "provided they were spoken so near the time of the actionable words or were otherwise so connected with them as to have a legitimate bearing upon the disposition of the defendant's mind at the time of uttering the slander complained of"; (2) they may be actionable words, though *semble* the judge should instruct the jury not to give damages for them; but (3), *semble*, they must be concerned with the same subject-matter); 1921, Saladino *v.* Gurdy, — N. H. —, 116 Atl. 436 (slander; other utterances in prior litigation, admitted);

New Jersey: 1836, Bartow *v.* Brands, 15 N. J. L. 248 (other words admissible to show malice); 1838, Dayton, J., in State *v.* Robinson, 16 N. J. L. 514 (other defamatory words, "if referring to those charged", admissible); 1843, Schenck *v.* Schenck, 20 N. J. L. 208 (other libels admitted, so far as they relate to the same charge, and even though uttered after suit begun); 1882, Evening Journal Ass'n *v.* McDermott, 44 N. J. L. 430 (previous or subsequent libels admissible, whether barred by limitation or not; the jury to be cautioned against giving damages for them; but a privileged repetition is inadmissible); 1888, Fahr *v.* Hayes, 50 N. J. L. 275, 281, 13 Atl. 261 (approving the preceding case); 1911, Ruskin *v.* Armn, 82 N. J. L. 72, 81 Atl. 342 (withdrawn plea of truth may be considered);

New Mexico: 1919, Henderson *v.* Dreyfus, 25 N. M. —, 184 Pac. 819 (subsequent repetition, if not privileged, admissible);

New York: 1810, Thomas *v.* Croswell, 7 Johns. 264, 270 (utterances, not libellous, against the plaintiff since action begun, admitted; *semble*, that libellous utterances would not be admissible, because the damages might be improperly increased); 1826, Matson *v.* Buck, 5 Cow. 499 (like the next case); 1827, Root *v.* King, 7 Cow. 613, 633 (an unproved plea, not withdrawn by an affidavit of falsity, admissible); 1829, King *v.* Root, 4 Wend. 140 (same case on appeal; doctrine below approved; but Mather, Sen., dissented at 150, with the distinction that the defendant must have so pleaded "knowing it to be false, or from a reckless disregard of consequences without having reasonable cause to suppose he could substantiate it"); 1832, Inman *v.* Foster, 8 Wend. 608 (solving the apparent doubt in Thomas *v.* Croswell, and holding that prior actionable utterances, but only those barred by limitation, could be used); 1838, Kennedy *v.* Gifford, 19 Wend. 297, 300 (confining the utterances to the subject of the original charge, and admitting a repetition after suit begun); 1844, Root *v.* Lowndes, 6 Hill 518 (the use of other utterances limited to the

extent indicated by Thomas *v.* Croswell and Inman *v.* Foster, with regret that even that much had been conceded; see quotation *ante*, § 405; the whole use limited to proving malice in excess of privilege); 1846, Keenholts *v.* Becker, 3 Den. 346 (other utterances, not slanderous, before and after action brought, not admitted to show malice); C. C. P. 1848, § 165 ("whether he prove the justification or not, he may give in evidence the mitigating circumstances"); C. P. A. 1920, § 338 (substantially similar); 1849, Campbell *v.* Butts, 3 N. Y. 173, *semble* (action brought for words already used in a former action to show malice, but not then declared on; the practice in the former case impliedly approved); 1850, Fero *v.* Roscoe, 4 N. Y. 165 (not treating it as a question of malice, but of damages, and admitting an unproved plea of truth, even if 'bona fide' made); 1850, Howard *v.* Sexton, 4 N. Y. 157, 161 (slander for charge of perjury; (1) charge at another time, of robbery, excluded; the other utterance must be of the same charge, since the malice to be proved is "not mere general ill-will, but malice in the special case set forth in the pleadings"; (2) such repetition allowed only to show malice in excess of privilege, following Root *v.* Lowndes, or to explain an ambiguous utterance); 1854, Bush *v.* Prosser, 11 N. Y. 347, 356, 366 (statute noticed as changing the law for pleas of truth); 1863, Fry *v.* Bennett, 28 N. Y. 324, 327 (affirming the first point of the preceding case, but apparently violating it in admitting different libels; *semble*, *contra* to the preceding case on the second point); 1870, Thorn *v.* Knapp, 42 N. Y. 474 (repetition after trial begun, admissible; failure to prove plea of truth, admissible); 1870, Titus *v.* Sumner, 44 N. Y. 266 (prior utterances of the same slander admissible, if barred by the statute; following Inman *v.* Fowler; *semble*, *contra* to Howard *v.* Sexton on the second point); 1872, Bassell *v.* Elmore, 48 N. Y. 563, 566 (repetition of the same charge to time of trial, held admissible, without mentioning the limitations of the preceding and the following case); 1875, Frazier *v.* McCloskey, 60 N. Y. 337 (repetition of the slander after action begun, excluded, because where the words may be the subject of another action, damages might thus be given twice for them); 1877, Distin *v.* Rose, 69 N. Y. 122, 127 (total failure to prove a plea of truth may be considered, if the plea was inserted wantonly or maliciously; but need not be so considered; "the Code has made this change in the law, . . . because it seems incongruous to say that a failure to establish a justification may enhance the damages, and yet the facts proved under it may mitigate them"); 1879, Daley *v.* Byrne, 77 N. Y. 187 (repetition after action begun, excluded; see quotation *ante*, § 404); 1892, Enos *v.* Enos, 135 N. Y. 609, 32 N. E. 123 (repetition of the same charge in other words, admitted);

North Carolina: 1829, Brittain *v.* Allen, 2 Dev. 120, 125 (repetition admissible, even after action begun; whether to be only repetitions, is not considered; the judge to instruct the jury not to give damages for them; "no regard ought to be paid to the old rule, that these words must be such as were not actionable, that rule having yielded to common sense"); 1831, s. c. 3 Dev. 167; 1859, Lucas *v.* Nichols, 7 Jones L. 32, *semble* (utterances after action begun, admissible, but damages not to be given for them);

Ohio: 1832, Carter *v.* McDowell, Wright 100 (words since suit begun, not admissible, except to show the sense of the words charged); 1834, Seely *v.* Cole, Wright 681 (repetition admissible, *semble*); 1834, Flamingham *v.* Boucher, Wright 746 (words barred by the statute, admitted, but the jury cautioned to use them only to find malice); 1846, Fisher *v.* Patterson, 14 Oh. St. 418, 424 (other libels admissible only where the intent is doubtful); 1848, Stearns *v.* Cox, 17 Oh. St. 590 (preceding restrictions as to doubtfulness of intent and as to ambiguities, repudiated; other libels, after suit begun, or before the statute bar, actionable or not, held admissible, subject to a caution to the jury); 1855, Van Derveer *v.* Sutphin, 5 Oh. St. 293, 295 (same); 1871, Alpin *v.* Morton, 21 Oh. 536, 544 (approving the preceding cases);

Oklahoma: 1915, Beshiers *v.* Allen, 46 Okl. 331, 148 Pac. 141 (other similar utterances since suit begun, admissible to show malice but not to increase damage);

Oregon: 1893, Upton *v.* Hume, 24 Or. 420, 436, 33 Pac. 81 (plea of truth, unproved, to be evidence of malice only when the circumstances indicate it; utterance of a distinct charge, not admissible);

Pennsylvania: 1799, Shock *v.* M'Chesney, 2 Yeates 473 (charge of forgery; only "expressions of the same nature as those complained of" are admissible; "distinct slanders, charging the plaintiff with other distinct offences, should not be received in evidence, because the defendant cannot be prepared to meet them, and they form the subjects of other actions"); 1811, Wallis *v.* Mease, 3 Binn. 546, 550 (other and different words charging the plaintiff, admissible, whether actionable or not actionable, before or after suit begun, barred by the statute or not; but the jury are to be instructed not to give damages for them); 1816, Kean *v.* M'Laughlin, 2 S. & R. 469 (admitting the same words spoken since action begun; approving Wallis *v.* Mease); 1826, M'Almont *v.* M'Clelland, 14 S. & R. 359, 361 (repetition after suit begun, admitted, because "not a new charge for which a new action could be brought"); 1857, Elliot *v.* Boyles, 31 Pa. 65, 68 (words showing malice, but not actionable, were admitted; no rule given nor authority cited); 1878, Barr *v.* Moore, 87 Pa. 385, 394 ("other articles of the same tenor and character", admitted); 1893,

Com. v. Place, 153 Pa. 314, 318, 26 Atl. 620 (other libellous articles on the same subject, admitted to show malice); 1895, Seip v. Deshler, 170 Pa. 334, 32 Atl. 1032 (subsequent letters, admitted); 1899, Thompson v. M'Cready, 194 Pa. 32, 45 Atl. 78 ("testimony honestly given in a judicial proceeding of the circumstances connected with the utterance of slanderous words tending to mitigation" is not evidence of malice);
South Carolina: 1822, Miller v. Kerr, 2 McC. 286 (repetition after action begun, admitted; here malice is "the gist of the action", not merely affecting privileges or damages); 1836, Randall v. Holsenbake, 3 Hill S. C. 175 (repetition so long ago as to be barred, and previous to the words laid; the rule held to admit words not actionable, and other actionable words "relating to the same species of crime" either after action begun or previous to the period of limitations; to any broader rule they decline to "yield an unqualified assent"); 1846, Morgan v. Livingston, 2 Rich. 573, 585 ("anterior publications [outlawed by statute], as well as publications after suit brought" of the same charge, admissible);
Tennessee: 1812, Howell v. Cheatham, Cooke 247 (repetition admissible, but not after action brought); 1847, Witcher v. Richmond, 8 Humph. 475 (repetitions since suit begun, admitted as explaining the meaning of the original charge); 1871, Saunders v. Baxter, 6 Heisk. 369, 387 (prior expressions of hatred or ill-will, held admissible, but not subsequent ones, unless as explanatory of the former charge or containing an express admission of malicious intent at the former time); 1899, Russell v. Farrell, 102 Tenn. 248, 52 S. W. 147 (subsequent utterance excluded, unless it involves an explanation or an admission of the former one or of malice in the former one);
Vermont: 1870, Cavanaugh v. Noble, 42 Vt. 576 (utterances "of a similar character" admissible; here made just before suit begun); 1883, Knapp v. Fuller, 55 Vt. 311 (subsequent hostile utterance, admitted);
Virginia: 1839, Lincoln v. Chrisman, 8 Leigh 338, 342, 345 ("slanderous words of the same and like character", though barred by the statute, admitted); 1874, Hansborough v. Stinnett, 25 Gratt. 495 ("like words antecedent or subsequent", admissible);
Washington: 1905, Ott v. Press P. Co., 40 Wash. 308, 82 Pac. 403, *semble* (subsequent similar utterances about other persons in the same business, excluded);
West Virginia: 1902, Swindell v. Harper, 51 W. Va. 381, 41 S. E. 117 (similar utterances, before and after the utterance in issue, held admissible, if made before action begun);
Wisconsin: 1886, Bradley v. Cramer, 66 Wis. 297, 302, 28 N. W. 372, *semble* (subsequent utterances, admissible; no rule laid down); 1893, Born v. Rosenow, 84 Wis. 620, 622, 54 N. W. 1089 (utterances over three years before, admitted); 1906, Earley v. Winn, 129 Wis. 291, 109 N. W. 633 (repetitions admissible); 1909, Pfister v. Milwaukee F. P. Co., 139 Wis. 627, 121 N. W. 938 (an unsuccessful attempt to prove a justification is some evidence of malice, even under Wis. St. 1898, § 4201, similar to Mass. Rev. St. 1836; two judges diss.).

SUB-TITLE II (*continued*): EVIDENCE TO PROVE A HUMAN QUALITY OR CONDITION

TOPIC X: EVIDENCE TO PROVE IDENTITY

CHAPTER XV.

§ 410. **Other Principles Discriminated.** In evidencing that proposition commonly spoken of as Identity, there is apt to be a confusion in thought with two other processes which are really not germane.

(1) It is perhaps natural to apply the notion of Identity or Identification to the general process of *proving an accused person guilty*. He is said to be "identified" as the murderer or the thief; *i.e.* the whole process of proof and the whole mass of evidence is thought of as involving the "identity" of the accused and the guilty person. From this point of view, all distinctions between the various sorts of evidence heretofore analyzed are merged and become useless. That the accused planned the act, had a motive for the act, bore traces of the act, and so forth, are all merely "identifying" facts; because the real guilty person also must have planned, had a motive, borne traces, and the like. Such an indiscriminate confusion and merger of all sorts of probative elements would render close analysis impossible, and naturally excites suspicion of the propriety of the term "identification" as thus applied. In truth, there is no propriety in it. The term does have a distinctive application; but this loose and indefinite usage just referred to may be once for all discarded as useless and misleading.

(2) In arguing from subsequent *traces* of an act to the *doing of an act*, the argument of Identity sometimes is necessarily involved and needs to be distinguished. Suppose, for example, to prove a murder, evidence is offered that a gun found three days later in the defendant's possession is exactly fitted by a bullet found in the body of the deceased. Here there are two inferences involved: (a) "Because the defendant possessed the gun when found later, therefore he probably possessed it at the time"; this inference is always open to doubt, since the defendant may have borrowed the gun since the killing, or some third person may have surreptitiously placed the gun on his prem-

ises; (b) "Because the gun, thus possessed by the defendant at the time of the killing, fitted the bullet found in the body, therefore the defendant's gun must be the one that shot the deceased"; here the inference is open to doubt because the bullet may fit other guns, *i.e.* the fitting of the bullet is not a necessary mark of the identity of the gun that shot it. Now the first inference is an inference from subsequent Traces to the former act of possession or use of the gun; no question of Identity is involved. It is the second inference that involves the element of the Identity. This is why much of the evidence herein termed Traces, as pointing back to an Act (*ante*, §§ 148–177), may incidentally involve a question of Identity. The distinction has been already explained (*ante*, § 151); and the precedents on that subject are not here to be dealt with.

§ 411. **General Principle of Identity-Evidence.** Identity may be thought of as a quality of a person or thing, — the quality of *sameness with another person or thing*. The essential assumption is that two persons or things are first thought of as existing, and that then the one is alleged, because of common features, to be the same as the other. The process of inference thus has two necessary elements: (1) it is a Concomitant one, in its logical scheme (*ante*, § 130); and (2) it operates by *comparing common marks*, found to exist in the two supposed separate objects of thought, with reference to the possibility of their being the same. It follows that its force depends on the *necessariness of the association between the mark and a single object*. Where a certain circumstance, feature, or mark, may commonly be found associated with a large number of objects, the presence of that feature or mark in two supposed objects is little indication of their identity, because, on the general principle of Relevancy (*ante*, § 31), the other conceivable hypotheses are so numerous, *i.e.* the objects that possess that mark are numerous and therefore two of them possessing it may well be different. But where the objects possessing the mark are only one or a few, and the mark is found in two supposed instances, the chances of the two being different are *nil* or are comparatively small. Hence, in the process of identification of two supposed objects, by a common mark, the force of the inference depends on the *degree of necessariness of association of that mark with a single object*.[1]

For simplicity's sake, the evidential circumstance may thus be spoken of as "*a* mark." But in practice it rarely occurs that the evidential mark is a *single* circumstance. The evidencing feature is usually a group of circumstances, which as a whole constitute a feature capable of being associated with a single object. Rarely can one circumstance alone be so inherently peculiar to a single object. It is by adding circumstance to circumstance that we obtain a composite feature or mark which as a whole cannot be supposed to be associated with more than a single object.

§ 411. [1] From the point of view of logic and psychology as applicable to argument before the jury (not the rules of Admissibility), see the materials collected in the present author's "Principles of Judicial Proof, as given by Logic, Psychology, and General Experience, and illustrated in Judicial Trials" (1913), §§ 14–26.

The process of constructing an inference of identification thus consists usually in adding together a number of circumstances, each of which by itself might be a feature of many objects, but all of which together can conceivably coexist in a single object only. Each additional circumstance reduces the chances of there being more than one object so associated. The process thus corresponds accurately to the general principle of Relevancy (described *ante*, §§ 31–33).

It may be illustrated by the ordinary case of identification by name. Suppose there existed a parent named John Smith, whose heirs are sought; and there is also a claimant whose parent's name was John Smith. The name John Smith is associated with so many persons that the chances of two supposed persons of that name being different are too numerous to allow us to consider the common mark as having appreciable probative value. But these chances may be diminished by adding other common circumstances going to form the common mark. Add, for instance, another name-circumstance, — as that the name of each supposed person was John Barebones Bonaparte Smith; here the chances of there being two persons of that name, in any district however large, are instantly reduced to a minimum. Or, add a circumstance of locality, — for example, that each of the supposed persons lived in a particular village, or in a particular block of a certain street, or in a particular house; here, again, the chances are reduced in varying degrees in each instance. Or, add a circumstance of family, — for example, that each of the persons had seven sons and five daughters, or that each had a wife named Mary Elizabeth and three daughters named Flora, Delia, and Stella; here the chances are again reduced, in varying degrees, in proportion to the probable number of persons who would possess this composite mark. In every instance, the process depends upon the same principle, — the extent to which the common mark is capable of being associated, in human experience, with more than one object.[2]

§ 412. **Test of Admissibility.** The only matter that is here of concern is the *admissibility* of circumstantial evidence of identification; and it will easily be seen that very few questions can arise from this point of view. The usual matter of dispute, when such evidence is offered, is whether it is sufficient to found a *presumption*, or, as a mass of evidence, to support a verdict; and in this aspect it raises an entirely different question (*post*, §§ 2490, 2494).

So far as there can be any general principle of Admissibility, it is perhaps to be stated as follows: A mark common to two supposed objects is receivable to show them to be identical *whenever the mark does not in human experience occur with so many objects that the chances of the two supposed objects are too small to be appreciable.* But it must be understood that this test applies to the total combination of circumstances offered as a mark, and not to any one circumstance going with others to make it up.

[2] 1906, Webb *v.* Ritter, 60 W. Va. 193, 54 S. E. 484 (the above principle cited, in identifying land by the payment of taxes, etc.).

On the whole, and in practice, it is seldom practicable and seldom attempted to pass upon the admissibility of identifying circumstances; it is better to wait until all the circumstances have been offered, and then to pass upon them from the point of view of a presumption or the sufficiency of evidence (*post*, § 2494). If the circumstance has no real probative value, no harm will be done; while if it has such value in combination with other facts, good evidence may be excluded by passing upon it piecemeal; for it usually happens that the whole group of identifying circumstances cannot be put before the Court for a ruling at one point of time.

It may be noted that in accordance with the general principle of *Explanation* (*ante*, § 34), the party denying the identity may show that there are numerous objects equally possessing the evidential mark offered, so as to show that the chances of the two supposed objects being the same are very small.[1] It may also be noted that a mark of identity may be *negative* as well as affirmative; *i.e.* where a certain circumstance would be necessarily associated with an object in issue, the lack of that feature in a particular object offered tends to show that it cannot be the object in issue,[2] — in analogy with the argument from essential inconsistency (*ante*, §§ 135, 158).

§ 413. **Circumstances Identifying a Person.** Rulings upon admissibility are for the foregoing reasons comparatively rare.[1] In the reports of celebrated trials are to be found innumerable instances of such evidence;[2] but it is not necessary here either to attempt to analyze the various types of facts or to collate the recorded instances in such trials. Common experience is usually a sufficient test of relevancy in cases of this sort.

The precedents in which an express ruling has been called for have dealt with *corporal marks*,[3] *voice*,[4] *mental peculiarities*,[5] *clothing*,[6] *weapons*,[7]

§ **412**. [1] 1859, Cooper *v.* State, 23 Tex. 343 (three sizes of shot being found both in the deceased's body and the defendant's gun, it was shown in explanation that mixed shot was in common use in the neighborhood).

[2] 1895, People *v.* Thiede, 11 Utah 241, 39 Pac. 837 (where the other man, alleged to have been the real murderer, must have been covered with blood, but was found not to be).

§ **413**. [1] For instances of identifying by Traces circumstantially, see *ante*, §§ 148–177, and by skill or capacity, *ante*, §§ 83, 220.

[2] For copious illustrations of the varied circumstances that may be employed to indicate identity, see Hubback, Evidence of Succession, Pt. II, ch. V. (reprinted in the "Law Library", Johnson, Phila., 1845), and the present author's "Principles of Judicial Proof" (1913).

[3] 1874, R. *v.* Castro (Tichborne Case), charge of Cockburn, C. J., II, 1 ff., 307 ff.; I, 670 ff., 718 ff. (tattoo-marks, etc.; but there were no express rulings); 1875, Com. *v.* Sturtivant, 117 Mass. 131, 139 (a blow having been inflicted by the left hand, the fact that the defendant is left handed is admissible); 1904, State *v.* Miller, 71 N. J. L. 527, 534 (homicide; bloody prints of a hand on the wall, admitted to compare with accused's hand placed on the mark when arrested).

[4] 1903, Patton *v.* State, 117 Ga. 230, 43 S. E. 533; 1920, Brown *v.* Com., 187 Ky. 829, 220 S. W. 1052 (voice and height); 1870, Com. *v.* Williams, 105 Mass. 67; 1866, State *v.* Shinborn, 46 N. H. 502. Compare the cases cited *ante*, § 222, and *post*, § 660.

[5] 1850, Webster's Trial, Bemis' Rep. 89 (knowledge of anatomy, as shown in the mode of dissecting the deceased's body, admitted to identify the accused, a medical professor).

[6] 1881, Murdock *v.* State, 68 Ala. 569, 574 (correspondence of footprints, admitted); 1879, Jones *v.* State, 63 Ga. 395, 398, 401 (boot-tracks, etc., admitted); 1884, Story *v.* State, 99 Ind. 413 (clothing of the deceased).

[7] 1895, People *v.* Yee Fook Din, 106 Cal. 163, 39 Pac. 530 (possession of a weapon excluded, because the weapon was not shown to have been the one used); 1852, People *v.* Larned, 7 N. Y. 445 (that tools with which a bank was broken had come originally from the defendant's premises, 200 miles away, admitted); 1879, Dean's Case, 32 Gratt. Mass. 912, 923

name,[8] residence, and other circumstances of *personal history*.[9] The usual question, however, has been whether some combination of these circumstances is sufficient to support a verdict or raise a presumption (*post*, § 2529).

Additional illustrations may be found in rulings dealing primarily with other principles, — for example, with a person's *subsequent belief* or conduct as evidence of his past career (*ante*, § 270), with statements about facts of *family history*, as an exception to the hearsay rule (*post*, §§ 1487, 1488, 1501, 1791), and with specimens of *spelling* as indicating a person's authorship of a writing (post, § 2024).

Distinguish the questions whether the *opinion rule* applies to testimony of identity (*post*, § 1977), whether a voice may be evidenced by *instances* of its utterance (*ante*, § 222), or identified by one who has *heard* it (*post*, § 660), and whether a person's identity is sufficiently evidenced by the witness' "*belief*" or "impression" (*post*, § 728).

§ 414. **Same: Finger-Prints.** The use of finger-prints as evidence combines two inferences, as does virtually all evidence from Traces (*ante*, § 149); *i.e.* from the finding of the trace or mark it is inferred that some person bearing that trace or mark was present at the time and place of doing the act charged, and from the peculiarities of the trace or mark it is inferred that the accused was identical with that person. Now in the first step of inference — that from Traces — the finger-print ordinarily is neither stronger nor weaker than other similar inferences. But the second step of inference — that from identical marks — is here extraordinarily strong. On the general principle of § 411, *ante*, the presence, in two objects of testimony, of a combination of marks, all of which can conceivably coexist in a single object only, represents the highest possible degree of certainty that the two objects are identical. Whether in a given thing such a combination can exist obviously depends on observation and study of that thing, as reported by competent persons in the appropriate branch

(murder with a gun; "it was proved that upon the examination of a large number of guns within a radius of eight miles of the scene of the murder, none were found of the same bore or which would carry precisely the same ball [as that found in the deceased's body]; two or three only . . . [might have carried it.] but these two or three were accounted for and proved to be where it was impossible the murderer of Fugate could have used them").

[8] Cases cited *post*, § 2529 and *ante*, § 270, n. 4.

[9] 1885, Lovat Peerage Case, L. R. 10 App. Cas. 763, 775 (statement of deceased members of a family, having no personal knowledge, as to a manslaughter by one of the ancestors, admitted as an identifying tradition, "a story adhering to that Alexander, but not as any evidence of the fact that a fiddler was ever killed by him or by anybody else"); 1905, Smith v. State, 165 Ind. 180, 74 N. E. 983 (the same witness need not testify to all the identifying circumstances: here the witness testified merely that she sold a revolver to a colored man, the defendant being colored); 1876, Com. v. Costello, 120 Mass. 358, 369 (fictitious signature to an appeal bond; name, residence, etc., of the real signer admitted to indicate the fictitious nature of the signer); 1871, Ruloff v. People, 45 N. Y. 224 (that X was known to be with Y and that Y was in a certain place, relevant to show X there); 1875, American Life Ins. & T. Co. v. Rosenagle, 77 Pa. 515 (to show that the person whose birth-date was testified to by two persons was the same person referred to by each, the dates of birth of the five other children of the same parents were admitted; here the similarity of circumstances showed that the person referred to was a member of the family in question); 1896, Bryant's Estate, 176 Pa. 309, 35 Atl. 571 (five different sets of claimants asserted the intestate to have been a member of their family, and the identity was ascertained by a careful collation of the facts true of the intestate and the various ancestors alleged).

of science. Do human finger-prints present a combination having that highest degree of certainty? Science answers that they do.[1] In brief, the accepted conclusion, after widest observation, is that several fixed and typical varieties of skin-marks on fingertips are clearly distinguishable, and that by the mathematical theory of probabilities the chance of two individuals bearing the same combination of such marks is so small as to be negligible, and that experience has confirmed this theory. Hence, identity of a combination of such fixed and typical marks is the strongest evidence of identity of person. Courts have therefore properly held such evidence admissible.[2]

But what are the conditions to be fulfilled, and the possibilities of error?

(1) *Science must have confirmed*, with fair concurrence, the above fact of experience for finger-prints in general, or for some similar species of marks. This can be shown by expert testimony (*post*, § 561), or by scientific authors (*post*, § 1693), but can now well afford to be judicially noticed without evidence (*post*, § 2582).

(2) A witness expert in the subject must state that the *system of interpretation* used by him in inferring identity of marks was a system accepted in the profession. There are several such systems; they differ chiefly in practical convenience only.

(3) The witness must further be able to state that the *particular marks* used as the basis of inference were *distinct and numerous enough* to afford

§ 414. [1] The subject is considered in the present author's "Principles of Judicial Proof" (1913), §§ 14–26.

A full account of systems of finger-print identification will be found in the following authoritative work: C. Ainsworth Mitchell, "Science and the Criminal" (1911, N. Y.).

The most comprehensive handbook on the subject is the following: H. H. Wilder and Bert Wentworth, "Personal Identification: Methods for the Identification of Individuals Living or Dead" (Boston, 1918); the authors are respectively professor of zoölogy in Smith College and former police commissioner of Dover, N. H. Their work sets forth all the scientific bases for finger-print identification, as well as the practical methods of employing it.

In Mark Twain's "Pudd'nhead Wilson", c. XXI (1893) there is a lucid account of the logic of finger-print identification; it occurs in a counsel's argument, and ends dramatically in freeing an innocent man charged with murder. This account was printed long before any extensive use had been made of the method in American governmental departments.

[2] *England:* 1909, Castleton's Case, 3 Cr. App. 74 (finger-prints on a candle left behind). *United States:* 1921, Moon *v.* State,— Ariz. —, 198 Pac. 288 (burglary; finger-print identity, admitted); 1911, People *v.* Jennings, 252 Ill. 534, 96 N. E. 1077 (finger-imprints, as interpreted by the scientific system of dactyloscopy, admitted leading opinion, by Carter, J.); Mich. Comp. L. 1915, § 1821 (State prison warden's description and measurement [of convict] by the Bertillon system or such other system as may be deemed proper for the identification of criminals", admissible to prove former conviction of person on trial); 1918, Richards *v.* Vermilyea, 42 Nev. 294, 175 Pac. 188 (murder of a stage-driver; finger-prints on an envelope in a mail-sack opened by the robbers, admitted to identify defendant; learned opinion by Coleman, J., placing the ruling on its proper logical basis); 1914, State *v.* Cerciello, 86 N. J. L. 309, 90 Atl. 1112 (finger-prints held admissible; but the Court's opinion here misses the real point of such evidence); 1915, State *v.* Connors, 87 N. J. L. 419, 94 Atl. 812 (burglary; facsimile of finger-prints on a post compared with defendant's finger-prints, admitted); 1921, Lamble *v.* State, 96 N. J. L.—, 114 Atl. 346 (murder; identity of finger-prints on automobile with defendant's finger-prints, evidenced by expert, admitted); 1915, People *v.* Roach, 215 N. Y. 592, 602, 109 N. E. 618 (murder; finger-prints on clapboards of the house of the homicide, admitted to identify defendant); 1917, People *v.* Sallow, Gen. Sess. N. Y. Co., 165 N. Y. Suppl. 915 (disorderly conduct; finger-print evidence admitted to show identity of former convictions); 1918, McGarry *v.* State, 82 Tex. Cr. 597, 200 S. W. 527 (burglary; finger-prints left on a window and made on a paper, admitted, with expert testimony).

an inference, under the system which he employs; and also that the marks thus used for study were *reproduced* or transferred by some *reliable process* from the original object on which they were impressed.

There is indeed also one possibility of the inference being fallible, but it occurs in the Traces-inference above noted, and not in the Identity-inference, *e.g.* finger-prints identical with A's may be found on a letter left at the scene of the act, and yet these may have been produced by B, who has surreptitiously elsewhere placed the letter where A touched it and has then carried the letter bearing A's imprint to the scene of the act.[3] This, and a few other ingenious and far-fetched expedients, might explain how A's finger-prints on the letter do not necessarily point to his presence at the scene. But such possibilities, though they must be recognized, belong decidedly to the other party to bring forward on the facts of a given case; they cannot affect the admissibility of the evidence. They indicate a possibility of weakness in the Traces-inference (*ante*, § 149), not in the Identity-inference; for they are comparable to the traditional method of explaining away *e.g.* the finding of stolen money in the accused's trunk by showing that an enemy placed it there in order to involve him in the charge.

§ 415. **Same: Footmarks.** For *footmarks*, there is also a double step of inference, viz. from the mark found to the presence of the maker at the time of the act, *i.e.* a Trace-inference (*ante*, § 149), and from the combination of features in the mark found to the person bearing the same combination of features, *i.e.* an Identity-inference.

Here, however, the second step of inference, in contrast to that from finger-prints (*ante*, § 414),is apt to be especially weak. This is because the features usually taken as the basis of inference — size, depth, contour, etc. — may not be distinctive and fixed in type for every individual, but may apply, even in combination, to many individuals. Hence their probative significance is apt to be small.

This ordinarily should not negative Admissibility, it merely affects weight. But popular looseness of thought is apt to overestimate this probative value; and accordingly Courts have sometimes excluded the evidence, mistakenly invoking the Opinion rule (*post*, § 1977) for the purpose.[1] No doubt a witness to identity of footmarks should be required to specify the features on which he bases his judgment of identity; and then the strength of the inference

[3] A telling illustration of this possibility is given by a clever author of fiction in a well-contrived detective story: R. Austin Freeman, "The Singing Bone" (London, 1913).

Still another such possibility is said to exist, in that a method has been invented of *reproducing finger-prints artificially* and thus of impressing their counterfeit on an object so as not to be distinguishable from impressions genuinely produced by the person himself whose fingers made the original print: Milton Carlson, "Finger Prints can be Forged" (Virginia Law Register, vol. V, N. S. p. 765, Feb. 1920). But as the method itself has been kept secret by the inventor, its practical availability must be doubted. Further information can be obtained from the International Association for Personal Identification, New York City.

§ 415. [1] The cases will therefore be found collected under various heads: *ante*, § 149 (Traces); *ante*, § 413 (Identity); *post*, § 571 (Expert Qualifications); *post*, § 660 (Observation); *post*, § 1977 (Opinion).

should depend on the degree of accurate detail to be ascribed to each feature and of the unique distinctiveness to be predicated of the total combination. Testimony not based on such data of appreciable significance should be given no weight.[2]

§ 416. **Same: Criminality of Act Immaterial.** It has already been seen (*ante*, § 218) that, where a circumstance is relevant for some purpose, the incidental revelation, in offering it, of other criminal conduct by a defendant does not stand in the way of receiving the evidence. The principle finds application here as elsewhere.[1]

§ 417. **Circumstances Identifying a Chattel, Document, or other External Object.** The principle of Identity applies as well to objects of external nature

[2] An example of this weakness can be seen in the argument of Mr. Wm. A. Beach for the accused, in Rubenstein's Trial (King's Co., N. Y., Jan. 31, 1876; Seller's Classics of the Bar, IV, 170).

§ 416. [1] ENGLAND: 1833, R. *v.* Fursey, 6 C. & P. 83, 3 St. Tr. N. S. 543, 551 (the kind of wound given to a third person by the accused, admitted to identify the weapon); 1836, R. *v.* Rooney, 7 C. & P. 517 (robbery of W., who was riding with U.; evidence of the finding of U.'s watch on the defendant admitted as identifying him as one of those taking part; "it makes no difference that Mr. U.'s watch is the subject of the next indictment"). UNITED STATES: *Alabama:* 1868, Yarborough *v.* State, 41, Ala. 405, 407 (disputed identity; the theft of other property, admitted to identify); *California:* 1857, People *v.* Butler, 8 Cal. 435, 439 (a question as to the defendant's business, answered by a statement that he was a gambler, held proper, since it might be relevant to identify the defendant or to test the witness' knowledge of him); 1897, People *v.* Ebanks, 117 Cal. 652, 49 Pac. 1049 (murder on Sept. 10; doings of the defendant a few days before, with a pistol and a sack, admitted to identify him); 1902, People *v.* Taylor, 136 Cal. 19, 69 Pac. 292 (a larceny, admitted to identify); *Kansas:* 1874, State *v.* Folwell, 14 Kan. 105, 109 (larceny of a horse; to identify the defendants, one who saw the wagon-tracks was allowed to say that he knew them because the wagon was his); *Maine:* 1867, State *v.* Bartlett, 55 Me. 200, 214 (to show a witness' acquaintance with the defendant and ability to identify him, the witness was allowed to say that he was an officer in a State prison; whether he might properly have said that he saw the defendant there was not decided); *Massachusetts:* 1875, Com. *v.* Sturtivant, 117 Mass. 123 (three persons found murdered in or about the same house; the fact was admitted that all were killed with the same weapon, at the same time); *Missouri:* 1907, State *v.* Toohey, 203 Mo. 674, 102 S. W. 530 (burglary); 1910, State *v.* Dunwoody, 231 Mo. 48, 132 S. W. 227 (fraudulent registration; registration elsewhere, admitted to identify); *New York:* 1875, Foster *v.* State, 63 N. Y. 619 (burglary; the taking of another article at the same time, admitted to identify the source of goods found in the defendant's possession); 1880, Hope *v.* People, 83 N. Y. 419, 423, 427 (robbery of the key of a bank from the cashier; at the time of the robbery of the key, all of the gang of robbers were masked; but upon a showing that the same gang subsequently robbed the bank, the fact was admitted of the defendant's participation in the latter robbery, to identify him); *Oklahoma:* 1908, Vickers *v.* U. S., 1 Okl. Cr. 452, 98 Pac. 467 (rape; a burglary about the same time, admitted to identify accused); *Oregon:* 1881, State *v.* Wintzingerode, 9 Or. 153, 157 (the identification of a gun used in the murder, and found in the defendant's possession, as one stolen from the deceased, admitted); 1900, State *v.* O'Donnell, 36 Or. 222, 61 Pac. 892 (larceny; possession of other stolen property, not admitted on the facts); *Pennsylvania:* Brown *v.* Com., 76 Pa. 319, 321, 337 (murder of Annetta K., at her house; the fact was offered of the murder of her husband, Daniel K., at the same time, near the house, with the same weapon, and of the possession of money in the house by the husband and of other circumstances showing that the two murders were committed by the same person; admitted, because "when two persons are murdered at the same time and place, and under circumstances evidencing that both acts were committed by the same person or persons, and were part of one and the same transaction or res gestæ, and tend to throw light on the motive and manner of the murder for which the prisoner is indicted", the second murder is admissible); 1881, Moyer *v.* Com., 98 Pa. 338, 349 (similar facts); *Texas:* 1908, Wyatt *v.* State, 55 Tex. Cr. 73, 114 S. W. 812 (robbery; another robbery on the same night, admitted); 1915, Collins *v.* State, 77 Tex. Cr. 156, 178 S. W. 345 (robbery).

See additional related instances cited *ante*, § 218 (inseparable acts).

(a place, book, document, or house) as to human beings. There is no room for the operation of the human will as affecting the validity of the inference, and hence there happens here to be no occasion for the discrimination, otherwise useful, between the second and third sub-titles of the present Title, *i.e.* evidence to prove a Human Quality or Condition, and evidence to prove a fact of External Nature.

The recorded rulings deal with chattels of various sorts,[1] and with documents, written or printed.[2]

§ 418. **Utterances used to Identify Time or Place.** It often happens that *a place or a time is marked significantly by an utterance* there or then occurring, so that the identification of it may alone be made, or best be made, by permitting the various witnesses to mention the utterance as an identifying mark. The utterance, not being used as an assertion to prove any fact asserted therein, is not obnoxious to the Hearsay rule (as explained *post*, § 1791), and may therefore be proved like any other identifying mark:

1865, COLT, J., in *Earle* v. *Earle*, 11 All. 1 (the libellant in divorce had called Ellen G. whose testimony tended if unexplained to show that she saw Mrs. E. sitting in the lap of

§ 417. [1] *Can.* 1921, R. *v.* Scheer, 57 D. L. R. 614, Alta. (automobile tires); *U. S.* 1896, Buchanan *v.* State, 109 Ala. 7, 19 So. 410 (defendant was charged with larceny from S. of a mixed lot of furnishing goods, ranging from shoe-tacks to shirts; S. had bought from G., who carried a large stock; comparison by the jury of the goods found in defendant's house and the original stock was held improper; no reason given; an absurd ruling); 1896, Crane *v.* State, 111 Ala. 45, 20 So. 590 (similar to the preceding); 1872, Com. *v.* Brooks, 109 Mass. 354 (the finding of a watch-ring at a certain place, admitted as evidence that a watch-robbery had taken place there); 1883, Com. *v.* Collier, 134 Mass. 203, 205 (to identify a barrel of beer as coming from S., the label of S. on the barrel was admitted; compare § 150, *ante*); 1888, Com. *v.* Kendrick, 147 Mass. 444, 18 N. E. 230 (identity of sampled beer with that possessed by the defendant; evidence "fairly establishing" it in the trial Court's opinion, held sufficient); 1875, DeArmond *v.* Neasmith, 32 Mich. 232 (gentleness of a heifer); 1882, Keith *v.* Tilford, 12 Nebr. 276, 11 N. W. 315 (herd of cattle).

For other cases illustrating the principle for *stolen goods*, compare the citations *ante*, §§ 148–152, 218.

[2] 1684, Lady Ivy's Trial, 10 How. St. Tr. 555, 617, 640 (defendant's title-deed shown to be forged because it read, in the recital of date, "the 13th day of November, in the 2d and 3d years of the reigns of our soveign lord and lady Philip and Mary by the grace of God king and queen of England, *Spain*, France, both Sicilies, Jerusalem, and Ireland, etc.", although the style of deeds until the next summer, when Philip acceded to the kingdom of Spain, was "king and queen of England, France, Naples, Jerusalem and Ireland, *princes of Spain and Sicily*"; this the Court calls "a natural, legal evidence, and a proper evidence in things of this nature to detect a forgery"); 1835, Johnson *v.* Morgan, 7 A. & E. 233 (libel by a song; to prove the contents of the particular song charged, the paper being lost, it was held sufficient evidence that 1000 copies of song had been printed by M., 300 of them put for sale with H., that the song charged had been bought of H., and that it corresponded with one produced which belonged to the 1000 copies; Coleridge, J.: "There is no rule, respecting the proof of identity, peculiar to the case of a printed paper; the evidence may depend upon correspondence in size, appearance, and other circumstances"); 1900, Carte *v.* Dennis, 5 N. W. Terr. 32, 45 (infringement of copyright of an opera; a printed copy produced held sufficiently identified); 1849, Com. *v.* Miller, 3 Cush. Mass. 243, 251 (to show that three certain notes were forgeries, thirty others were admitted, as indicating by the identity of marks that they were formed from one pattern by tracing); 1881, Shelden *v.* Warner, 45 Mich. 640, 8 N. W. 529 (three similar kinds of ink in each of two documents, used to show an identity of source); 1813, Southwick *v.* Stevens, 10 John. N. Y. 443, 446 (the source of a newspaper evidenced by the features of the type).

For other illustrations, see the rulings dealing with opinion testimony to the *ink*, *paper*, and other marks of documents (*post*, §§ 2024–2027), with the *production of the original* of a *newspaper* (*post*, §§ 1234, 1237), and the *authentication* of *printed matter* (*post*, §§ 440, 2150).

Mr. R. in Mrs. E's. bedroom; Mr. R. testified that while Mrs. E. was ill in bed in her house Mr. R. on one occasion, at Mrs. R.'s request, took Mrs. E. in his lap to enable Mrs. R. to make the bed, and when Mrs. R. returned after a moment's absence he said to her that "Ellen had been in"; Mrs. R. testified to a similar effect; to the admission of the statement by Mr. R. to his wife an objection was made): "It was important, as the case stood, for the libellee to satisfy the jury that Mr. and Mrs. R. were testifying to the same occasion. . . . Any circumstance or act occurring at that transaction and remembered by both witnesses would show that they were testifying to the same occasion and would be clearly competent. So we are of opinion that the conversation of the parties or any declarations made at the time are to be regarded as of the nature of verbal acts, and admissible for the purpose of identifying the occasion of which the witnesses speak. Statements used for this limited purpose are admitted without regard to the truth of the fact stated. . . . There is no violation of the rule against hearsay evidence."

This principle is generally accepted. But it is to be understood that the utterance cannot be used as having any assertive value; and some Courts occasionally refuse to allow the specific tenor of the utterance to be stated, where a special danger exists of giving improper credit to it as a hearsay assertion.[1]

From this use of identifying utterances by several witnesses testifying to a common time or place, distinguish the following superficially similar uses: (1) mentioning a third person's utterance as a *reason for observing* a particular fact (*post*, § 655); (2) mentioning it as a *reason for recollecting* a particular fact (*post*, § 730); (3) using one's own *prior utterance* of a fact to *corroborate one's present testimony* and repel the suggestion of recent contrivance (*post*, § 1130).

§ 418. [1] The principle is illustrated in the following cases: ENGLAND: 1846, R. *v.* Richardson, 2 Cox Cr. 361; Denman, L. C. J., and Alderson, B. (to show the date when a conversation with the accused about poison occurred, the witness was allowed to state a remark which he shortly afterwards made to C. about it, so that by calling C. the time could be fixed; but "of course it could only be used to fix the time of the prisoner's conduct"); UNITED STATES: *Alabama:* 1919, Rogers *v.* State, — Ala. —, 83 So. 359 (receiving stolen goods; larceny of goods from another owner, not allowed to be used on the facts as tending to identify the time, etc.): *Georgia:* 1887, Barrows *v.* State, 80 Ga. 194, 5 S. E. 64 (a remark of D. served to mark the time after which a witness obtained certain knowledge); *Iowa:* 1899, State *v.* Dunn, 109 Ia. 750, 80 N. W. 1068 (conversation admitted to fix a date); 1900, Stewart *v.* Anderson, 111 Ia. 329, 82 N. W. 770 (similar; left to the trial Court's discretion); *Mass.* 1850, Com. *v.* Webster, Mass., Bemis' Rep. 269, 295 (fixing the time of seeing a person, by notes written and received on that day, allowed); 1865. Earle *v.* Earle, 11 All. 1 (see quotation *supra*); 1876, Com. *v.* Piper, 120 Mass. 187; 1877, Com. *v.* Sullivan, 123 Mass. 221 (to fix the time of a sale, the fact was admitted of A's testimony to it having been given at a certain time before a magistrate); 1878, Whitney *v.* Houghton, 125 Mass. 452 (the time of a sale was in issue; testimony as to the date of a conversation by the defendant in which he mentioned the sale was rejected; if the sale was proved, this seems unsound); *Michigan:* 1883, People *v.* Mead, 50 Mich. 229, 15 N. W. 95 (note that in this Court some of the precedents in §§ 655, 730, *post*, where utterances fixing one's recollection or attention are held admissible, are used as though they fell under the present head); *Rhode Island:* 1899, Agulino *v.* R. Co., 21 R. I. 263, 43 Atl. 63 (the fact of A calling B's attention to a circumstance, admitted to corroborate); *Vermont:* 1861, Hill *v.* North, 34 Vt. 616 (time fixed by a remark); 1881, Weeks *v.* Lyndon, 54 Vt. 640, 647 (similar); 1895, State *v.* Young, 67 Vt. 450, 32 Atl. 252 (similar); 1898, Wilkins *v.* Metcalf, 71 Vt. 103, 41 Atl. 1035 (similar).

SUB-TITLE III: EVIDENCE TO PROVE FACTS OF EXTERNAL INANIMATE NATURE

(EVENTS, CONDITIONS, TENDENCIES, CAUSES, QUALITIES, AND EFFECTS, OF THINGS AND PLACES)

CHAPTER XVI.

INTRODUCTORY

TOPIC I: IDENTITY

TOPIC II: OCCURRENCE OF AN EVENT

TOPIC III: EXISTENCE (OR PERSISTENCE) IN TIME

TOPIC IV: TENDENCY, CAPACITY, QUALITY, CAUSE, OR EFFECT

1. General Principles

2. Precedents arranged by Subjects

A. INSTANCES OF MATERIAL EFFECTS, AS EVIDENCE

B. INSTANCES OF CORPORAL EFFECTS, AS EVIDENCE

INTRODUCTORY

§ 430. **Distinction between this and the preceding Subjects.** In the classification of circumstantial evidence, as already observed (*ante*, § 43), there can be, at certain points, no sharp distinction between a Human Act, a Human Quality or Condition, and a Fact of External Inanimate Nature, with reference to evidencing them as propositions to be proved. Some matters, such as death, may sometimes be viewed in either the first or the second aspect; for other matters, such as the possession of land, it may not be easy to distinguish between the second and the third. The propositions which come to be proved before tribunals of justice embrace every sort of fact in life, and no classification not purely arbitrary can divide them for practical purposes into classes always absolutely distinct. All that can be done is to separate by themselves such ' facta probanda ' as are more or less related with reference to the mode of evidencing them and the considerations of probative value affecting the evidentiary facts. The grouping already set forth (*ante*, § 43) seems to find justifications in such natural considerations. That at the point where the lines of grouping are drawn some obscurity exists is a necessary defect of all such classifications, and does not affect their general validity. The inter-relation of the matters grouped under the first sub-title (evidence to prove a Human Act) has already been seen. Certain sorts of evidentiary facts — Character, Design, Habit, Motive — are specially appropriate and common in proving such matters, and the peculiar restrictions of our law upon the use of character have there constantly to be distinguished from the use of other sorts of related evidence, and make a combined consideration indispensable. The matters in the second sub-title (evidence to prove a Human Quality or Condition) are related with equal closeness. The use of specific instances of conduct, with its appurtenant dangers of unfair surprise, undue prejudice, and confusion of issues, is common to all. The prohibition of character-conduct has constantly to be distinguished from the use of other conduct; and the considerations of probative value and of auxiliary policy which are there applicable must be studied in comparison in order to appreciate their proper significance.

Coming now to the third and present group, we find its distinguishing feature to be the *absence of the element of a human will* and of the *human*

emotion, reason, and character as affecting conduct. The evidencing of a human act from antecedent or subsequent human attributes, and the evidencing of a human quality or condition from human conduct, involve a class of experience as to the meaning of human attributes and human conduct which is peculiar and distinct. Where the thing to be proved and the evidence to prove it do not contain these elements, the considerations of Relevancy (*ante*, § 30), affecting the inferences to be drawn, are necessarily different, and suggest naturally a distinct grouping for practical purposes. The considerations of Auxiliary Probative Policy (*ante*, § 42), where these human elements are lacking, have also a different force and bearing. Thus, for practical purposes, the third grouping is broadly marked out by considerations essentially connected with the propositions to be proved and the evidence to prove them. While there may easily be doubt and difference of opinion as to the appropriate group for a few topics, the validity of the grouping as a whole is not thereby affected.

The warning must here be repeated (*ante*, § 43) that for the classification of any evidential question, as well as for the working out of its solution, the only safe and scientific and practical way is to ask perpetually two questions: 1. What is the exact *proposition to be proved?* 2. What is the *evidentiary fact* from which the inference is desired to be drawn? With these two data in hand — the abscissa and the coördinate, so to speak, of the problem — most places in the topography of the law of Evidence ought easily to be found.

§ 431. **General Principles of Relevancy.** The general principles of Relevancy, or Probative Value, as already examined, here receive constant and copious illustration.[1] Their application is in some ways more normal and more instructive, because less complicated by the varying considerations of Auxiliary Probative Policy (*ante*, § 42) which come into play where human conduct is concerned. The exposition of principles (*ante*, §§ 30–36) will serve as an introduction to the treatment of the ensuing precedents; but specific reference to the various principles is also made, as occasion requires, at the appropriate places.

§ 432. **Division of Topics.** The kinds of ' facta probanda ' may be subdivided, having regard to those propositions evidenced by more or less associated facts and inferences, into four categories or groups:

I. Identity (for example, whether a machine delivered was the same as the one agreed to be delivered);

II. Occurrence of an Event (for example, whether a tree fell, or whether lightning struck a house);

III. Existence, or Persistence, in Time (for example, whether a defect in a street or a house was in existence at the time in issue);

§ 431. [1] From the point of view of logic and psychology as applicable to argument before the jury (not the rules of Admissibility), see the materials collected in the present author's "Principles of Judicial Proof, as given by Logic, Psychology, and General Experience, and illustrated in Judicial Trials" (1913), §§ 4–13.

IV. Tendency, Capacity, Quality, Cause, or Effect (for example, whether a place in a sidewalk was dangerous, or whether a gunshot could carry a certain distance).

Here, again, no specific single terms can accurately distinguish the different groups, nor is it possible always to draw the lines sharply between the various groups. The practical justification for the grouping will be best appreciated in consulting the precedents. Under one or another of these heads seem to come all the evidential questions that concern external inanimate nature.

It has already been seen (*ante*, § 43) that, for the purpose of grouping evidential facts involving similiar inferences, it is usually convenient to arrange them according as the inference is Prospectant, Concomitant, or Retrospectant, *i.e.* according as a view is taken forward in time from the evidentiary fact to the ' factum probandum ', or concurrently at the two, or backward from the former to the latter. This distinction, which has been seen to be practically useful in both the preceding groups of evidential material, is here equally useful in most of the topics.

§ 433. **Combination of Different Inferences.** A given evidentiary fact may and usually does involve (as already observable in dealing with the other materials) more than one of these processes of inference. For example, in proving a sidewalk-hole to be unsafe, the evidence may be that A fell there two weeks ago; this involves, first, an inference in the fourth group, namely that the place was then unsafe, and, secondly, an inference in the third group, namely, that its unsafeness two weeks before evidences its unsafeness at the time in issue; and either of these inferences may be rejected as unsound, while the other remains sound. Again, to prove the identity of a bale of goods delivered, its features six months before may be offered; and this involves the soundness of two inferences, one of the first and one of the third sort. Again, the question being whether a tree was lying across a street on January 1, the evidentiary fact that the tree was struck by lightning on July 1 preceding involves two inferences, namely, that the tree fell when struck, and that its fallen condition continued till the time in question, *i.e.* an inference of the second and one of the third sorts. Again, to show that a dust-explosion occurred in a certain room, the evidentiary fact that a dust-explosion previously occurred in the same room involves two and perhaps three inferences, — first, that there is a tendency in a room thus circumstanced for the dust to explode spontaneously, secondly, that as a result of this tendency an explosion did occur, and perhaps (intervening between these two), thirdly, that the condition at the previous time continued up to the time in question, — inferences, respectively, of the fourth, the second, and the third sorts.

In spite, however, of this incidental resort to two or more of the kinds of inference in one piece of evidence, the kinds of inference, as types, remain distinct. They are governed by distinct considerations and must be studied separately. Without analyzing them and studying them separately, nothing

but confusion results. It has already been seen, for instance (*ante*, § 192), that in offering to prove an immoral act for the purpose of showing the same person to have done an act charged, we cannot neglect to separate the process of thought into its two elements of inference, *i.e.* (1) A's immoral act indicates probably an immoral trait; (2) this trait indicates the doing of the act in question; for while in general both of these forms of argument are forbidden, yet the prohibition is a limited one only and rests on distinct grounds for each, and thus it may happen that the immoral act offered in the particular case does not come within the prohibition of (1), nor does the immoral trait evidenced by it come within the prohibition of (2) — as, where the intercourse of a rape-complainant with a third person is offered to show the probability of her consent. The same analysis and caution is here necessary in order to avoid being misled by the superficial nature of an evidentiary fact. It is easy to misuse a rule by ignoring the reasons for it.

Topic I: IDENTITY

§ 434. **Identity of One Object with Another.** The mode of inference used in proving identity is precisely the same for objects of inanimate nature and for human beings. The principle has been already examined (*ante*, §§ 411–418), and the precedents upon the present subject have been there considered; so that no further notice of the subject is necessary.

Topic II: OCCURRENCE OF AN EVENT

§ 435. **Scope of the Subject.** This term (the Occurrence of an Event) may serve as a generalization to cover all cases where a thing is thought of as coming into being or as producing result, and includes therefore theoretically matters which might perhaps be conceived of also under the category of Existence. For example, if the 'factum probandum' be the destruction of a house, it might ordinarily be conceived of either as an event — the momentary fact of destruction, — or as a condition of existence — the state of being destroyed.[1] For practical evidential purposes, however, the choice of terms is here not important. The distinction between the second and the third groups is the distinction between the mere fact of occurrence or existence as such, and the fact of occurrence or existence with reference to time. In the present group it is asked how to prove the fact of destruction or non-destruction; and, with reference to the evidentiary matters pointing forward as causes of its probable destruction or pointing backwards as effects or traces of its de-

§ 435. [1] "When successive phenomena are in question, these abstracted portions ['factum probandum' and evidentiary fact] may always themselves be viewed as events, even where so uneventful as hardly to deserve the name in popular language. Thus, where any quality of any thing changes ever so slightly — say, when a thermometer rises one degree —, we have what is here considered an 'event' . . . It may seem [in these examples] strange to call a large river or a large town 'events', but here the names are only used elliptically, for the growth of the town and the continued existence of the river." (Sidgwick, Fallacies, 333, 338).

struction, it is immaterial whether we regard "event" or "condition", "occurrence" or "existence", as the more appropriate term for this category. In the mass of instances the notion of the occurrence of an event is the more appropriate term; and that term (subject to an exception pointed out *post*, § 437) will be employed as the general one.

§ 436. **Occurrence of an Event, as evidenced from Cause or Effect.** An event may be evidenced circumstantially by a cause or by an effect. This mode of inference is available in the three forms already mentioned (*ante*, § 432), — Prospectant, Retrospectant, and Concomitant. For example, the sinking of a ship is evidenced prospectantly by the presence of a storm in the vicinity; the occurrence of a fire is evidenced retrospectantly by the blackened ruins left as its traces; the revolution of car-wheels is evidenced concomitantly, by the motion of the car, to the person riding in it. This type of inference, though perhaps in practice the commonest of all, gives rise, nevertheless, to practically no judicial rulings. One reason for their rarity is that, for the occurrences of external or inanimate nature, testimonial evidence is commonly abundant. Another reason is that, where circumstantial evidence is resorted to, the instinctive logic which suggests the offer of evidence will also suffice to convince the tribunal and the opponent of its propriety; nobody, for instance, would object to the offer of certain blackened and charred wood as evidencing a fire. Still another reason is that, where the desired inference transcends the scope of ordinary instinct and experience, it is offered as the subject of a testimonial knowledge or opinion by an expert witness, — as where a physician testifies that froth in the lungs of a corpse evidences a certain kind of death. Another reason is that most events of external nature are associated with some human act, and hence the proof involves evidence of the act.[1] But a reason the most important for present purposes is that an inference of this type, though in form the first one to be put forward as the main inference, frequently — if not usually — resolves itself into another of a different type, and the evidential question comes to turn upon the other. This feature it is necessary to explain more fully. The process may be examined for each of the three modes of inference in turn, — prospectant (inference from a prior or causal fact), retrospectant (inference from an effect), and concomitant:

(1) *Prior Cause, as the basis of inference.* That a corporal injury will cause a permanent disability to work; that noxious fumes will cause the destruction of herbage; — these are examples of this sort of inference. The evidential offer may be put in this way: The fact of injury is offered as evidence that at a future time there will ensue an inability to work; the fact of noxious fumes is offered as evidence that at a future time there will ensue no herbage. Such evidential offers would unquestionably be recognized as proper. But in practice these offers involving an argument from cause to

§ 436. [1] See examples under §§ 148–160, *ante*, which otherwise might be appropriately dealt with here.

effect do not raise any evidential questions in the above form, but resolve themselves into others; and this in two chief ways: (*a*) Where the desired inference is to an unknown or future *effect* or state of things which it is said the evidential fact will probably cause, the inference rests on an important assumption which in its turn becomes the subject of a new evidential question. To take the second illustration above, and state it more accurately: The fact of these fumes having a tendency to destroy herbage evidences that in future they will probably result in destroying the herbage in question. Now the evidential offer is in this shape unquestionably sound; but this form of statement — while accurately illustrating the present type of argument — brings out the necessity of proving, in its turn, a fact of a new and different category, viz. this assumed *tendency of the fumes to destroy herbage;* and this fact of *tendency* (or capacity) is seen to be in reality the probable point of controversy. It is in attempting to evidence this alleged tendency that the troublesome evidential questions arise; and these questions, so numerous in practice, involve a different sort of inference and different considerations both of probative value and of collateral inconvenience (herein dealt with *post*, §§ 441–464).[2] (*b*) Where the desired inference is as to the *cause* of a concededly existing state of things or occurred event, the same situation is usually reproduced. Thus, in the above illustration, where herbage is conceded to have been destroyed, and the dispute is whether the fumes in question were the cause of the destruction, the evidential suggestion that something harmful to herbage was the cause which would probably effect the destruction of the herbage would plainly be proper; its relevancy is apparent. But the real point of controversy here, as in the preceding class of cases, now comes to be this supposed tendency of these particular fumes to destroy herbage; and it is in the process of evidencing this tendency that the evidential difficulties arise; and these, as just noted, involve different principles.

(2) *Subsequent Effect, as the basis of inference.* That the falling barometer indicates the existence of an atmospheric disturbance; that the derailed car indicates the prior occurrence of a collision or other destructive event; — these are instances of inferences from effect back to the existence of a cause. Such inferences, however, rarely raise evidential questions in practice, for reasons the same as those just explained. Thus, in the illustration above used, the destruction of the herbage is evidently relevant, without question, as indicating the same destructive influence of atmosphere, soil, or the like; but in the further process of fixing on the fumes in question as the precise cause, either we proceed to offer that specific inference through an expert witness, who asserts as a matter of professional experience that the appear-

[2] An example of the simple use of such evidence, offered in the form of an expert's assertion of a physical law, is this: 1909, Cutts *v.* Boston Elev. R. Co., 202 Mass. 450, 89 N. E. 21 (whether a passenger's fall from a car-platform was caused by the motorman's sudden turning on of the power; the defendant contended that such a jerk would have tended to throw the plaintiff inwards, the plaintiff contended that it might equally throw him outwards).

ance of the herbage indicates specific fumes as the course (in which case no question of circumstantial relevancy arises), or, in attempting otherwise to fix upon the fumes as one of the probable destructive influences, it must first be shown that they have this tendency to destroy herbage; so that in evidencing this tendency, the argument sets up new auxiliary inferences, and has travelled into the scope of a new category of fact. Thus, in general, the inference from an effect to the existence or operation of a cause is usually so proper as to be unquestionable, or else leads to a new controversy as to whether the supposed cause has any causing tendency of the alleged sort, and this new controversy involves a different sort of inference.

(3) *Concomitant Events, as the basis of inference.* An event cannot be inferred from its concomitant event except on the assumption that they have a common cause, or unless the inference is really not one of concomitancy but of cause and effect. An example of the latter sort is the inference of fire from smoke, *i.e.* it is really the inference of fire as a cause from smoke as the effect. An example of the former sort is the inference of revolving wheels from the motion of the car, *i.e.* there is really an inference, first from the motion to the motive power as a cause, and next, from the motive power to the revolution of the wheels as a common effect of the same cause. In some instances, however, for practical purposes, this latter analysis may be neglected and the inference treated as a single one; these instances are dealt with in the next sections. Otherwise, no separate problem is involved in this form of argument.

Topic III: Existence, or Persistence, in Time

There is, in strictness, no place for a separate category of mere Existence, as distinguished from Occurrence; for, as already suggested (*ante*, § 435), the notion of a thing's either coming into being or of its having been in being is an inclusive and single notion, with reference to which inferences from cause or from effect may equally be made. Thus in inferring future disability from corporal injury, it is immaterial whether the former be termed the occurrence of an event or the existence of a condition; the inquiry is merely how far we may infer towards it from something else as its cause or its effect; and the term Occurrence has therefore been employed (*ante*, § 435) as the one most generally applicable to the ' factum probandum.' Nevertheless, it is convenient to separate, for some purposes, a category of Existence in Time as the ' factum probandum ', *i.e.* those instances in which the Existence in Time of an object, condition, or quality is to be evidenced by a prior, subsequent, or concomitant existence. The inference may, as usual, be of one of these three general types; but the first two are not dissimilar in their operation, and may be considered together.

§ 437. (1) **Existence, from Prior or Subsequent Existence; General Principle, applied in Sundry Instances (Highways, Machines, Buildings, Railway**

Tracks, etc.). When the existence of an object, condition, quality, or tendency at a given time is in issue, the *prior existence* of it is in human experience some indication of its probable persistence or continuance at a later period. The degree of probability of this continuance depends on the chances of intervening circumstances having occurred to bring the existence to an end. The possibility of such circumstances will depend almost entirely on the nature of the specific thing whose existence is in issue and the particular circumstances affecting it in the case in hand. That a soap-bubble was in existence half-an-hour ago affords no inference at all that it is in existence now; that Mt. Everest was in existence ten years ago is strong evidence that it exists yet; whether the fact of a tree's existence a year ago will indicate its continued existence to-day will vary according to the nature of the tree and the conditions of life in the region. So far, then, as the *interval of time* is concerned, no fixed rule can be laid down; the nature of the thing and the circumstances of the particular case must control.

Similar considerations affect the use of *subsequent existence* as evidence of existence at the time in issue. Here the disturbing contingency is that some circumstance operating in the interval may have been the source of the subsequent existence, and the propriety of the inference will depend on the likelihood of such intervening circumstances having occurred and been the true origin.[1] On landing at New York it can hardly be inferred that the steamer at the next dock has been there for a week; but it may usually be inferred that the dock has been there for some years; while the particular circumstances of appearance and the like will in the latter instance affect the length of time to which the inference could be carried back. Here, as with prior indications, the *interval of time* to which any inference will be allowable must depend upon the nature of the thing and the circumstances of the particular case.

The opponent, on the principle of *Explanation* (*ante*, § 34), may always attempt to explain away the effect of the evidence by showing that in the meantime other circumstances have occurred to raise a probability of change instead of continuance.

This general principle that a *prior* or *subsequent* existence is evidential of a later or earlier one has been repeatedly laid down, and has even been spoken of as a Presumption (*post*, § 2530):

1820, BEST, J., in *R.* v. *Burdett*, 4 B. & Ald. 124: "I am to presume a thing always [to have been] in the state in which it is found, unless I have evidence that at some previous time it was in a different state."

1847, SANDFORD, V. C., in *Bogardus* v. *Trinity Church*, 4 Sandf. Ch. 744: "It is a rule of evidence, founded on the experience of human affairs, that where a state of things is

§ 437. [1] Quoted with approval in Potlatch Lumber Co. *v.* Anderson, C. C. A., 199 Fed. 742 (1912). The contrary statement, as to subsequent existence, by Gray, C. J., in Chandler *v.* Aqueduct Co., 122 Mass. 307 (1877), is wholly unsound; and has been repudiated by the neat remark in Laplante *v.* Mills, Mass., *infra*: "It is said that presumptions do not run backward; but that depends on the case."

once established by proof, the law presumes that such a state of things continues until the contrary is shown or a different presumption is raised from the nature of the subject in question."

1867, BIGELOW, C. J., in *Com.* v. *Billings*, 97 Mass. 405: "Facts and circumstances in their nature continuous may always be shown to exist anterior to the precise period when it is necessary to show their existence, unless the interval is too great to afford a reasonable inference that the same state or condition of things has remained unchanged."

1869, COLT, J., in *Thayer* v. *Thayer*, 101 Mass. 113: "The rule is that a condition once proved is presumed to have been produced by causes operating in the usual way, and to have continuance till the contrary be shown."

That no fixed rule can be prescribed as to the time or the conditions within which a prior or subsequent existence is evidential, is sufficiently illustrated by the precedents, from which it is impossible (and rightly so) to draw a general rule. They may be roughly grouped into two classes, — those in which the evidence has been received without any preliminary showing as to the influential circumstances remaining the same in the interval (thus leaving it to the opponent to prove their change by way of explanation in rebuttal), and those in which such preliminary showing is required. Whether it should be required must depend entirely on the case in hand, and it is useless to look or to wish for any detailed rules.

The precedents show the principle applied to all manner of subjects, — to the condition of a *highway*,[2] or of a *bridge*,[3] or of a *railway track*, station, or roadbed,[4]

[2] *Connecticut:* 1900, Dean *v.* Sharon, 72 Conn. 667, 45 Atl. 963 (the sameness of a highway's condition being shown, its condition after the accident was admitted); 1914, Ross *v.* Stamford, 88 Conn. 260, 91 Atl. 201 (presence of slippery snow and ice, without specifying the time, excluded); *Iowa:* 1895, Hunt *v.* Dubuque, 96 Ia. 314, 65 N. W. 319 (condition of a sidewalk a year before, admissible, if substantially unchanged); 1899, Bailey *v.* Centreville, 108 Ia. 20, 78 N. W. 831 (subsequent condition, unchanged, of a sidewalk, admitted); *Massachusetts:* 1884, Barrenberg *v.* Boston, 137 Mass. 231 (condition of a sidewalk as to ice, before and after the time in issue, admitted); 1902, Tobin *v.* Brimfield, 182 Mass. 117, 65 N. E. 28 (condition of a highway four or five days after an accident, held not improperly excluded in the trial Court's discretion); *Michigan:* 1892, Fuller *v.* Jackson, 92 Mich. 197, 203, 52 N. W. 1075 (condition of a sidewalk-plank the next morning, admitted); 1908, Williams *v.* Lansing, 152 Mich. 169, 115 N. W. 961 (sidewalk a week or two afterwards, admitted); *Minnesota:* 1898, Hall *v.* Austin, 73 Minn. 134, 75 N. W. 1121 (rotten condition of planking a week later, admitted); *Missouri:* 1904, Norton *v.* Kramer, 180 Mo. 536, 79 S. W. 699 (sidewalk); *Pennsylvania:* 1895, Link *v.* R. Co., 165 Pa. 75, 30 Atl. 820, 822 (condition of a sidewalk two days later, admitted); 1898, Potter *v.* Natural Gas Co., 183 Pa. 575, 39 Atl. 7 (similar condition of pipe in a road up to a few weeks previous, admitted); *Tennessee:* 1897, Rosenbaum *v.* Shoffner, 98 Tenn. 624, 40 S. W. 1086 (condition of the place of an accident next day, admitted); *Vermont:* 1910, Herrick *v.* Holland, 83 Vt. 502, 77 Atl. 6 (condition of highway holes four days later, when substantially unchanged, admitted); *Washington:* 1902, Bell *v.* Spokane, 30 Wash. 508, 71 Pac. 31 (subsequent condition of a sidewalk, admitted); *Wisconsin:* 1893, Schuenke *v.* Pine River, 84 Wis. 669, 677, 51 N. W. 1007 (condition of a highway at a later time, admitted).

See also, for this inference in combination with others, the cases cited *post*, Bailey *v.* Trumbull, Conn., § 458; Hudson *v.* R. Co., Ia., § 458; Stone *v.* Ins. Co., Mich., § 460; Quinlan *v.* Utica, Gillrie *v.* Lockport, N. Y., § 458.

[3] 1894, Jessup *v.* Osceola Co., 92 Ia. 178, 60 N. W. 485 (condition of bridge-planking, etc., a few days afterwards, admitted); 1894, Washington C. & A. T. *v.* Case, 80 Md. 36, 30 Atl. 571 (decayed condition of a bridge nearly a year after an accident, admitted; but the fact of subsequent need of repairs fourteen months after the accident was excluded).

[4] *Alabama:* 1890, Birmingham U. R. Co. *v.* Alexander, 93 Ala. 133, 136, 9 So. 525 (injury at a railroad track; its condition from one to five months thereafter, admitted, where coupled with evidence that its condition had remained unchanged); 1906, Redus *v.* Milner C. & R. Co., 148 Ala. 665, 41 So. 634 (condition of a railway track eighteen months later, excluded);

or of a *stream*,[5] or of *premises*, without[6] or within,[7] or of *machinery* or apparatus,[8] or of a *stock of goods*,[9] or of *sundry articles*,[10] or of the condition of a *human body*[11] or of an *animal*.[12]

Connecticut: 1889, Dyson *v.* R. Co., 57 Conn. 24, 17 Atl. 137 (the condition of a railroad crossing in winter was shown, the accident having taken place in summer when the trees were in leaf); 1899, Cunningham *v.* R. Co., 72 Conn. 244, 43 Atl. 1047 (prior condition of a rail as to elevation above highway, admitted); *Illinois:* 1882, Pennsylvania Co. *v.* Boylan, 104 Ill. 595, 599 (defective planks in a culvert; the lasting capacity of repairs made nine months before, admitted to show whether there was need for repairs at the time); *Indiana:* 1915, Chicago & E. R. Co. *v.* Mitchell, 184 Ind. 383, 110 N. E. 265 (injury to a car-repairer; display of a repairer's flag at that place several days before, held not improperly admitted, in the trial Court's discretion); *Missouri:* 1885, Hipsley *v.* R. Co., 88 Mo. 348, 354 (injury by derailment; condition of the roadbed other than at time of accident, excluded); 1887, Stoker *v.* R. Co., 91 Mo. 509, 516, 4 S. W. 389 (condition of a culvert, as to overflowing, from one to three years before or after, excluded; but such condition is admissible "within such reasonable time as will from the nature and circumstances of the case induce or justify a reasonable presumption or inference that the condition is the same and unchanged"); 1906, Dean *v.* Kansas C. St. L. & C. R. Co., 199 Mo. 386, 97 S. W. 910 (condition of rails six months admitted; "we may be presumed to know that bad steel rails do not get any better by further use for six months or improve like wine with age"); *North Carolina:* 1897, Hampton *v.* R. Co., 120 N. C. 534, 27 S. E. 96 (appearance of the place of an accident more than two years later, after changes had occurred, excluded); *Rhode Island:* 1899, Agulino *v.* R. Co., 21 R. I. 263, 43 Atl. 63 (lighting of a station; its condition at prior and subsequent times, excluded on the facts as too remote);

[5] 1873, Lewin *v.* Simpson, 38 Md. 468, 483 (the overflow of back-water since suit begun, admitted to show the overflow before that time, in connection with a showing that the grade, etc., remained the same); 1873, Brooke *v.* Winters, 39 Md. 509 (the flow of a mill-stream after suit begun, admitted to show its flow before that time; but subject to the opponent's explanation as to the recent operation of other causes); 1861, Dewey *v.* Williams, 43 N. H. 384, 387 (diversion of a mill-stream; measurements of water-heights while the conditions "remained substantially unchanged", admitted).

[6] 1894, Osgood *v.* Chicago, 154 Ill. 194, 41 N. E. 40 (subsequent condition admitted, where the premises taken by eminent domain had changed somewhat between the taking and the trial); 1913, Whiting-Middleton C. Co. *v.* Preston, 121 Md. 210, 88 Atl. 110 (nature of excavation nineteen months later, admitted, no substantial change of conditions appearing); 1878, Ulrich *v.* People, 39 Mich. 245 (rape; condition of the field, where it was said to have occurred, more than a month later, as showing no traces of a struggle, excluded); 1898, Beardslee *v.* Columbia Tp., 188 Pa. 496, 41 Atl. 618 (place of accident; subsequent condition admissible, if substantial identity is not changed, and changes are pointed out; the trial Court's discretion to control).

[7] 1906, Foley *v.* Pioneer M. & M. Co., 144 Ala. 178, 40 So. 273 (condition of mine ventilation, thirteen hours after an accident, admitted); 1895, Colorado M. & I. Co. *v.* Rees, 21 Colo. 435, 42 Pac. 42 (previous open condition of an elevator-door, admitted, to show the defective absence of a lock); 1898, Sievers *v.* P. B. & L. Co., 151 Ind. 642, 50 N. E. 877 (condition of an elevator after an injury, admitted); 1896, Marston *v.* Dingley, 88 Me. 546, 34 Atl. 414 (subsequent condition of a habitation, admitted); 1877, Com. *v.* Powers, 123 Mass. 244 (keeping liquor with intent to sell; the condition of the room on the next day, as to fixtures, etc., admitted); 1900, Barker *v.* Mfg. Co., 176 Mass. 203, 57 N. E. 366 (subsequent condition as to the amount of steam in a room, admitted); 1901, Toland *v.* Paine F. Co., 179 Mass. 501, 61 N. E. 52 (condition of stairs four hours later, admitted); 1904, Droney *v.* Doherty, 186 Mass. 205, 71 N. E. 547 (condition of an elevator the next day, admitted, no change having been suggested); 1893, Leidlein *v.* Meyer, 95 Mich. 586, 591, 55 N. W. 367 (condition of premises injured by water, a year later, excluded); 1904, Meyers *v.* Highland B. G. M. Co., 28 Utah 96, 77 Pac. 347 (position of a plank in a mine, several hours later, allowed).

[8] 1898, Rockford C. R. Co. *v.* Blake, 74 Ill. App. 175, 173 Ill. 354, 50 N. E. 1070 (prior condition of car-brakes, received); 1900, Powers *v.* R. Co., 175 Mass. 466, 56 N. E. 710 (condition of a locomotive step, some time before and after, lack of change of condition not being shown, held not improperly excluded); 1903, Boucher *v.* Robeson Mills, 182 Mass. 500, 65 N. E. 819 (condition of defective machine-belt at time of trial, admitted, though altered by repair); 1921, State *v.* Claymonst, — N. J. L. —, 114 Atl. 155 (condition of arc-light at street-corner at 2 A.M., admissible to show its condition a few hours earlier); 1909, Corcoran *v.* Albuquerque Traction Co., 15 N. M. 9, 103 Pac. 645 (car-step's condition seven months before, admitted); 1903, Hannum *v.* Hill, 52 W. Va. 166, 43 S. E. 223 (condition of a broken telephone wire some months before and after the time in issue, excluded).

[9] 1904, Griffin *v.* Martel, — Conn. —, 58 Atl. 788 (value of a stock of goods sixteen months

The matter should be left entirely to the trial Court's discretion.

That the opponent may explain away the inference by other circumstances (as already noted) is also illustrated by the precedents.[13]

The *presumption of continuity* (*post*, § 2530) is founded on this inference.

These applications of the principle are analogous to the use of the same inference in evidencing, from prior or subsequent condition, a *human quality*, — habit, possession, ownership, partnership, and solvency (*ante*, § 382), emotion (*ante*, §§ 395–406), physical capacity (*ante*, § 225), insanity (*ante*, § 233), and character (*post*, §§ 1617, 1618). In the proof of a place or person by photographs (*post*, § 792), the principle is frequently applied.

Distinguish, however, the prohibition against using the *subsequent repaired condition* of a place or a machine as an *admission of negligence* (*ante*, § 283), and the propriety of using a *prior dangerous condition* as evidence of *notice* (*ante*, § 252).

§ 438. (2) **Existence, from Concurrent Existence; the Whole evidenced by the Parts, etc. (Highways, Railway Tracks, Premises, etc.).** The process of thought by which one thing *concurrently* indicates another rests on the assumption that in human experience the one is likely to be found associated with the other. This assumption, then, in one form or another, must underlie

before, admitted); 1896, Scottish U. & N. I. Co. *v.* Stubbs, 98 Ga. 754, 27 S. E. 180 (an inventory of a stock of goods, made shortly before the fire and while another owned them, admitted); 1904, Union Hosiery Co. *v.* Hodgson, 72 N. H. 427, 57 Atl. 384 (joint use of steam; to show the amount of coal used, the consumption in the two or three years preceding and the year following, was held not improperly excluded in the trial Court's discretion, for dissimilarity of conditions, etc.).

[10] 1885, Mulliner *v.* Bronson, 114 Ill. 510, 513, 2 N. E. 671 (timber warranted of a certain quality when delivered; its quality after sawing and while being shipped, admitted; the opponent to show if possible that damage had occurred on the way); 1896, Laplante *v.* Mills, 165 Mass. 487, 43 N. E. 294 (the condition of a ladder two years after the accident, admitted, as involving the permanent and therefore unchanged structure of the ladder; "it is said that presumptions do not run backward; but that depends on the case"); 1865, Yates *v.* People, 32 N. Y. 512 (the question was whether the street-light would have shown the accused that his pursuer was an officer, and evidence of the light's power just before the trial was excluded); 1875, Lindsay *v.* People, 63 N.Y. 143, 147, 156 (blood-spots on a board; see *post*, § 451); 1878, King *v.* R. Co., 72 N. Y. 608 (subsequent condition of a piece of iron, admitted, the circumstances remaining the same); 1894, Foote *v.* Woodworth, 66 Vt. 216, 220, 28 Atl. 1034 (issue as to the soiled state of jars; test with a piece of paper, excluded, the conditions at the time in issue not being shown the same).

[11] 1893, People *v.* Hawes, 98 Cal. 648, 652, 33 Pac. 791 (murder; vest taken from deceased's body after burial, admitted, after evidence that condition remained the same); 1897, West Chicago St. R. Co. *v.* Kennedy-Cahill, 165 Ill. 496, 46 N. E. 368 (appearance of a person before and after an injury, admitted to show the source of illness); 1885, Williams *v.* State, 64 Md. 390, 1 Atl. 887 (condition of a human body some time after burial, admitted); 1892, French *v.* Wilkinson, 93 Mich. 322, 34, 523 N. W. 530 (injury by bite of dog; state of the limb three years later excluded); 1915, State *v.* Ilgenfritz, 263 Mo. 615, 173 S. W. 1041 (clothing and bloodspots thereon, not admitted because no proof was made as to the unchanged condition in the interim; unsound).

Compare the cases cited *ante*, § 225 (prior or subsequent physical condition)..

[12] 1874, Kansas S. Y. Co. *v.* Couch, 12 Kan. 612, 614 (to show the condition of cattle in Kansas in November, the fact of the condition of the cattle in Cherokee in October was rejected; "the fact that a thing is in a certain condition at one time is some proof that it is in the same condition at some subsequent time; but proof of this kind is usually confined to such things as are not liable to change suddenly or rapidly, and it is generally admissible only where better evidence cannot be obtained"); 1875, Freyman *v.* Knecht, 78 Pa. 141, 143 (a mare with diseased eyes; condition a year after the sale, admitted if the condition in the meantime was also shown).

[13] *E.g.* Dyson *v.* R. Co., Conn.; Brooke *v.* Winters, Md., *supra*.

any attempt to evidence the latter by showing the concurrent existence of the former. For practical purposes the situations may be grouped under three heads.

(*a*) *Miscellaneous Instances.* That the presence of smoke indicates the concurrent presence of combustion; that in coming upon sea-water in its natural place we are likely to come upon fish; that on apple-trees fruit is likely to be found in season, — these are illustrations of the form which this inference most usually takes. This form, however, is but superficially a concurrent indication; almost every apparent inference is in reality a prospectant one, *i.e.* from cause to effect. That apple-trees are likely to produce apples; that fire is likely to produce smoke, — such are the true forms of these arguments upon analysis. There are few, if any, genuine instances of concurrent argument of this sort;[1] and no rules of evidence have had occasion to be laid down. The inference in its true form has already been examined (*ante*, § 436, par. 3).

(*b*) *Existence of the Whole inferred from a Part, or of one Part from Another.* To argue to the whole from a part, or to one part from another, is also, in the last analysis, an argument from one effect of a common cause to another effect. But for practical purposes it is sufficient to treat the inference as an immediate one. The condition of the inference's propriety is that in human experience the whole has been found probably to exist with certain related parts; it is then admissible to use the existence of one of the parts as evidence from which to infer the presence of the whole or of one of the associated parts, — as where, observing a floating iceberg, it is inferred that beneath the water's surface is a larger mass of ice in the proportion usually found associated with such a mass above water; or where on observing, from one side of a locomotive, two driving-wheels, we infer that on the other side there are two similar ones. This sort of inference is common enough in trials, but does not seem to have raised any difficulties requiring rulings.[2]

(*c*) *Condition or Quality in One Place, from Condition or Quality in Another.* Logically of the same nature as the preceding, but in practice having a slightly different aspect, is the inference frequently desired to be made from the nature of a condition or quality in one place to the condition or quality at another place, usually in the vicinity. The logical assumption is that by a common cause or causes uniform effects have been produced over a given area, which is thenceforth related to the evidential place as a homogeneous whole to its parts. In practical application, therefore, the requirement is that the two places should be so related that they probably form parts of a homogeneous area including them both; and in such case the condition or quality of the one place is relevant to show the condition or quality of the

§ 438. [1] See Sidgwick, Fallacies, 333, for an exposition of this.

[2] 1904, Chicago & A. R. Co. *v.* Howell, 208 Ill. 155, 70 N. E. 15 (size of a freight-car, evidenced by the size of the series to which it belonged).

other. This principle receives frequent application, — to *highways*,[3] to *railway* tracks, stations, and roadbeds,[4] to *machines*, *buildings*, and other

[3] *Federal:* 1886, Osborne *v.* Detroit, 36 Fed. 36, 38 (injury at a defective sidewalk; condition at another place near by, admitted, but on the theory that it would have led to notice of the defect in question); *Connecticut:* 1875, Taylor *v.* Monroe, 43 Conn. 42 (rejecting the fact of the safe condition of a place as shown by tests made at a different part where the conditions were different); 1899, Cunningham *v.* R. Co., 72 Conn. 244, 43 Atl. 1047 (condition of rail as to elevation above highway at other parts of a street, excluded); *Idaho:* 1909, Miller *v.* Mullan, 17 Ida. 28, 104 Pac. 660 (street-crossing; opinion not clear); *Iowa:* 1888, Hoyt *v.* Des Moines, 76 Ia. 430, 41 N. E. 63 (cited *post*, § 458); 1891, Riley *v.* Iowa Falls, 83 Ia. 761, 50 N. W. 33 (the condition of other planks "along the place of that accident", admitted); 1897, Faulk *v.* Iowa Co., 103 Ia. 442, 72 N. W. 757 (defect in a railing at or near the place in question, admitted); 1899, Bailey *v.* Centreville, 108 Ia. 20, 78 N. W. 831 (condition of sidewalk 200 feet away, admitted); *Massachusetts:* 1875, Brooks *v.* Acton, 117 Mass. 204 (injury at a ridge of ice and snow across the highway; to show its height, which was disputed, the fact of the depth of the snow in the adjoining woods was excluded, because the conditions were dissimilar); *Michigan:* Campbell *v.* Kalamazoo, 80 Mich. 655, 660, 45 N. W. 652, *semble* (condition of other parts of the sidewalk fronting the same lot, admitted); 1894, Edwards *v.* Three Rivers, 102 Mich. 153, 60 N. W. 451 (injury at a sidewalk; "condition of the walk in the vicinity", admitted); 1896, Wiel *v.* Mendon, 108 Mich. 251, 66 N. W. 58 (condition of the sidewalk several rods away, admitted); 1897, Canfield *v.* Jackson, 112 Mich. 120, 70 N. W. 444 (condition of the sidewalk in the vicinity of the accident, admitted); 1897, Haynes *v.* Hillsdale, 113 Mich. 44, 71 N. W. 466 (defects in other parts of the sidewalk built at the same time, admitted); 1902, Styles *v.* Decatur, 131 Mich. 443, 91 N. W. 622 ("general character and condition of that walk", admitted); 1908, Williams *v.* Lansing, 152 Mich. 169, 115 N. W. 961 (other defects in vicinity of a sidewalk, admitted); *Minnesota:* 1881, Kelley *v.* R. Co., Minn. 98, 100, 9 N. W. 588 (cited *post*, § 458); 1899, Lyons *v.* Red Wing, 76 Minn. 20, 78 N. W. 868 (condition of the adjacent sidewalk, admitted); *New Hampshire:* 1894, Emerson *v.* Lebanon, 67 N. H. 579, 39 Atl. 466 (condition of a highway-railing four years before, excluded on the facts); *Oklahoma:* 1903, Kingfisher *v.* Altizer, 13 Okl. 121, 74 Pac. 107 (defective bridge; "other defects in the bridge", admitted); *Washington:* 1919, Bullock *v.* Yakima Valley Transp. Co., 108 Wash. 413, 184 Pac. 641 (plaintiff was injured on a sidewalk and sued the county and the railroad company jointly; the latter introduced photographs showing the sidewalk's defective condition at other points, to evidence plaintiff's negligence in going upon it; held error as to the county, without an instruction that they were not evidence of the condition of the sidewalk at the point in question; unsound); *Wisconsin:* 1899, Conrad *v.* Ellington, 104 Wis. 367, 80 N. W. 456 (highway injury; general bad condition of the road in the vicinity two days before, admitted); 1901, Vielleese *v.* Green Bay, 110 Wis. 160, 85 N. W. 665 (sidewalk-condition "as far as the walk runs lengthwise", admitted); 1903, Hoffman *v.* North Milwaukee, 118 Wis. 278, 95 N. W. 274 (bad condition of a sidewalk across the street, admitted, not to show the condition at the place in issue, but to negative the plaintiff's negligence in going on the latter part).

For the use of such facts to evidence *notice*, see *ante*, § 252.

[4] 1885, Cleveland C. C. & I. R. Co. *v.* Newell, 104 Ind. 264, 267, 3 N. E. 836 (injury by derailment through a broken rail; the breaking of another rail at the same place on the same morning, admitted); 1875, Louisville & N. R. Co. *v.* Fox, 11 Bush Ky. 505 (injury by a defective railroad track; the defective condition of other portions of the same section, excluded as too remote); 1898, Louisville & N. R. Co. *v.* Henry, — Ky. —, 44 S. W. 428 (other holes in a station-platform, excluded; the present principle not noticed); 1893, Turner *v.* R. Co., 158 Mass. 266, 33 N. E. 520 (to prove that a frog became unblocked, not a short time before the accident, but long before, the fact of others being unblocked in the same vicinity was used, on the ground that they would probably not all have come unblocked at once); 1878, Grand R. & I. R. Co. *v.* Huntley, 38 Mich. 537, 540 (injury by derailment; defects in the track "where it was injured or displaced", admissible, but not "away from the scene of the injury"); 1883, Morse *v.* R. Co., 30 Minn. 465, 16 N. W. 358 (injury to an engineer, alleged to have happened through a broken rail and a defective switch; the fact was rejected of other defects in the same yard, because they were not shown to be the apparent result of the same causes); 1885, Hipsley *v.* R. Co., 88 Mo. 348, 354 (injury by derailment; condition of the roadbed other than "at the place of and the immediate vicinity of" the accident, excluded); 1887, Sidekum *v.* R. Co., 93 Mo. 400, 405, 4 S. W. 701 (derailment; the preceding case approved); 1871, Reed *v.* R. Co., 45 N. Y. 574, 576, 580, *semble* (defective ties, etc.; defective condition of the road half a mile away, excluded).

structures,[5] to *natural growths* and formations, weather conditions, and the like.[6] It would be a mistake to attempt to erect these specific rulings into hard-and-fast precedents; the law should do no more than recognize the general principle, leaving it entirely to the trial Court to apply it to each case. The steam-hammer of the Supreme Court is not needed to crack nuts.

§ 439. **Same: Samples as Evidence of an Entire Lot.** It is on the present principle that a sample is receivable in evidence to show the quality or condition of the entire lot or mass from which it is taken.[1] The requirement

[5] 1886, Fort Wayne *v.* Coombs, 107 Ind. 87, 7 N. E. 743 (a neighboring break in a sewer, admitted to show that the materials were defective); 1897, Snyder *v.* Albion, 113 Mich. 275, 71 N. W. 475 (decayed condition of timber in other parts of the same bridge, admitted); 1899, Rose *v.* St. Louis, 152 Mo. 602, 54 S. W. 440 (injury from the falling of a cornice-stone alleged to be rotten; condition of other stones in the cornice allowed to be shown); 1879, Plummer *v.* Ossipee, 59 N. H. 57 (Allen, J.: "The accident happened by the carriage running upon the log at its west end. The east end of the log was admitted to be in the highway. . . . Evidence of wheel marks upon the east end of the log was evidence of an obstruction at that place; and whether it was evidence of an obstruction at the place of the accident depended upon the similarity in size, form, and position, with reference to the travel upon the highway, of the west end of the log with the east end"); 1907, Lamb *v.* Philadelphia & R. R. Co., 217 Pa. 564, 66 Atl. 762 (condition of other parts of a roof, admitted); 1882, Randall *v.* Tel. Co., 54 Wis. 140, 11 N. W. 419 (injury by a fallen telegraph line; the fallen condition of the line at other near places and times, admitted to show the defective and negligent nature of the construction and maintenance); 1899, Baxter *v.* R. Co., 104 Wis. 307, 80 N. W. 644 (explosion of a boiler; defective part of a flue, admitted; Bardeen, J., diss.).

[6] 1892, Central R. Co. *v.* Ingram, 98 Ala. 395, 397, 12 So. 801 (absence of fog at an adjacent place where conditions were more favorable for it, admitted, to negative the existence of fog on the track); 1872, Cleland *v.* Thornton, 43 Cal. 437 (nature of timber burned; "character of the timber for milling purposes in that immediate neighborhood," admitted); Colo. Comp. L. 1921, § 3322 (drainage of contiguous mines; the Court may consider as evidence the effect of elevation or depression of water in "the same, contiguous, or separate lodes or mine", etc.); 1894, Hart *v.* Walker, 100 Mich. 406, 410, 59 N. W. 174 (the fact of hot weather in a place 12 miles away from that in issue, admitted); 1873, Stanbaugh *v.* Smith, 23 Oh. 594 (the existence of coal seams of certain thicknesses and quality upon other lands in a neighborhood, admitted to show the existence, quantity, and quality of coal on the premises in question).

§ **439.** [1] ENGLAND: 1916, Wilkinson *v.* Clark, 2 K. B. 636 (violation of milk-standard law; a sample taken from the same cow on the day after the offence alleged, containing a percentage higher than standard, held admissible to show adulteration, provided conditions were similar); 1920, Smith *v.* Philpott, 1 K. B. 222 (like Wilkinson *v.* Clark; here a sample taken 3 days later was admitted); UNITED STATES: 1922, Cook *v.* Korshak, 301 Ill. 603, 134 N. E. 49 (trover against a pawnbroker for a stolen diamond ring; the defendant had refused to exhibit the diamond purchased by him; to prove value, the plaintiff produced two other diamonds originally in the same setting and called experts to their value; held error, the plaintiff's non-expert testimony to identity of quality being insufficient; unsound; inasmuch as the defendant had by his refusal to exhibit given rise to an inference on the principle of § 285, *ante*, the plaintiff should have been allowed to furnish her only available evidence; Lord Camden would have rendered a different decision); 1885, Epps *v.* State, 102 Ind. 539, 1 N. E. 491 (absence of arsenic in another sample from the same package, admitted to show the absence of arsenic); 1920, Davis *v.* Van Camp Packing Co., 189 Ia. 775, 176 N. W. 382 (plaintiff was poisoned by eating a can of pork and beans prepared by defendant; on the issue of defective condition and negligent preparation by failure to inspect, etc., the fact that other cans of beans purchased from the same consignment were found defective was admitted; "it is not necessarily evidence of other acts of negligence"); 1922, State *v.* Horowich, — Me. —, 116 Atl. 266 (illegal possession of liquor; intoxicating quality of samples of the same stock, admitted); 1888, Com. *v.* Schaffner, 146 Mass. 512, 514, 16 N. E. 280 (another sample taken by the inspector from the defendant's milk-wagon, on same day, at substantially the same time, admitted to show the bad quality of the milk); 1888, Com. *v.* Kendrick, 147 Mass. 444, 18 N. E. 230 (quality of liquor shown by samples); 1899, McConnell *v.* Lewis, 58 Nebr. 188, 78

is merely that the mass should be substantially uniform with reference to the quality in question, and that the sample portion should be of such a nature as to be fairly representative. [2] When the sample is not taken from the very substance or article in issue, but from another one, the only difference in the argument is that another inference is introduced, *i.e.* the inference of Identity (*ante*, § 411); it must first be evidenced that substance A is in nature identical, for the purpose in hand, with substance B, and then a sample from B, working through a double inference, evidences the nature of substance A. [3]

§ 440. **Same: Sample Copies of Printed Matter.** An *impression from type* (usually known by the unfortunate because ambiguous term *copy*) is evidence of the *contents* of another impression from the same type, the required assumption being merely that both were produced by the same type. [1] The easier mode of proof is usually by a witness who offers one impression as representing his recollection of the other (*post*, § 748).

The present principle, however, is to be distinguished from that which is involved when it is attempted from one type-impression to show the *authorship*, or publication, of another and similar one. Two cases may arise. (*a*) Where the fact of the person's having printed or published an entire mass of series or impressions is otherwise proved, then his publication of each and every one is shown by necessary implication. But this is the rare case. (*b*) Where the authorship (or publication) of a single impression is shown, the authorship of another impression exactly similar is not necessarily proved, although it ought at least to be regarded as evidenced, because the printing of one evidences in ordinary experience the probable printing of all others of the same content and appearance (*ante*, § 376). That question, however,

N. W. 518 (samples of leather, exhibited); 1895, Vietti *v.* Nesbitt, 22 Nev. 390, 41 Pac. 151 (the quality of ore shown by assays of ore "from the same ore body and near where the ore in question came from but in adjoining mine").

Compare the cases cited *post*, § 457.

[2] 1895, Fox *v.* Mining Co., 108 Cal. 369, 41 Pac. 308 (question discussed as to whether "battery-samples" are and "car-samples" are not the better index of ore-values); 1871, Brown *v.* Leach, 107 Mass. 367 (before testing by sample, the sample must be shown a fair one); N. Y. St. 1913, c. 223, p. 392 (amending Consol. L. 1909, Pub. Health by inserting a new § 240*a*, as to the mode of taking samples for evidence in trials under the public health law); 1916, Perry Bros. *v.* Diamond I. & S. Co., 92 Wash. 105, 158 Pac. 1008 (whether eggs had been spoiled by poor storage; samples of a lot, evidenced).

[3] 1899, Golden Reward M. Co. *v.* Buxton M. Co., 38 C. C. A. 228, 97 Fed. 413 (samples ore from an ore body of the same general character and forming a continuation of the same ore body, admitted); 1864, Jupitz *v.* People, 34 Ill. 520 (larceny of brass couplings; samples of couplings testified to be similar, admitted); 1920, Patterson *v.* Uncle Sam Oil Co., 107 Kan. 221, 191 Pac. 258 (injury by explosion of coal-oil due to presence of gasolene; the seller had not long before mixed gasolene and coal-oil in the same container, inadvertently; presence of gasolene in quantities purchased by two other persons, excluded, on the facts,; 1867, Com. *v.* Goodman, 97 Mass. 117 (to show a liquor to have been intoxicating, samples were admitted of liquor taken from one P., contained in barrels having a similar mark, and being also similar in color, flavor, and strength; careful opinion by Bigelow, C. J.);

For *statutory provisions* allowing *samples* to be used, see *post*, § 445.

Compare also § 457 (corporal effects as evidence).

§ 440. [1] 1837, R. *v.* Murphy, 8 C. & P. 308 (contents of a handbill, evidenced by other bills said to be similar).

Compare the cases cited under the principle of identity (*ante*, § 417) and the principle of producing the original (*post*, §§ 1234, 1237).

does not involve the present principle, *i.e.* the nature of the article, but involves the doing of an act, *i.e.* of authorship or publication.[2]

Topic IV: TENDENCY, CAPACITY, QUALITY, CAUSE, OR EFFECT

1. General Principles

§ 441. **Scope of the Subject.** It has already been noted (*ante*, § 436) how, in so many instances of other classes of cases, that which is the main or first apparent inference offered is upon analysis to be resolved into an inference of the present sort, *i.e.* in which the proposition to be evidenced is a tendency, capacity, or the like. It is thus easy to see why the great majority of the rulings are concerned with this specific sort of inference. Yet it is not to be supposed that the ensuing number of precedents indicates the relative actual frequency of the present sort of inference in trials. It is merely that the evidential difficulties of the subject occur chiefly in connection with the present type of inference, and thus lead naturally to a multiplication of rulings disproportionate to the actual frequency of the part played by this mode of inference.

What, then, is the mode of evidencing circumstantially a tendency, capacity, or quality of external inanimate nature? In general, the inference is from specific instances of *observed effects, exhibitions, or illustrations, to the supposed tendency, capacity, or quality producing them.* This inference from effects to capacity or tendency to produce those effects furnishes the general form to which all such processes are reducible. For example, the question at issue may be whether the vibrations of factory-machinery have caused a conceded injury in an adjacent house. The main controversy is whether the former is the cause of the latter; but, in searching among the probable causes, the argument is obviously confined to those things which have a tendency or capacity to produce such effects, and thus the real proposition of the proponent now becomes this, namely, that the factory-apparatus has a tendency or capacity to produce such effects. Thus, while one of the ultimate issues for the jury still remains the question whether the factory caused the injury, yet the subsidiary proposition to which the evidence has to be directed is whether the factory has such a tendency or capacity. In short, when it is desired to show broadly the occurrence of an event, or the cause of it, the process of thought usually resolves itself into two inferences, — first, that the capacity or tendency of something to cause the event is evidence that the event did so result therefrom; and, secondly, that something else is evidence of such a capacity or tendency; and it is the second of these inferences which in practice raises evidential questions.[1] The existence of a tendency, capacity, or quality may of course also come into issue independ-

[2] Compare the other principles as to authentication of printed matter (*post*, § 2150).

§ 441. [1] For the inference of *defective* or *negligent construction* from the single fact of the *injury in issue*, see *post*, § 2509 (presumption of negligence from accident).

ently of any question as to its being a cause, — for example, where the maintaining of a dangerous place is itself an offence. But, however it comes into issue, it is evidenced by using its observed effects.

§ 442. **Principle of Probative Value (Relevancy).** The requirements for this process of inference are indicated by the logical principles already examined at the outset (*ante*, §§ 30–36), and a brief re-statement will be sufficient. There is presented, as the 'factum probandum', a capacity or tendency in X to produce the specific effect B. This means that in the presence of a certain complex of circumstances the introduction of X will result in the occurrence of B; *i.e.* this alleged tendency or capacity in X is not an abstract and absolute one, but a limited and specific one, namely, a capacity, under the circumstances in which B occurred, to be followed by B. What X's capacity or tendency under other circumstances might be, is immaterial; the single question is whether there was such a capacity or tendency under the circumstances in hand. In looking elsewhere, therefore, to evidence this specific capacity or tendency by observing the same effect elsewhere, the requirement is that the circumstances elsewhere are the same as in the case in hand. Thus, if elsewhere are found similar results, B′ and B″, accompanying X, it cannot be inferred that they are the result of the alleged tendency of X, unless the other circumstances in those cases were similar to that in issue; because otherwise it cannot be known that some other circumstance, Y or Z, was not the cause of B′ or B″. In other words, unless the circumstances are the same, the door is open for other hypotheses that might account for the effects B′ and B″, as well as for B. Thus, if the proposition is that X factory's vibrations have a tendency to injure an adjacent building B, the falling of timbers in other adjacent houses B′ and B″ might not evidence such a tendency if B′ were an old house and B″ were a wooden house, while B was a new brick house; the case B′ would at most indicate a tendency in X to injure an old house, not a new house B; and the case B″ would at most indicate a tendency in X to injure a wooden house, not a brick house B. Or, again, if in a third house B‴, lying on the other side of X factory and next to Y factory also, there is a similar injury, it cannot be inferred that it is the result of a tendency in X to produce such an injury to B, because the factory Y may have caused, partly or solely, the injury to B‴. The general logical requirement is, then, that when a thing's capacity or tendency to produce an effect of a given sort is to be evidenced by instances of the same effect found attending the same thing elsewhere, these other instances have probative value — *i.e.* are relevant — to show such a tendency or capacity *only if the conditions or circumstances in the other instances are similar to those in the case in hand.*[1]

§ 442. [1] In the foregoing analysis the inference from other instances only is considered. The inference from the instance in issue (*i.e.* of negligent construction from the mere fact of the plaintiff's injury in an accident) is recognized as a presumption, and is dealt with *post*, § 2509.

But this similarity need not be precise in every detail. It need include only those circumstances or conditions which might conceivably have some influence in affecting the result in question. For instance, in the case put above, the circumstance that house B′ was of wood while house B was of brick would conceivably affect the case and likelihood of injury by vibration; but the circumstance that the inner walls in B′ were papered while those in B were kalsomined, or that the house B′ was painted red while the house B was painted green, or that the occupant of house B′ was a Presbyterian while the house B was occupied by a Methodist, — such a circumstance, though perhaps material in other aspects, could not have any bearing upon the likelihood of injury by vibration. A similarity between the two cases in respect to such circumstances, therefore, would not be required. The similarity that is required is, in short, a similarity in essential circumstances, or, as it is usually expressed, a *substantial similarity, i.e.* a similarity in *such circumstances or conditions as might supposably affect the result in question.*

The logical foundation of this principle has been already set forth in another place (§§ 30–33). As applied to the present sort of inference it has constantly received the sanction of the Courts; and whatever are the inconsistencies of its applications, there is substantial unanimity in the general reasoning:

1862, MERRICK, J., in *Emerson* v. *Lowell Gaslight Co.*, 3 All. 410, 417 (the question here being whether the illness of the plaintiffs was caused by gas leaking from the defendant's pipes): "The evidence offered by the plaintiffs to show that, wherever the gas which escaped from the fracture in the defendant's pipe entered any dwelling-house in the neighborhood of the plaintiffs, sickness followed, was properly excluded. . . . The attending circumstances may be so different that the occurrence of sickness in one house would have no tendency to show the cause of illness in the occupants of another."

1864, CHAPMAN, J., in *Hunt* v. *Lowell Gaslight Co.*, 8 All. 169, 171 (the issue being the same as in the preceding case): "The plaintiffs . . . were permitted to offer evidence that A. H. and his family had been in perfect health up to the time when the gas began to escape into their house, and that, immediately or soon after, every member of the family became seriously ill. . . . The sickness of these persons . . . is admissible merely for the purpose of showing the nature of the gas which came into the house, to the influence of which all the inmates were subjected alike. Evidence that inmates of another house were made sick in consequence of inhaling the gas . . . has been held to be inadmissible. The evidence should be limited to the effect of the gas upon those who have in common and under similar circumstances inhaled it."

1886, GARDNER, J., in *Baxter* v. *Doe*, 142 Mass. 558, 561, 8 N. E. 415 (to show that the plaintiff's illness on board the defendant's vessel was due to the defendant's failure to supply anti-scorbutic food and medicine, the fact was offered of a similar sickness of others of the crew, on board the ship, about the same time): "It is difficult to find a case where all the conditions and circumstances affecting all the crew were so similar. As suggested by the plaintiffs in their argument, the crew lived together in the same quarters, on the same vessel, for the same length of time, worked in the same employment, were subjected to the same climatic influences, hardships, deprivations, and manner of life, partook of the same food at substantially the same time; and of the crew of twelve, eight were affected at about the same time with about the same symptoms of disease. This evidence . . . tended directly to prove that the provisions served to the crew were unsuitable and insufficient, and that the sickness was occasioned by the want of anti-scorbutics."

1887, HOLMES, J., in *Reere* v. *Dennett*, 145 Mass. 28, 11 N. E. 938 (a stockholder alleged that the invention "naboli", for the manufacture of which the corporation was formed, was worthless to effect its represented object, the painless extraction of teeth; the inventor's patients were allowed to testify that it practically prevented pain, where similar operations had formerly been painful): "The objections made to it are . . . that the fact may admit of being explained by other causes than the conclusion sought to be established. In some cases, at least, it would seem that the painful fillings were performed by other dentists, so that it might be argued that the evidence was only a testimony to the skilfulness of the defendant's hand. But . . . when the fact sought to be proved is very unlikely to have any other explanation than the fact in issue, and may be proved or disproved without unreasonably protracting the trial, there is no objection to going into it. If a dozen patients should testify that when the defendant used his naboli, he filled their teeth without hurting them, and that he hurt them a good deal when he did not use it, supposing the testimony to be believed and not to be explained by fancy and a general disposition on the part of witnesses to think well of new nostrums, it would go far towards proving that naboli had some tendency to deaden pain."

1883, LORD, J., in *State* v. *Justus*, 11 Or. 182, 8 Pac. 337: "The object of the experiments made on the pasteboard targets which were offered in evidence was to prove by inference that the deceased came to his death by a near gunshot wound at the hands of the defendant. . . . [After describing the characteristics of 'near' wounds,] Now it must be manifest that there are here noted so many marked characteristics of near gunshot wounds which could by no possibility be reproduced or represented by experiments upon pasteboard, yet upon which the fact of a near wound is made to depend and often to be determined, that it would be utterly unsafe to apply the inferences sought to be deduced from such experiments to the facts in dispute, unless there can be found, in such experiments and in the subject-matter which it is their object to explain or illustrate, some point of similitude or ground of common resemblance, always present, as a result induced by a similarity of conditions or circumstances. . . . When it is considered how important it is that experiments should be based on conditions and circumstances as nearly as possible like the matter they are intended to illustrate, to avoid the liability of misconception or error from some supposed agreement or resemblance, we should certainly hesitate to admit such experiments", *i.e.* when made, as here, by non-professional witnesses not skilled in determining the essential appearances of such wounds.

1892, LORD, J., in *Leonard* v. *So. Pac. Co.*, 21 Or. 555, 559, 28 Pac. 887 (admitting experiments as to whether a rail could have injured a wheel-flange): "There seems to be some hesitation in receiving evidence of experiments or demonstrations; and from the liability to misconception and error there can be no doubt that the experiments or demonstrations should be made under similar conditions and like circumstances. In all cases of this sort very much must be left to the discretion of the trial Court. But when it appears that the experiment or demonstration has been made under conditions similar to those existing in the case in issue, its discretion ought not to be interfered with. In the present case the things used for the purpose of demonstration were similar in size, material, and position, and were operated under conditions similar to the thing sought to be demonstrated."

1892, MILLER, C. J., in *Chicago, St. L. & P. R. Co.* v. *Champion*, — Ind. —, 32 N. E. 874: "During the trial the appellant placed a witness upon the stand, and proposed to show that shortly before the trial a test was made upon the siding on which the accident took place, and at about the same place, by letting a gondola car of the same kind as the one in use at the time of the injury down upon the siding. . . . Evidence of this kind should be received with caution, and only be admitted where it is obvious to the Court from the nature of the experiments that the jury will be enlightened rather than confused. In many instances a slight change in the conditions under which the experiment is made will so distort the result as to wholly destroy its value as evidence and make it harmful rather than

helpful. In other cases a principle may be established by experiments made under circumstances quite different from the one under investigation, that will have an important and beneficial effect upon the investigation. . . . In our opinion the circumstances under which the experiment was made were sufficiently similar to the facts surrounding the happening of the accident to make it admissible in evidence for what it was worth." McBRIDE, J., dissenting: "It cannot be certain that the circumstances and conditions were in each case precisely the same."

There is also available here, but not so commonly, the subordinate form of argument known as the *method of difference* (*ante*, § 33). In ascertaining whether X is the cause of B, an examination may be made of sundry instances B′, B″, C, D, similar to each other in all other conditions except that X is present or absent; if it is found that wherever X is present, the effect B, B′, B″, is found, and that as soon as X ceases to be present a different effect, C or D, is found, it may be inferred that the difference of effect is produced by the difference in the absence or presence of X; because that is the only causative circumstance which is different in the different instances. The requirement is that the other instances, *i.e.* of B, B′, B″ not being found, should be similar in all substantial conditions except the absence of X. This mode of evidencing is in judicial investigations not so frequently available, because it is not usually feasible to find instances which fulfil these requirements; but so far as the issue admits of experiments in which the conditions can be thus artificially manipulated, the mode is equally feasible. Occasional instances are found in the precedents, usually in the form of proof of the absence of the harm in question before the alleged harmful act and then the supervening presence of the harm immediately after.[2]

§ 443. **Principle of Auxiliary Policy.** It has already been pointed out (*ante*, § 42) that, in ascertaining the principles of circumstantial evidence, the rulings of Courts are found to be much obscured, and the difficulty of clear treatment greatly increased, by the concurrent application of certain principles resting on notions of Auxiliary Probative Policy. The result of their concurrent application is the frequent exclusion of facts that are entirely relevant and would have been admitted if the principles of Relevancy alone were to be applied. It is important to distinguish the rule and the effect due to a principle of Relevancy from the rule and the effect due to a principle of Auxiliary Policy. The fact may be generally relevant, yet in a particular instance obnoxious to some rule of Auxiliary Policy; and if so, it may become proper to use it on some occasion to which the latter rule does not apply. Or the fact may be obnoxious to no rule of Auxiliary Policy, but merely irrelevant; and if so, it is impossible to use it at all, unless the offer can be so changed as to meet the requirements of Relevancy. It is therefore important, when a class of facts is found excluded, to ascertain whether the reason of exclusion is a reason of Relevancy or a reason of Auxiliary Policy.

[2] Wolkes *v.* Chadd, 3 Doug. 157, § 451, *post*; Kramer *v.* Messner, 101 Ia. 88, 69 N. W. 1142, § 451; Standish *v.* Washburn, 21 Pick. Mass. 237, § 451.

In practice, the Courts almost invariably indicate the reason for exclusion; and the material is plentiful for a correct understanding of the principles intended to be laid down by them.

Of the various considerations of Auxiliary Probative Policy recognized in the law, only two have any application to the present sort of evidence. (1) The reason of *Unfair Surprise*.[1] The notion here is that the production of various instances to evidence a tendency, capacity, or quality finds the opponent unprepared to answer such evidence, — unprepared to dispute the occurrence of the various instances, unprepared to test or to rebut or to explain away the varied facts thus perhaps for the first time brought to his attention; and that therefore, on account of the danger of relying on evidence thus not open to exposure by rebuttal, it should be excluded. (2) The reason of *Confusion of Issues*.[2] The notion here is that, in attempting to dispute or explain away the evidence thus offered, new issues will arise as to the occurrence of the instances and the similarity of conditions, new witnesses will be needed whose cross-examination and impeachment may lead to further issues; and that thus the trial will be unduly prolonged, and the multiplicity of minor issues will be such that the jury will lose sight of the main issue, and the whole evidence will be only a mass of confused data from which it will be difficult to extract the kernel of controversy. These reasons, as applied to the present sort of evidence, have been frequently invoked in judicial opinion:

1882, Lord O'HAGAN, in *Metropolitan Asylum District* v. *Hill*, 47 L. T. R. N. S. 29 (speaking for the rejection of evidence of the effects of other hospitals in spreading contagion, offered to show the noxious quality of the one in question): "Without proof as to the state and management of the other hospitals, so as to establish a substantive similarity, any inference drawn from a comparison of their operation with that of the H. asylum might have been quite fallacious and deceptive. But, even without regard to this, . . . it would have involved the jury in a multitude of collateral inquiries, calculated to confuse and embarrass them, and it might have been endlessly prolonged by an indefinite multiplication of objects of comparison. To keep such investigations within reasonable limits, and secure promptitude, precision, and satisfaction in the demonstration of justice, it seems to me that Courts should be very jealous of the admission of such proof."

1877, ASHBURN, J., in *Insurance Co.* v. *Tobin*, 32 Oh. St. 90 (excluding previous instances of steamboat disasters occurring through snags, etc., and yet without any shock or other coincident warning): "It was calculated to create as many collateral issues as special cases of such loss introduced. In this case the witness [to the former instance] says, 'No one knew anything about it at the time.' . . . This would probably become a disputed question, calling for the testimony of all the persons on the 'Sherman' at the time of the [prior] accident to settle the question of fact as to her case. Here would be a vexed but valueless collateral issue. . . . Very many cases [of similar accidents] were introduced in testimony on the part of the plaintiff. . . . This class of testimony was incompetent because calculated to surprise and take undue advantage of defendant at the trial. Ordinarily he could not be prepared to meet and contest the merits of each particular case of loss from unknown cause introduced. To deprive him of this privilege would be the denial

§ 443. [1] This principle, in its other aspects, is dealt with *ante*, § 42, *post*, §§ 1849 ff.

[2] This principle, in its other aspects, is dealt with *ante*, § 42, *post*, §§ 1863, 1904 ff.

of a legal right, and to admit them would overwhelm the case with collateral issues of fact, distract judicial investigation, leading to no valuable legal result."

1879, DOE, C. J., in *Amoskeag Co.* v. *Head*, 59 N. H. 332, 337 (excluding evidence of sums paid for thirty-two other rights of flowage, as indicating value): "How far a trial can justly and reasonably go upon such [additional] issues is often a question of fact. The trial to which parties are entitled is not an endless one, nor one unreasonably protracted and exhausting. There may be a vast amount of evidence, relevant in a certain legal sense, but so unimportant, when compared with an abundance of better evidence easily available, as to be properly excluded. The parties being allowed upon collateral issues an equal range amply sufficient for the purposes of justice under the circumstances of the particular case, they are not necessarily entitled as a matter of law to go further in that direction."

1884, BARROWS, J., in *Mayhew* v. *Mining Co.*, 76 Me. 113: "One substantial ground for excluding evidence of collateral facts is that it is seldom that such identity in all essentials is found that a legitimate inference respecting the one case can be drawn from the other, and a host of collateral issues are brought in to distract the attention of the jury from the real point. The fear of this has sometimes, perhaps, produced decisions excluding evidence which might throw light upon the issue."

1887, COLE, C. J., in *Phillips* v. *Willow*, 70 Wis. 9, 34 N. W. 731 (excluding the fact that two other persons had collided with the stone by which the plaintiff's sleigh had been overturned): "[Courts have excluded this evidence] because such evidence tends to draw away the minds of the jurors from the point in issue, and to excite prejudice and mislead them; and, moreover, because the adverse party, having had no notice of such a course of examination, is not presumably prepared to meet it. . . . It is apparent that if this testimony was relevant to prove a defect . . . , it would have been competent [in answer] to show that these persons were not driving carefully, or had skittish teams; also that hundreds had passed over this highway in safety with carriages, notwithstanding the alleged defect. So issue after issue would be raised, and facts collateral to the main issue made by the pleadings would multiply; the main issue forming new ones, and the suit itself expanding like the banyan tree of India, whose branches drop shoots to the ground which take root and form new stocks till the tree itself covers great space by its circumference."

The answers to these arguments of policy, however, are not difficult: (1) As to the argument from Unfair Surprise. In the first place, the inconvenience here urged is found in trying almost every issue whatever; for the evidence of an opponent is always to some extent unforeseen, and this is, in general, no valid objection (*post*, § 1845). In the next place, the risk does not usually exist to any serious extent in the present sort of issue, for the nature of the controversy readily suggests the sort of evidence that will be resorted to. Furthermore, the argument is rarely allowed elsewhere to prevail except to prevent certain modes of impeachment of character (*ante*, § 194; *post*, § 979), where otherwise the evidence might range over a whole lifetime; and it is not a serious objection in cases where the unexpected evidence bears directly upon the issue and but covers a small range both of time and of material. Lastly, the evil of shutting out that which is frequently the sole accessible or reliable evidence is much greater than the occasional disadvantage of surprise. The argument of surprise, it should be added, is very rarely pressed in this connection. (2) As to the argument from Confusion of Issues. In the first place, it must be noted that it is by no means universally, perhaps not usually, forceful; for the other instances

offered of the tendency or quality are seldom numerous and are not commonly disputed. In the next place, the multiplicity and confusion is usually no greater than that which occurs in the trial of other matters with their numerous minor issues; and it would seem, having regard to the direct bearing of the present sort of evidence on that which is usually a main issue, that the disadvantage cannot be avoided without too great a sacrifice of useful evidence. Finally, and most important, wherever upon minor issues this disadvantage becomes a real and marked one, without compensating advantage from useful evidence, it is unnecessary to take the radical step of excluding such evidence in all cases by a universal rule; because a simple expedient is at hand, by which the evil can be stopped in such cases while the advantage of the evidence is retained for other cases, — namely, the expedient of leaving it to the discretion of the trial Court to draw a line of exclusion wherever the evil of confusion of issues impends. The whole objection in question is mainly (as Mr. Justice Holmes has neatly put it [3]) "a purely practical one, a concession to the shortness of life"; and it would be unworthy of the genius of our law if Courts should feel obliged to lay down a hard-and-fast rule of exclusion when such a simple expedient was at hand for preventing the supposed disadvantages.

§ 444. **Discretion of the Trial Court.** The true solution of the conflicting considerations, then, is that evidence of the sort, when relevant, should be admitted, unless in the discretion of the trial Court it seems to involve a serious inconvenience by way of unfair surprise or confusion of issues. Such is the solution clearly pointed out by many Courts:

1872, DOE, J., in *Darling* v. *Westmoreland*, 52 N. H. 401, 408: "Another cause of confusion [in the rulings] is the mixture of law and fact, and the lack of a distinction, lucidly and emphatically expressed, between what is matter of strict law and what is matter of judicial discretion. Judicial discretion, in its technical legal sense, is the name of the decision of certain questions of fact by the Court; and a close attention to the difference between fact and law, and the difference between an exercise of judicial discretion (unfortunately so called) and a decision of a question of law, will remove much of the obscurity in which the subject of the relevancy of evidence has been involved. . . . [In the Knapp case,[1] where, to show the defendant's extraordinary strength, various instances of his feats of strength were received,] the judge in the exercise of what is called judicial discretion, allowed the parties to go back fifteen years; and if he had allowed them to go back sixteen years, or only fourteen years, no question of law would have arisen as to the proper length of time. . . . The general relevancy of that class of evidence was matter of law. But how far back in the history of his life it was advisable to go for experimental knowledge of his strength was a question of fact, to be determined upon a variety of considerations, some of which are erroneously given in the books as reasons for the exclusion of irrelevant or collateral evidence as a matter of law. The decision of this question of fact was, in the peculiar and technical language of the law, an exercise of judicial discretion. . . . As to the number of experiments or experiences on many points, collateral in a certain sense, but relevant in a legal sense, it is impossible in the nature of the case for a limit to be fixed as a matter of

[3] In Reeve *v.* Dennett, 145 Mass. 28, 11 N. E. 938.

§ 444. [1] 45 N. H. 148, 149, 154; *ante*, § 219.

law. But it does not follow that the law excludes all evidence of which it cannot measure a reasonable quantity."

1894, KNOWLTON, J., in *Bemis* v. *Temple*, 162 Mass. 342, 344, 38 N. E. 970 (admitting evidence of the frightening effect of a flag upon other horses): "The only objection to testimony of the last kind in such a case is that in testing it collateral issues may be raised. Such an objection in many cases is a sufficient reason for excluding the testimony. Whenever a line of inquiry will give rise to collateral issues of such number and difficulty that they will be likely to confuse and distract the jury and unreasonably protract the trial, it should not be permitted. But the mere fact that a collateral issue may be raised is not of itself enough to justify the exclusion of evidence which bears upon the issue on trial. Most circumstantial evidence introduces collateral issues, and ordinarily it is a practical question, depending upon its relations to the other facts and circumstances in the case, whether it should be received. It may be remote from the real issue or closely connected with it, and in many cases its competency depends upon the decision of questions of fact, affecting the practical administration of justice in the particular case, such that a Court of law will refuse to revise the ruling of the presiding judge, but will treat his ruling as a matter of discretion."

This sensible solution has not yet been generally accepted by many Courts, at least in express language. Where the question of Auxiliary Probative Policy has been considered, the evidence has more often been either rejected or accepted as if by a fixed rule, although the natural result has been a lack of uniformity in the rulings of such Courts. It is much wiser and more practical to leave the possible inconvenience to be determined by the tribunal best fitted to determine it, the trial Court, and to sanction the reception of all such relevant evidence subject to this exclusionary discretion based on inconvenience. This attitude is more and more frequently taken by the Courts, and will probably receive general approval as the true mode of dealing with such evidence.

§ 445. **Distinction between Experiment and Observation.** There are two ways in which the data may be obtained for evidencing tendency, capacity, or quality, on the principle under consideration. One is by using such instances as may be found ready at hand, — instances which have already occurred in the ordinary course of events and happen to be suitable for the purpose. The other is to reproduce artificially and expressly the appropriate conditions and then observe the data obtained by this effort and prearrangement. The former process is the simple one of Observation; the latter is that of Experiment. The former is, in general scientific acceptance, distinctly inferior for most purposes to the latter; because, in taking data just as they come, it is not usually feasible to secure precisely the proper conditions required for the validity or certainty of our inference; while in the latter the conditions may usually be prearranged precisely as they are needed in order to make a sound inference. Indeed, the former source of data, in the modern scientific world, is looked upon as concededly so inferior in probative value, as not to be resorted to except in such situations (for example, geological formations and human diseases) as do not usually admit of artificial prearrangement and control.

But this attitude of modern scientific thought is quite other than that which has been exhibited by many members of the bar and bench. There is a certain mental state which may in lenient moments be termed conservatism, but perhaps deserves to be called juristic narrowmindedness. It is often due to nothing more incurable than an ignorance of precedents and a bigoted fear of everything not technical. This attitude has shown itself, in many quarters, in the form of an alarm at experimental evidence, a disinclination to accept what does not come in the accustomed shapes of certified copies, sealed instruments, and sworn depositions. It is the same spirit that was so reluctant, at the beginning of the 1800s, to resort to expert evidence. It is the same spirit that is willing to doubt the propriety of showing to the jury the very thing whose existence is in controversy, and prefers that the regular and cumbrous indirections should instead be followed (*post*, § 1151). This spirit has led occasionally to a rejection of experiments offered under the present principle as evidence of a tendency, capacity, or quality. These rulings of rejection are usually to be compared to the shying of a horse,— an instance of instinctive but unreasoning repulsion.

Occasionally there is, to be sure, some independent and plausible reason for questioning the evidence; for example, experiments made in a court-room in the presence of the tribunal may be inconvenient and impracticable (*post*, § 1160); experiments have also (but improperly) been objected to because they are hearsay or ' ex parte ' only (*post*, § 1385); experiments of some kinds may be objectionable because they violate the privilege against self-crimination (*post*, § 2265). So far as these considerations apply to experiments, they apply to them in common with other forms of evidence, and may be dealt with under the other principles of evidence just indicated. But the present question is the simple one whether data whose relevancy is not questioned are objectionable or inferior because they have been obtained, not by observing merely such casual material as Nature has provided for us, but by carefully arranging the conditions so as to obtain by experiment more trustworthy results. That there should be such a distinction between Observation and Experiment would be unworthy of our law. That there is none has been made clear once for all in a classical passage by one of the greatest of American judges:

1872, Doe, in *Darling* v. *Westmoreland*, 52 N. H. 401: "Was the fright of Fletcher's horse competent evidence on the question whether the lumber was likely to frighten horses? . . . On the independent and general question of the horse-frightening capacity of a certain pile of lumber, what rule of law considers the fright of [the plaintiff's] horse as important and disregards the fright of Mr. Fletcher's horse as of no consequence at all? . . . If the question were, whether the lumber was capable of floating in water, or making a good fire, or being sawed or cut or planed in a specific manner, or supporting horses and wagons passing over a bridge, there could be no legal objection to the trial of an appropriate experiment upon it in the presence of the jury, or to the evidence of experiments that had been tried elsewhere. And there is no reason, outside of the technical rules of law, why its ability to frighten horses should not be tested out of court, and proved in court in the same manner.

When we want to know whether a certain horse is skittish or is capable of a certain speed, whether a certain substance is poisonous and destructive of animal or vegetable life, whether certain materials are of a certain strength, whether a certain field or a certain kind of soil is likely to produce a certain kind or amount of crop, whether a certain man or brute or machine is likely to perform a certain kind or amount of work, or whether anything can be done or is likely to be done, one way is to speculate about it, and another way is to try it. The law is a practical science, and when it is appealed to to direct what means shall be used to find out whether a certain pile of lumber is likely to frighten horses, if any one asserts that, on this subject, the law prefers speculation to experience, abhors actual experiment and delights in guesswork, the person advancing such a proposition takes upon himself the task of maintaining it upon some legal rule, distinctly stated by him and well established by the authorities. Such a proposition is not sustained by the reason of the law. It is sustained by nothing that can be justly called a principle. By what technical rule, at war with reason and principle, is it supported? . . . The experience of other persons, equally relevant on that point, has seemed [to some judges] to have an objectionable appearance, because it did not come into the case in the same unobjectionable way as that by which the plaintiff's experience was introduced. . . . The tendency to error has been aggravated by an exception (which is a peculiarity of precedents of English origin) excluding relevant evidence of a defendant's general and notorious disposition to commit such crimes or torts as that with which he is charged, and his habitual commission of crimes or torts of a like kind as proof of such disposition. . . . However much reverence may remain for ancient innovations in behalf of human life under circumstances no longer existing, and however strong may be the inclination derived from that reverence and from habit to adhere to the practice of excluding evidence of human character furnished by experience, the extension of that practice to the rejection of experimental knowledge of the character of inanimate matter ought to stop. . . . It is evident that the exception [of the charact · rule, above referred to], not being sufficiently emphasized as an exception and a very p liar one, has produced much confusion by seeming to countenance the idea that the has an antipathy against experimental knowledge in general."

There is an increasing judicial tendency to treat evidence of experiments in the spirit of Mr. Justice Doe's utterance; and it can hardly be supposed that the casual erroneous precedents would be regarded as a hindrance.[1]

§ 445. [1] In the following list are given numerous examples of the different kinds of rulings upon experiments as such; the list includes merely typical cases, and many others may be found in the citations of the ensuing sections. The rulings may be grouped as follows, all the cases named being cited more at length in the ensuing sections: (1) Admitting the experiments offered; (2) Excluding them, but only because the tests of relevancy were not fulfilled in the case in hand, and not because they were experiments instead of observed data; (3) Excluding them for no appreciable reason; (4) Excluding them because made before the jury (under § 1160, *post*); (5) Excluding them because 'ex parte' (under § 1385, *post*); (6) Excluded for sundry peculiar reasons; (7) Left to the trial Court's discretion.

(1) Under this head fall the following cases: Witches' Trial, cited *supra;* Cowper's Trial, *post*, §§ 457, 460; R. *v.* Palmer, § 457; R. *v.* Heseltine, § 451; Broder *v.* Saillard, § 451; People *v.* Hope, § 451; People *v.* Durrant, § 451; Chicago, St. L. & P. R. Co. *v.* Champion, § 451; Brooke *v.* R. Co., § 458; State *v.* Cater, § 457; Mo. P. R. Co. *v.* Moffatt, § 460; State *v.* Asbell, § 457; Champ *v.* Com., § 457; Swett *v.* Shumway, § 451; Eidt *v.* Cutter, § 451; People *v.* Morrigan, § 460; Stone *v.* Ins. Co., § 460; Becket *v.* Aid Assoc., § 457; Vaughan *v.* State, § 457; Dillard *v.* State, § 457; Berckmans *v.* Berckmans, § 460; Lindsay *v.* People, § 451; Smith *v.* State, § 460; Leonard *v.* R. Co., § 451; Sullivan *v.* Com., § 457; Boyd *v.* State, § 457; Byers *v.* R. Co., § 460; Moore *v.* State, § 457; Osborne *v.* Detroit, § 457; State *v.* Flint, § 460; State *v.* Ward, § 451.

(2) Under this head fall the following cases: Lou. & N. R. Co. *v.* Hill, *post*, § 460; Jones *v.* State, § 460; Lake E. & W. R. Co. *v.* Mugg, § 451; Libby *v.* Scherman, § 458; Painter *v.* People, § 460; McMurrin *v.* Rigby, § 460;

How much more in harmony with the pristine practice of our law is Mr. Justice Doe's attitude, than that of the modern rulings which he justly criticises, may be seen in the following record of one of Sir Matthew Hale's trials, more than two centuries ago:

1665, *Witches' Trial*, 6 How. St. Tr. 647, 697; the children claiming to be bewitched would go into fits, clenching their fists, and then opening them with a shriek when the supposed witch touched them, "which accident would not happen by the touch of any other person." It was suggested that the children "might counterfeit this distemper"; so the judge, Sir Matthew Hale, desired that several gentlemen would test one of the children with Amy Duny, a defendant, in another part of the Court. "They put an apron before her [the child's] eyes, and then one other person touched her hand, which produced the same effect as the touch of the witch did in the Court. Whereupon the gentlemen returned, openly protesting that they did believe the whole transaction of the business was a mere imposture. This put the Court and all persons into a stand."

§ 446. **Distinction between Possibility, Capacity, Tendency, and Cause, as the object of Evidence; Evidencing a Possibility.** The notion of Causation is by no means easy to analyze correctly; but it is enough to point out here that certain superficially different terms represent essentially the same evidential process. When it is asked, for example, whether certain factory-vapors were the cause of a destruction of herbage, the notion of "cause", simple as it seems, becomes upon analysis somewhat complex and at the same time indefinite. Stated in its broadest form, the notion of cause and effect is merely that of invariable sequence.

It is only rarely, however, if at all, that such an abstract assertion can be made in universal terms that will stand examination. Thus, that a bullet shot from a pistol into the heart "causes" — *i.e.* will invariably be followed by — death, is a seemingly impregnable assertion; and yet not only may it not be true of bullets of every size, but it may not be true, even with ordinarily large bullets, in instances recorded here and there; and, in the future, surgical skill may show that the instances of non-sequence of death might be made even more numerous. The assertion may then be amended by adding limiting conditions, so as to say that, provided this and that and the other be so, a bullet through the heart causes death. In short, instead of an absolute certainty or invariability of sequence, the assertion will be only of a very high probability of sequence. In most instances no one thinks of making an assertion in absolute form, and it is easy to see that an assertion of causation means usually only an assertion of high probability or strong tendency.

Com. *v.* Piper, § 451; Ulrich *v.* People, § 460; Klanowski *v.* R. Co., § 460; Justice *v.* State, § 457; West Pub. Co. *v.* Coop. Pub. Co., § 460.

(3) Under this head falls the following case: Evans *v.* State, *post*, § 457.

(4) Under this head fall the following cases: R. *v.* Palmer, *post*, § 457; Jumpertz *v.* People, § 460.

(5) Under this head belong the cases collected *post*, § 1385; no such principle of exclusion is recognized.

(6) Under this head fall the following cases: Wynne *v.* State, § 457; Polin *v.* State, § 451.

(7) Under this head fall the following cases: State *v.* Smith, § 451; Ball *v.* U. S., § 457.

The English and Canadian statutory rules, quoted *post*, § 1151, expressly authorize the judge to authorize "experiments or observations" to be made and samples to be taken.

Thus, the planting of seed in good soil at the right time of the year will probably result in a harvest in due season; but the result is not invariably certain, because no rain may fall or the land may be built upon or other influences may intervene. Though we should feel justified in speaking of the seed as the cause of the harvest, yet it would not be intended to assert anything more than that the seed has a tendency to produce the harvest. Coming now to an example of still weaker probability, suppose it to be asserted that gunpowder may spontaneously — *i.e.* without human meddling — explode, this is not saying that it will probably so explode, but merely that under a rare combination of circumstances it will do so, *i.e.* it has a capacity to do so. Capacity, then, is a quality representing the same process of thought as tendency; *i.e.* it represents the possibility of a result as compared with the probability of a result, and above them both is a notion of a still higher degree, rarely realized in experience, — that of absolute certainty of result. All these are in the same category; the difference is that in the highest degree we think of the sequence as occurring under any and every combination of other circumstances, but in the middle degrees under the ordinary combinations only, and in the lowest degrees under rare combinations only. The notion of causation is perhaps most commonly associated with the middle and highest degrees only; *i.e.* one would naturally enough say, "A bullet through the heart will cause death", and "Sowing seed will cause a harvest"; while in the lowest degree one would either not speak at all of cause or would qualify the statement, for example, by saying, "Gunpowder may cause spontaneously an explosion." The essential thing to note is that *all these terms express* only *varying degrees of certainty or probability or possibility;* and that they all belong to the same logical category of thought:

1884, Professor *Alfred Sidgwick*, Fallacies, 81, 285: "Abstract assertions of succession are commonly made with a large margin for the incalculable. We feel fairly contented in obtaining any hint of 'law', — any knowledge, that is, which may form a basis for even imperfectly secure inference and proof. The only alternative to 'Chance' is often 'Tendency', and our gladness to escape from Chance we dignify this as 'Law.' . . . Between mere guesses, hypotheses, theories, empirical laws, and 'laws of Nature', there are only continuous differences of degree in certainty, according to the nature and number of the tests they have stood and the duration of their past invulnerability. . . . The resemblance in uncertainty between a fanciful guess and a proved law may be less important than the difference in the degree of certainty; but the fact cannot be safely hidden that the resemblance exists. . . . The method of proving laws is one and the same, whether they be the merest wildest supposition or the soundest explanation of the facts of Nature."

In the precedents upon the present subject, then, there is *no difference in logic or in legal principle* between evidencing a capacity, a tendency, or a certainty of operation or causation. The only difference is as to the practical need or utility of one or the other degree of likelihood in the case in hand. Thus, if the issue is as to a spontaneous explosion of gunpowder, we may appreciably advance our proof by showing merely a capacity, *i.e.*

possibility, of such a result.[1] But, if the issue is as to the destruction of herbage by vapors, the capacity of the vapors to do this would probably be conceded, and the only useful way of advancing the proof will be to show, not merely a capacity, but a strong tendency to produce this effect.[2] Again, if the issue is as to the injury to an adjacent house by factory-vibrations, their tendency to produce some injury would perhaps be easily enough shown or conceded, and the desirable thing would be, in offering evidence of effects elsewhere, to show by them that a fair certainty of injury actually attended the vibrations.[3] Incidentally, however, these differences may bear on the question of admissibility, so far as the evidence is required to have an appreciable value for the particular issue at bar.

§ 447. **Number of Instances required.** It follows, from what has just been said, that the number of instances offered is immaterial, so far as the logical principle is concerned. The only difference will be as to the practical utility, for the case in hand, of the inference to be drawn. One instance may indicate a capacity to produce the result; but so feeble and indefinite a possibility may practically not advance the cause beyond what would be already conceded or easily accepted. So, too, a limited number of instances might show a tendency or common probability, and yet this tendency might be already beyond dispute and unnecessary to prove, and nothing short of an approach to certainty or universality of operation would advance the cause of the proof. Thus, an offer of one or two instances only might properly be rejected by a Court, if it would tend to show merely a capacity which was already beyond dispute. The jury might be inclined to give too great effect to a single instance; and if the claim of the proponent required for its proper evidencing the existence of a strong tendency or of an approximate certainty of result, the Court might be justified in rejecting an offer of such scanty scope as not to evidence anything more than a capacity or possibility. No Court seems to have rejected evidence on these specific grounds, though they would serve as justifying the rulings in several cases where the rejection of a single instance has been put upon other and insufficient grounds.[1] But usually, where the evidence is regarded by the Court as otherwise admissible, it is received without any criticism as to number of instances.[2] Where the purpose is to show the existence of a mere capacity, so as to negative the impossibility of a thing's occurrence, here a single instance is always admissible.[3]

§ 443. [1] Of this sort are some of the precedents in § 460, *post*, in which the question is whether a person could be distinguished or whether work could be done; and also in § 457, *post*, in which the question is whether *e.g.* a pistol could carry from a certain distance.

[2] Of this sort are most of the precedents in § 458, *post*, where the question is whether a place in a highway was dangerous, *i.e.* likely to cause injury to passers-by.

[3] This degree of strength of evidence seems never to have been required by Courts.

§ 447. [1] *E.g.* Hoyt *v.* Des Moines, § 458; Hudson *v.* R. Co., § 458.

[2] *E.g.* Bailey *v.* Trumbull, § 458; Tomlinson *v.* Derby, § 458; Gilmer *v.* Atlanta, § 458; Darling *v.* Westmoreland, § 460; Pomfrey *v.* Saratoga Springs, § 458; State *v.* Isaacson, § 457.

[3] *E.g.* Broder *v.* Saillard, § 451; R. *v.* Heseltine, § 451; Augusta S. R. Co. *v.* Dorsey, § 460; State *v.* Delaney, § 451; Davis *v.* State, § 460.

§ 448. **Negative and Affirmative Instances; Evidencing an Impossibility.** Whether an instance is to be regarded as affirmative or negative in form depends much on the issue as made by the parties. For example, if it were desired to prove performance of a warranty that a certain substance is calculated to deaden pain in dental operations,[1] instances of the substance having made operations painless are affirmative of the quality alleged by the warranty; but if a patient were suing the dentist for careless use of a substance calculated to produce pain, the offer of the same instances by the dentist would in form negative the alleged quality, *i.e.* they would be instances in which pain was not produced.

Assuming, then, that the issue is such that the instances are thus genuinely negative in purpose and form, is there any difference to be noted as to the conditions of their use, as distinguished from affirmative instances? Keeping in mind the principle just examined (*ante*, § 446), it will be seen that there is no difference of logical principle, though there is practically a difference in availability, according to the object of the evidence:

(1) Suppose that the proponent in the issue is (correctly) offering only to show a *capacity* — *i.e.* an occasional possibility — of producing the effect. Obviously, it is here logically of no avail to produce against him instances in which the effect was not produced. They do not meet his point; for it is quite consistent with the capacity or possibility of producing the effect that there should be many instances in which the effect was not produced; for example, if the proponent has evidenced by one or two instances the capacity of a pistol to carry two hundred yards, it is logically of no avail for the opponent to answer with a negative instance (or instances) in which it has not carried thus far. Logically nothing short of a universal negative will suffice.

Nevertheless, even a single negative may on certain conditions be receivable, and in the following way: If the proponent's witnesses to the capacity (or to the instances of capacity) are not to be believed, the opponent's negative instances are logically no answer; but it is impossible to say beforehand whether the jury will believe the proponent's witnesses. Assuming, then, that they do not believe them, and therefore that there is no affirmative instance of the alleged capacity in the field, even a single negative instance may suffice to show the non-capacity or impossibility on one condition, namely, that it is made equivalent to a universal negative. The only way to do this is to take an instance which by allowing for all possible counteracting causes shows that, even where they could not have operated, nevertheless the effect was not produced, *i.e.* there was an incapacity to produce it. For example, one instance of a pistol's not carrying 200 yards is simply a negative instance showing that it does not always carry that distance; but if we show that the greatest possible charge of powder was put in, the smallest possible bullet was used, and the most skilful marksman possible aimed it, and still it did not carry 200 yards, we have gone far to show that it is utterly incapable of

§ 448. [1] Compare Reeve v. Dennett, 145 Mass. 28, *post*, § 457.

carrying that distance, *i.e.* to prove a universal negative from a single instance. Where the precautions are thus sufficient to exclude the operation of possible counteracting influences, a single instance may be more trustworthy than a thousand of another kind, because it yields the assurance that if there were under any circumstances a possibility of producing the alleged effect, it would have been here produced. This is an example of the Method of Difference applied to show a negative.[2]

In practice, the proponent seldom has occasion to allege merely a capacity, and that case may be neglected. But the opponent may meet the situation by denying even such a capacity, and then the above principles apply on the issue thus formed. So that the opponent may properly, in evidencing an impossibility, offer either (a) a universal negative, *i.e.* that no instances of such a capacity have occurred; (a′) one or more instances attended by such precautions or conditions as practically amount to a universal negative. As to (a), note that evidence merely of instances not having been heard of is not sufficient, unless they would have been heard of if they had occurred.[3] As to (a′), note that for purposes of mere admissibility (*i.e.* not demonstration), only a moderate degree of such precautions could be required.

(2) Suppose, however, that the proponent is aiming to show something stronger than a mere capacity, *i.e.* a *general or usual tendency*, and has evidenced this by a few instances; here, obviously, an equal or greater or less number of negative instances or perhaps even a single instance would help to show that no usual or general tendency could be predicated, and thus would be practically available to answer the showing made by the proponent.

(3) But suppose, finally, that the proponent is interested in showing a fair *certainty or inevitableness* of effect; here even a single negative instance would suffice to dispose of his contention. The proponent cannot claim that an effect is invariably found, if an instance is shown in which the effect is not found; for example, where it is claimed that a near gunshot wound always leaves powder-stains, a single instance will overturn this claim.

In practice, however, there is little discrimination to be made between the use of the negative instances in these three situations. If the distinction between these three possible attitudes of the proponent were sharply marked by the pleadings, then the foregoing discriminations would apply, and the opponent would have to regulate the use of his negative instances accordingly. But there is usually no such sharp demarcation; the proponent alleges the qualities of a certain object as the cause of the alleged effect, but he seldom is restricted to one of the above three purposes; *i.e.* he will hope to prove a universal or invariable production of the effect, but he will probably be satisfied if he can prove only a general tendency, and he may end by not evidencing any more than a mere capacity. At one and the same time he

[2] Sidgwick, Fallacies, 275, 282, 339 (quoted *ante*, § 33).

[3] Compare § 671, *post*.

is making an attempt at all three; and therefore the opponent is entitled to offer whatever would be relevant against any one of the three, and cannot be criticised if his offer would be insufficient against some one, if it is sufficient against another.

To sum up, then:

(1) Where the proponent offers to show merely a capacity, or where the opponent invites the issue by proposing to show a non-capacity or impossibility, the latter's evidence may properly be of either of two sorts: (*a*) He may show that in all experience with the thing in question, no such effect had ever occurred; (*b*) He may show one or more instances attended by such conditions as make it probable that no such effect could possibly occur.

(2) Under the second head above, one or more negative instances are always receivable; but more may be required.

(3) Under the third head, a single negative instance is always receivable.

In general, the rulings are based upon the above principles; though occasionally an unwarranted distrust of negative instances is shown.[4]

§ 449. **Explaining away the Proponent's Instances.** An opponent who is not supporting his case by bringing in new data of his own, but confines himself to destroying the proponent's data, finds three ways at hand for diminishing their effect. The three ways have been examined already in dealing with Relevancy in general (*ante*, §§ 34, 35); and a brief notice of their application to the present sort of evidence will here suffice.

(1) The opponent may produce contradictory, or *negative, instances;* that is to say, the proponent's instances being offered to show a tendency or capacity to produce an effect, the opponent answers by producing other in-

[4] Typical cases may be grouped as follows.

I. *Negative instances rejected:*

1. Because of auxiliary policy, dissimilarity of conditions, or some other independent reason, and not because they were negative.

2. Because they were negative: (1) *a.* Improperly rejected under (1) *a, supra; a′.* Properly rejected under the same; *b.* Improperly rejected under (1) *a′, supra; b′.* Properly rejected under the same; (2) Improperly rejected under (2) *supra;* (3) Improperly rejected under (3) *supra.*

II. *Negative instances received:* (1) *a.* In the situation of (1) *a, supra; b.* In the situation of (1), *b, supra;* (2) In the situation of (2) *supra;* (3) In the situation of (3) *supra.*

Not all of the above sorts are represented in the rulings, but all are capable of occurring.

I, 1: Bauer *v.* Indianapolis, § 458; Branch *v.* Libbey, § 458; Balt. & Y. T. R. *v.* Leonhardt, § 458; Balt. & Y. T. R. *v.* State, § 458; Aldrich *v.* Pelham, § 458; Lewis *v.* Smith, § 458; Peverly *v.* Boston, § 458, Ulrich *v.* People, § 460; Temp. Hall Assoc. *v.* Giles, § 458; Polin *v.* State, § 451; Bloar *v.* Delafield, § 460.

I, 2 (1) *a:* Hodges *v.* Bearse, § 458; (1) *a′:* Balt. & Y. T. R. *v.* State, § 458; (1) *b:* no instances; (1) *b′:* Libby *v.* Scherman, § 458; Ulrich *v.* People, § 460.

I, 2 (2): Nave *v.* Flack, § 458 (express repudiation of this class of evidence); Bauer *v.* Indianapolis, § 458.

I (3): no instances.

II (1) *a:* Crofter *v.* R. Co., § 458; Tremblay *v.* Harnden, § 451; Doyle *v.* R. Co., § 458 (an express sanction of such evidence); Dougan *v.* Champlain Co., § 458; Baird *v.* Daly, § 458; Sinton *v.* Butler, § 458.

II (1) *b:* Epps *v.* State, § 457; Champ *v.* Com., § 457; Vaughan *v.* State, § 457; Smith *v.* State, § 460; Leonard *v.* State, § 451; Sullivan *v.* Com., § 457; Boyd *v.* State, § 457; Byers *v.* R. Co., § 460; Osborne *v.* Detroit, § 457.

II (2): Calkins *v.* Hartford, § 458; Wilson *v.* Granby, § 458; Hill *v.* R. Co., § 460; Salem D. R. Co. *v.* Adams, § 460; McCool *v.* Grand Rapids, § 458; Lester *v.* Pittsford, § 458.

II (3): Cowper's Trial, § 457.

stances in which the effect did not appear, arguing from this that the tendency must be only a limited one and does not produce its effects with any probability. The principles governing this use of negative instances have been considered in the preceding section.

(2) The opponent may show that, while the proponent's instances occur 'prima facie' under similar conditions, yet there was for one or more of them some attendant condition which was really important and was likely to have been the true source of the effect observed, so that the proponent's instance may or must be attributed to that other and not to the alleged tendency or cause in question. Thus he *explains away* the proponent's instance by showing that it does not mean what it seemed to mean.[1] Such explanatory circumstances are always receivable in evidence.[2] The only limitation is the policy of preventing confusion of issues (*ante*, § 443), — the fear of which indeed finds its chief justification, so far as it has any, in the necessary propriety of allowing this mode of explanation, when once the proponent is allowed to open the way with particular instances.

(3) The third method takes away the force of the proponent's instance by offering *other instances* in which the same effect is found, but *without the presence of the alleged cause*. The absence, in these additional instances, of the thing alleged to have the causing tendency, forces us to look upon its presence in the proponent's instance as merely accidental, and explains that instance away as due not to the alleged tendency but to something else. Thus, to show that an illness following Monday's dinner was not due to the ham eaten, an instance of the same illness following Tuesday's dinner, at which the dishes were the same except that no ham was eaten, indicates that some other dish was probably the common cause on both occasions. The limitations on the use of this form of disproof are that the conditions (otherwise than as to the alleged cause, *e.g.* the ham) were substantially the same on both occasions; for, unless this is ensured, it might be supposed that the alleged cause — *e.g.* the ham — might have operated in the one case and some other cause in the other case. It is only by confining the difference of the two instances to the single circumstance in question that the argument is effective to eliminate it as the cause.[3]

(4) The use of the Method of Difference (*ante*, § 442, at the end) is not to be confounded with the preceding modes of argument. It has in appearance a negative character, and may be resorted to in Disproof; but it does not operate by explaining away the proponent's evidence; it begins a new line of evidence, although that evidence may be directed to proving a negative proposition, *i.e.* that a certain thing was not a cause.

§ 449. [1] In § 35, par. 2, *ante*, this form of argument has been sufficiently illustrated.

[2] The process is common, though the precedents are few: Abend *v.* Mueller, § 451; Pettibone *v.* Smith, § 451.

[3] The following precedents illustrate it: Standish *v.* Washburn, § 451; Eidt *v.* Cutter, § 451; Pinney *v.* Cahill, § 457; Hoyt *v.* R. Co., § 458; Haynes *v.* Burlington, § 451.

This form of argument has been examined in § 35, par. 3, *ante*.

2. Precedents arranged by Subjects

§ 450. **Principle of Classification.** For the practical purposes of study and reference, it is better to consider the precedents in such an order that the rulings upon a given sort of tendency, capacity, or quality, can be found in one place. Each of these tendencies or qualities exemplifies in the rulings more than one of the preceding modes of argument, and in the foregoing examination of the principles the specific typical precedents have been noted in illustration. But it is chiefly desirable to be able to note the state of the law on a given sort of evidence in each jurisdiction. Moreover, other questions, requiring special consideration, incidentally arise under certain subjects, and can only be treated under the particular head of evidence involved.

How shall the various precedents be arranged most usefully for the present purpose? The principle involved is the evidencing of a tendency (capacity, or quality) by its effects. The precedents may therefore best be grouped according to the various kinds of tendencies (capacities, or qualities) and the various kinds of effects.

A preliminary grouping may be:

A. *Material effects* (for example, marks left by a pistol shot, damage done to houses by smoke, fire set by locomotive-sparks);

B. *Corporal effects*, including animal and human effects (for example, wounds produced by shots, disease produced by poison, injuries by dangerous highways);

C. *Mental and Moral effects, i.e.* on *human conduct* (for example, efforts to escape the danger of a railroad collision, time required by a workman for work, precautions required for a dangerous machine).

This classification is to some extent arbitrary, as all must be, in the sense that some cases might equally well go in one group or another. But the general lines of division are marked; and the grouping is the most useful, because it enables us to compare the employment of analogous kinds of effects, and to see how far the uses of related kinds of effects throw evidential light on each other.

A. INSTANCES OF MATERIAL EFFECTS, AS EVIDENCE

§ 451. **Miscellaneous Instances (Factories, Railroads, Floods, Gases, Land, Machinery, Tools, Apparatus, Weapons, etc.).** The tendency, capacity, or quality, so far as it exists, may show itself through its material effects.

1. Instances of the effects of its apparent operation under substantially similar circumstances will serve to evidence it, subject to the foregoing limitations of principle. In this way may be evidenced the existence (or not) of sundry *nuisances*, by the presence (or absence) of certain effects under

similar circumstances (for example, of similar damage by other factories), streams, hospitals, sewers, operating under analogous conditions);[1] of the nuisance-nature of a *railroad*, by its injurious effects upon similar adjacent property, in respect to smoke, noise, vibration, and the like;[2] of the tendency of *water*, in various forms, by its effect under similar circumstances (for example, in the flowage of streams, the silting of harbors, the breaking of dams, the destruction of bridges, the drainage of swamps);[3]

§ 451. [1] *England:* 1839, Tennant *v.* Hamilton, 5 Cl. & F. 122 (nuisance in injuring the plaintiff's premises by smoke, etc.; evidence on both sides as to the condition of "land similarly circumstanced to those of the party complaining", admitted, per L. C. Cottenham, "for ascertaining what the effect was of the smoke and vapor emitted by this manufactory"); 1857, R. *v.* Fairie, 8 E. & B. 486, 488 (Coleridge, J., cited a former case in which, on a charge of nuisance, he admitted evidence of the similar effects of the defendant's manufacture carried on at another place, to show "the tendency of the manufacture to produce such effects"; Lord Campbell, C. J., agreed); 1876, Broder *v.* Saillard, 2 Ch. D. 692 (Jessel, M. R., in an action to restrain a noise-nuisance, admitted "a practical experiment performed by Mr. l'Anon, who actually only put in the stable a piece of wood with a horse's shoe attached, and when that was struck upon the ground he heard it on the second floor front [of the next house]; showing that it is distinctly heard . . ."); 1882, Metropolitan Asylum Dist. *v.* Hill, 47 L. T. R. N. S. 29 (whether a smallpox hospital was a nuisance in infecting a neighborhood; per Lord Selborne, L. C., evidence was admissible of "any similar or other facts from which the effect, or absence of effect, of other hospitals, and particularly of those at H. and S., on the surrounding neighborhoods, could either positively or approximately be ascertained"; *accord*, Lord Watson; *contra*, Lord O'Hagan; quoted *ante*, § 443); 1904, Attorney-General *v.* Nottingham, 9 Ch. 673 (smallpox hospital as a nuisance; experience of other similar hospitals as to the risk of infection, admitted by consent, following Hill *v.* Metrop. Asylum District, *supra*, but Farwell, J., writing the opinion, suggesting that "the admission of such evidence in chief is wrong in principle", on the ground of surprise and confusion of issues).

United States: 1899, Hoadley *v.* Seward & S. Co., 71 Conn. 640, 42 Atl. 997 (nuisance by a factory; effect of defendant's business upon other persons situated substantially the same as the plaintiff, admitted); 1871, Cooper *v.* Randall, 59 Ill. 320 (Walker, J., for the majority, admitting evidence in a nuisance case that the defendant's mill threw dust, smut, etc., on other houses: "It tended to show that the mill was capable of inflicting the injury complained of by appellant. If the deposit was general in the immediate neighborhood, and large quantities were deposited on other buildings similarly situated, it would be a just inference that the same was true of appellant's house"); 1900, Bradley *v.* R. Co., 111 Ia. 562, 82 N. W. 996 (condition of grass-roots in adjoining meadow under similar conditions, admitted); 1900, Hughes *v.* General Electric L. & P. Co., 107 Ky. 485, 54 S. W. 723 (nuisance of smoke, etc.; effect on other dwellings in vicinity, excluded; no authority cited); 1864, Lincoln *v.* Mfg. Co., 9 All. Mass. 181 (alleged poisoning of a stream by copper acids, destroying meadow-crops; that similar effects were produced upon other meadows along the river, excluded, for reasons of confusion of issues and because of the slight probative value; Standish *v.* Washburn, *post*, doubted).

[2] 1896, Metropolitan W. S. E. R. Co. *v.* Dickinson, 161 Ill. 22, 24, 43 N. E. 706 ("physical effects upon adjoining property of an elevated railroad of the same general character as this one in the way of noise, smoke, gases, etc.", not admissible; except that witnesses to value may be asked whether they are qualified by knowing it); 1905, Baltimore B. R. Co. *v.* Sattler, 100 Md. 306, 59 Atl. 654 (smoke nuisance; the effects produced on other property in the immediate neighborhood, admitted); 1851, Concord R. Co. *v.* Greely, 23 N. H. 237, 243 (inconveniences of a railroad on adjoining land, not allowed to be shown by the experience on adjacent lands, because of the collateral issues involved); 1891, Doyle *v.* R. Co., 128 N. Y. 488, 495, 28 N. E. 495 (damage by the operation of an elevated railroad; evidence received of the effect upon the premises similarly situated and "not too distant"; "the Court may undoubtedly in such case, in the exercise of its discretion, limit the number of witnesses to be called, and may confine the examination of the witnesses to premises in the vicinity, giving a reasonable range"); 1896, Hine *v.* R. Co., 149 N. Y. 154, 43 N. E. 414 (to show the effect of an elevated railroad upon the light coming to abutting premises, the effect upon premises across the street was admitted).

[3] ENGLAND: 1782, Folkes *v.* Chadd, 3 Doug. 157, Lord Mansfield, C. J. (admitted evidence of the state of other harbors along the same coast where no embankment existed, to show that no such change had occurred as at the harbor in question, where an embankment existed).

of the tendency of *gases*, by their injurious effects on other houses, trees, or water-supplies, or by their mode of operation in other apparatus; [4]

UNITED STATES: *Alabama:* 1906, Central of Ga. R. Co. *v.* Keyton, 148 Ala. 675, 41 So. 918 (effect of prior overflows of a sewer admissible to show "the consequences of the overflow under similar circumstances"); *Indiana:* 1914, Hardin *v.* Cook, 181 Ind. 698, 105 N. E. 231 (whether a tile-ditch could drain a certain tract; the successful drainage of a similar tract by such a ditch admitted); *Kentucky:* 1903, Louisville Water Co. *v.* Weis, — Ky. —, 76 S. W. 356 (flooding of a cellar from a leaking meter; the flooding of other cellars, offered to show that other causes had operated, held properly excluded in the trial Court's discretion); *Maine:* 1860, Clark *v.* Water Power Co., 52 Me. 75 (in an action for diverting a stream, injuries to another mill-owner were rejected on the facts, because "there were no elements of comparison offered which could afford any safe or reliable data for the judgment of a jury", and still other evidence, because the conditions "did not present such points of similarity to the plaintiff's mill and privilege as to afford any reliable data for comparison"); *Massachusetts:* 1838, Standish *v.* Washburn, 21 Pick. 237 (the extent of flowage of meadows; the plaintiff offered to show a change in the quality and quantity of his land-production in the previous ten years as compared with the anterior period; then the defendant offered to show like changes in other lands not flowed; the latter was rejected, so far as the other meadows were distant and presumably not under the same influences); 1872, Hawks *v.* Charlemont, 110 Mass. 112 (the occurrence of washouts at a previous occasion and a different place by a removal of stones in the same way as alleged against the defendant; the trial Court ruled that "if the plaintiff could show that the localities and all the elements entering into the occurrences taking place at each locality were alike", the evidence might be given; and this ruling was sustained); 1889, Verran *v.* Baird, 150 Mass. 142, 22 N. E. 630 (to show the effect of the breaking of the plaintiff's dam, the fact was offered of the appearance of a gully halfway between the dam and the plaintiff's property; but the other facts "necessary to make the gorge a measure of the volume and force of the water" were wanting, and the evidence was rejected); 1904, Burnside *v.* Everett, 186 Mass. 4, 71 N. E. 82 (overflow of a sewer; an instance of overflow two years before, held not improperly excluded on cross-examination; but the Court cites Collins *v.* Dorchester, *post*, § 458, n. 2, which ought rather to be treated as discredited by later rulings); *Michigan:* 1877, Pettibone *v.* Smith, 37 Mich. 580 (the low water in a stream was explained as the result of a succession of dry seasons, not of the defendant's diversion of water); 1921, Holcomb *v.* Alpena Power Co., 215 Mich. 382, 184 N. W. 587 (damage to land by flood from a dam; defendant's inability "to raise good crops upon the land as before", admitted); *Minnesota:* 1867, Dorman *v.* Ames, 12 Minn. 451, 456 (overflow caused by a dam; that certain changes observable in the land were also observed in other land, not admitted for defendant); *New Hampshire:* 1903, Roberts *v.* Dover, 72 N. H. 147, 55 Atl. 895 (back-flow of sewage; that the sewer had at other times flowed back into cellars on an adjacent street, admitted to show the adequacy of the sewer's capacity); *North Carolina:* 1903, Bullock *v.* Lake Drummond C. & W. Co., 132 N. C. 179, 43 S. E. 593 (effect of a canal in damaging adjacent property, excluded); *Pennsylvania:* 1839, Reed *v.* Dick, 8 Watts 480, 481 (admitting evidence of the behavior and condition of other vessels, to show the violence of a storm); 1891, Hoffman *v.* R. Co., 143 Pa. 503, 22 Atl. 823 (illustrating the force of discharge of water by experiment in Court, allowed); *Vermont:* 1865, Haynes *v.* Burlington, 38 Vt. 350, 363 (to show that the setting back of water was not the cause of injury to a building, etc., similar injuries to another building not touched by the water were rejected, because the other conditions did not appear to be "so similar that one would be any fair test for the other"); *Virginia:* 1915, Riverside & D. R. C. M. Co. *v.* Waugh, 117 Va. 386, 84 S. E. 658 (that other land similarly situated was similarly affected by the same freshet, admitted).

[4] *Illinois:* 1864, Ottawa G. & C. Co. *v.* Graham, 35 Ill. 348 (Walker, C. J.: "One of the questions controverted before the jury was whether the gas could pass through the earth the distance the well was situated from the tank, so as to affect the water. If it could be shown that it had so affected the water in other wells at the same or greater distance from the tank, such evidence" would be admissible); *Kentucky:* 1908, Black Diamond C. & M. Co. *v.* Price, — Ky. —, 108 S. W. 345 (subsequent mine explosions, not admitted; unsound; no authority cited); *Massachusetts:* 1879, Eidt *v.* Cutter, 127 Mass. 522 (whether the gases from the defendant's copperas works had caused the discoloration of the paint on the plaintiff's house; the defendant alleged that the discoloration was due to sewer gas; experiments made with painted boards, etc., were admitted for the plaintiff as showing that under circumstances substantially similar, except that the sewer gas was wanting, the same results were produced; but the matter was admitted as being the grounds of experts' opinions); 1900, Koplan *v.* Gaslight Co., 177 Mass. 15, 58 N. E. 183 (whether a leak in the defendant's pipes had caused an

of other injurious operations and structures affecting the condition of *land* or *buildings* by vibration, burning, or otherwise;[5] of the tendency or quality of *tools*, *weapons*, *vehicles*, *acids*, and other materials, as indicated in their effects upon similar substances under similar conditions;[6]

explosion; testimony to "a smell of gas near the place of the accident at different times within three months previously", admitted); *New York:* 1895, Evans *v.* Gas Co., 148 N. Y. 112, 42 N. E. 513 (to show that plaintiff's trees were injured by escaping gas, the fact was admitted of trees in the neighborhood being similarly affected at the time); *Pennsylvania:* 1902, Kilbridge *v.* Carbon D. & M. Co., 201 Pa. 552, 51 Atl. 347 (explosion of a gas cylinder; the fact that the defendant had sold 150,000 like cylinders, only one of which had ever exploded, treated as evidence to show their safety); *Washington:* 1904, Rowe *v.* Northport S. & R. Co., 35 Wash. 101, 76 Pac. 529 (injury to orchards, etc., by smelting furnaces; effect of the gases on vegetation in the vicinity, under similar conditions, admissible; but experiments before the jury as to the effect of sulphuric acid on different substances were excluded as not involving similar conditions; the partly dissenting opinion of Dunbar, J., is the preferable one); *West Virginia:* 1899, Barrickman *v.* Marion Oil Co., 42 W. Va. 634, 32 S. E. 327 (fire caused by negligent supply of natural gas to plaintiff's house; condition and pressure of gas in neighboring houses governed by same regulator, admitted).

[5] *California:* 1868, Clark *v.* Willett, 35 Cal. 544 (the effect of the tunnelling of the defendant, as detrimental to adjacent premises other than the plaintiff's, offered to show that the defendant caused the land to crack and settle; excluded on the ground of surprise and confusion of issues); 1911, Fountain *v.* Connecticut F. Ins. Co., — Cal. App. —, 117 Pac. 630 (whether a building wall fell before the fire began; an earthquake being the alleged cause of the fall, the fall of other buildings in the same block was excluded, the conditions being not shown to be substantially similar); 1911, Loomis *v.* Connecticut F. Ins. Co., 16 Cal. App. 532, 117 Pac. 642 (similar); *Illinois:* 1882, Abend *v.* Mueller, 11 Ill. App. 256 (action for injuries to soil and buildings caused by vibrations of the east end of the St. Louis Bridge; (1) evidence was admitted that at the west end the vibrations were more severe and that yet buildings were not injured; "Differences arising from diversity of soil or geological formation, if any, or otherwise, could readily have been ascertained on cross-examination or by the introduction of rebutting testimony"; (2) evidence of cracks, etc., caused in other buildings had been admitted; it was held then proper to show that these injuries were caused by vibrations of an adjacent Belt Railway and not by travel over the bridge); 1898, Sugar C. C. M. Co. *v.* Peterson, 177 Ill. 324, 52 N. E. 474 (falling of mine-roof in another place, not admitted); 1902, Fitzsimons & Connell Co. *v.* Braum, 199 Ill. 390, 65 N. E. 249 (injury to a building by dynamite blasts near by; the fact that adjacent buildings were or were not injured by the same blasting, excluded on the facts); *Iowa:* 1905, Castner *v.* Chicago B. & Q. R. Co., 126 Ia. 581, 102 N. W. 499 (effect of fire upon land similarly situated, admitted); 1906, Huggard *v.* Glucose S. R. Co., 132 Ia. 724, 109 N. W. 475 (former effects of wind in blowing objects similarly situated, held properly admitted, but experiments as to vibrations, etc., held properly excluded, in the trial Court's discretion); *Louisiana:* 1900, Seibert *v.* McManus, 104 La. 404, 29 So. 108 (experiments as to fire-construction, admissible when made under identical conditions); *Maryland:* 1921, Hagerstown & F. R. Co., *v.* State, 139 Md. 507, 115 Atl. 783 (death by fall of a tree-limb on an electric wire; prior fall of other tree-limbs, admissible to show decayed condition); *New Jersey:* 1909, Fishman *v.* Consumer's Brewing Co., 78 N. J. L. 300, 73 Atl. 231 (fire said to have been set by hot ashes in an adjacent stable; the occurrence of a fire at the same place from that cause in 1901, excluded); 1922, Foley *v.* New York O. & W. R. Co., — N. J. L. —, 116 Atl. 781 (injury by a rolling boulder: the prior fall of other stones, excluded, for lack of similarity of conditions).

[6] ENGLAND: 1873, R. *v.* Heseltine, 12 Cox Cr. 404 (arson; to show that the fire could have been set as claimed, experiments made with candles of different lengths, similar to those found in the débris of the fire, were admitted).

UNITED STATES: *Federal:* 1913, Otis Elevator Co. *v.* Luck, 9th C. C. A., 202 Fed. 452 (defective hook; another accident with the same hook fifteen months before, admitted);
Alabama: 1901, Decatur C. W. & M. Co. *v.* Mehaffey, 128 Ala. 242, 29 So. 646 (experiments two years before, not under substantially the same conditions, to show the swinging of a scaffold, excluded; 1901, Timothy *v.* State, 130 Ala. 68, 30 So. 339 (experiments as to the distance at which powder-marks will be left, held inadmissible);
California: 1874, People *v.* Brotherton, 47 Cal. 402 (that a powder possessed by the defendant had destroyed ink-traces in another check written with the same ink as the one alleged to have been altered by the defendant, admitted); 1882, People *v.* Hope, 62 Cal. 291,

and of the tendency of a *machine* or apparatus, as shown by other instances of its operation under similar circumstances, to operate defectively or other-

295 (experiments in Court with burglar's tools, allowed, for an unspecified purpose); 1897, People *v.* Durrant, 116 Cal. 179, 48 Pac. 75 (fitting a chisel into marks on a door, allowed, the door, etc., being in the same condition);
Connecticut: 1881, State *v.* Smith, 49 Conn. 381 (experiments with pistols by an expert, to see from which one a bullet had been discharged; the trial Court's discretion in refusing, held conclusive);
Florida: 1908, Johnson *v.* State, 55 Fla. 46, 46 So. 155 (experiments before the jury as to mark made by a spur, held not improperly rejected in discretion); 1914, Martin *v.* State, 68 Fla. 18, 66 So. 139 (murder; experiments as to the distance of a pistol when discharged, held not improperly rejected);
Georgia: 1915, Standard Oil Co. *v.* Reagan, 15 Ga. App. 571, 84 S. E. 69 (experiments as to explosiveness of kerosene, allowed);
Illinois: 1884, Tomlinson *v.* Earnshaw, 112 Ill. 313 (to show that a sandstone having certain iron-spots in it was nevertheless of first quality, testimony was received that all such stones, even of first quality, had such spots); 1902, Jewell Filter Co. *v.* Kirk, 200 Ill. 382, 65 N. E. 698 (satisfactory operation of other filters of the same vendor, excluded, the similarity of circumstances not being shown);
Indiana: 1892, Lake Erie & W. R. Co. *v.* Mugg, 132 Ind. 168, 31 N. E. 465 (experiments as to the freezing of a boot to the rail on a cold day, made on the day of the injury, excluded, because the conditions were not similar; see quotation *ante*, § 442); 1892, Chicago, St. L. & P. R. Co. *v.* Champion, — Ind. —, 32 N. E. 874 (experiments in letting a gondola-car down upon a siding under similar conditions, admitted; see quotation *ante*, § 442); 1899, Thrawley *v.* State, 153 Ind. 375, 55 N. E. 95 (experiments with similar pistol and cartridges to determine carrying distance, allowed);
Iowa: 1900, Bach *v.* R. Co., 112 Ia. 241, 83 N. W. 959 (defective guard-rail; subsequent derailment under different conditions, excluded);
Massachusetts: 1869, Swett *v.* Shumway, 102 Mass. 368 (experiments by a witness as to the strength of similar horn and hoof rings when put together, admitted); 1876, Com. *v.* Piper, 120 Mass. 190 (murder by clubbing; experiments on a dynamometer with a bat of substantially the same form and weight as that alleged to have been used were rejected; Morton, J.: "Experiments of this character would tend to confuse and mislead rather than to assist the jury, unless they were shown to have been made under conditions the same as those existing in the case on trial. It was not shown in this case that there was a similarity in the conditions of the two events and the Court might properly in its discretion reject the testimony"); 1902, Kingman *v.* Lynn & B. R. Co., 181 Mass. 387, 64 N. E. 79 (dangerous operation of a ring in a car at other times on the same day, admitted); 1915, Thornhill *v.* Carpenter-Morton Co., 220 Mass. 593, 108 N. E. 474, 492 (experiments as to ignitive qualities of a gasoline substance, in the jury's presence, excluded in the trial Court's discretion);
Michigan: 1913, People *v.* Auerbach, 176 Mich. 23, 141 N. W. 869 (experiments as to a gun's discharge, held not improperly excluded in discretion);
Minnesota: 1901, Thiel *v.* Kennedy, 82 Minn. 142, 84 N. W. 657 (experiments with a wringer under similar conditions, rejected in discretion as involving confusion of issues); 1904, State *v.* Ronk, 91 Minn. 419, 98 N. W. 334 (experiments with a gun-target, excluded);
Missouri: 1913, State *v.* Bass, 251 Mo. 107, 157 S. W. 782 (results of observation and experiment as to conditions of powder-shells exploding, excluded, because not made under "similar conditions and circumstances"; the opinion's strict insistence on similarity is too nearly like the literal imitativeness of the simple-minded Chinese who — in Charles Lamb's essay at least — learned how to make roast pig; in the case in hand, indeed, the defendant's house had been burned down and his wife's body found in the ruins, but with gunshot wounds; two judges diss.);
Nebraska: 1883, Polin *v.* State, 14 Nebr. 540, 16 N. W. 898 (whether a revolver would go off at half-cock; an experiment by the sheriff, with the remaining cartridges, under order of the Court, not allowed at the defendant's request, because the Court could not order the sheriff, and because the experiment could have been tried equally well with the empty chambers);
New Hampshire: 1899, Little *v.* Head & D. Co., 69 N. H. 494, 43 Atl. 619 (test of strength of a hook, held not improperly excluded in discretion);
New York: 1875, Linsday *v.* People, 63 N. Y. 143, 147, 156 (tests of blood-spots on boards long after the murder, admitted, on evidence that their condition was the same);
North Carolina: 1854, Otey *v.* Hoyt, 2 Jones L. 72 (to show that a will was forged, by chemically removing the ink and writing in its place, a witness testified that "he had just seen an experiment performed whereby legible writing with ordinary ink had been erased and extracted from a piece of paper", which he then held in his hand, by the application of certain chemicals; excluded); 1915, Carter *v.* McGill, 168 N. C. 507, 84 S. E. 802 (sale of fertilizers

wise (for example, in actions for breach of warranty or personal injury);[7] here the *workings of other similar machinery* (tools or apparatus) would

with ingredients not equal to warranty; to show the cause of his deficiency of crops raised thereby, defendant offered to show that other farmers in the same vicinity used the same fertilizer and obtained no beneficial effects on crops; held admissible "if conditions were favorable to a correct test of its value");
Oklahoma: 1911, Gibbons *v.* Terr., 5 Okl. Cr. 212, 115 Pac. 129 (experiments as to bullet-marks on a door, held improperly admitted on the facts);
Oregon: 1892, Leonard *v.* R. Co., 21 Or. 555, 28 N. W. 887 (a scar on the outside of the bottom flange of a rail was alleged to have been made by the wheel of an engine on a rail crossing the first; experiments were received of the rolling of a similar wheel on a similar rail crossing, showing the impossibility of such a result; the experimental wheel was slightly smaller, but an increase of size would only have increased the impossibility; see quotation *ante*, § 442); 1920, Horn *v.* Elgin Warehouse Co., 96 Or. 403, 190 Pac. 151 (breach of warranty of wheat seed; to show the quality of the seed furnished, certain crops obtained by other buyers of defendant's seed were admitted); 1921, Hall *v.* Brown, 102 Or. 389, 202 Pac. 719 (contract to supply teams for raising a crop; results of crop on other lands, held not admissible because not shown to be under similar conditions);
Rhode Island: 1904, Cheetham *v.* Union R. Co., 26 R. I. 279, 58 Atl. 881 (derailment; experiments under similar conditions, admitted);
Tennessee: 1912, Hughes *v.* State, 126 Tenn. 40, 148 S. W. 543 (experiments with pistols to show effects of powder-burn on cloth, allowed);
Virginia: 1908, Richards *v.* Com., 107 Va. 881, 59 S. E. 1104 (shoe-tracks; substantially similar conditions required);
Vermont: 1888, State *v.* Ward, 61 Vt. 153, 17 Atl. 483 (experiments as to the similarity of sleigh-tracks, received); 1900, Hardwick S. B. &. T. Co. *v.* Drenan, 72 Vt. 438, 48 Atl. 645 (experiments as to adhesiveness of gummed paper, not admitted where similarity of conditions did not appear);
West Virginia: 1919, McClain *v.* Marietta Torpedo Co., 84 W. Va. 139, 100 S. E. 87 (experiments as to the phenomena of explosion of nitroglycerine, held not improperly rejected by the trial Court).

Distinguish such forms of contract as the following: 1917, American Agric. C. Co. *v.* McKinney, 174 Ky. 22, 191 S. W. 647 (refusal to pay notes given for fertilizer, because the material was worthless; crop failures for other farmers using it, excluded, the contract guaranteeing only the presence of essential ingredients, and not their effect).

For evidence from the effects of gunshots, drugs, etc., on *human bodies*, see §§ 457, 460, *post*.

[7] *Federal:* 1898, Taylor *v.* U. S., 32 C. C. A. 449, 89 Fed. 954 (counterfeiting; whether a machine could do certain work; allowed to be operated before the jury); 1908, Chicago Gt. Western R. Co. *v.* McDonough, 8th C. C. A., 161 Fed. 657, 667 (boiler explosion; four similar explosions of the same boiler within four years before, the conditions being substantially the same, admitted); 1922, Paterson B. & M. Co. *v.* Mesh, 3d C. C. A., 278 Fed. 615 (effect of storage on other lots of eggs, admitted); *Alabama:* 1904, Birmingham R. L. & P. Co. *v.* Bynum, 139 Ala. 389, 3 So. 736 (defective coupling; a witness allowed to state how often he had known cars with that coupling to break loose); *Connecticut:* 1904, Watson *v.* Bigelow Co., 77 Conn. 124, 58 Atl. 741 (defective boiler; lack of complaint by other purchasers of plaintiff's boilers, excluded, for confusion of issues, absence of similar conditions, etc.); *Illinois:* 1894, Phillips, J., in Bloomington *v.* Legg, 151 Ill. 9, 13, 37 N. E. 696 ("Where an issue is made as to the safety of any machinery or work of man's construction which is for practical use, the manner in which it has served that purpose, when put to that use, would be a matter material to the issue"); *Indiana:* 1876, Baber *v.* Rickart, 52 Ind. 594, 597 (whether a ditching machine would work as warranted; its manner of working at another place, admitted); *Iowa:* 1894, State *v.* Delaney, 92 Ia. 467, 61 N. W. 1040 (arson; to show that the fire might have been caused by a leaky gasoline stove, the fact was admitted of a former fire in the same house from the stove); *Massachusetts:* 1880, Brierly *v.* Davol Mills, 128 Mass. 291 (whether a loom attachment was capable of successful working; its working upon another loom of substantially the same construction and operation, admitted); 1894, Tremblay *v.* Harnden, 162 Mass. 383, 38 N. E. 972 (injury by a machine; that it "worked perfectly before the accident and had worked perfectly ever since", admitted); 1896, Flaherty *v.* Powers, 167 Mass. 61, 44 N. E. 1074 (habit of a machine to spatter, admitted, to show its behavior at the time of the accident); 1897, Roskee *v.* Pulp Co., 169 Mass. 528, 48 N. E. 766 (experiments with machinery to test its working, received); 1905, Gregory *v.* American Thread Co., 187 Mass. 239, 72 N. E. 962 (former defective operation of a machine, excluded in the trial Court's discretion as too remote); *New Hampshire:* 1903, Saucier *v.* N. H. Spinning Mills, 72 N. H. 292, 56 Atl. 545 (experiments with a carding-machine to test its operation, made under similar circumstances, admitted in the trial Court's discretion); *New York:* 1890, McCarragher *v.*

equally be receivable, provided the conditions were similar and a confusion of issues was not involved; but, in the first place, it should be understood that the other instances are merely evidential of the way the one in question probably worked, and should not be taken as a legal standard of adequate operation (*post*, § 461); and, in the second place, the issue in the case may be such that the other instances are less likely to be relevant (as where a different contract of operation was made), or that an instance of a special kind only is material (as where one machine is taken as the sample of sale).[8]

Rogers, 120 N. Y. 526, 24 N. E. 812 (injury at a machine; prior misworking of the same machine in the same way, admitted, to show "the condition of the machine"); *Ohio:* 1893, Findlay Brewing Co. *v.* Bauer, 50 Oh. 560, 35 N. E. 55 (admitting instances of the previous workings of a machine under another person, to show its defective character); *Oklahoma:* 1913, Curtis & G. Co. *v.* Pribyl, 38 Okl. 511, 134 Pac. 71 (injury from the belt of a rip-saw; experiments not admitted on the facts); *Pennsylvania:* 1896, Baker *v.* Hagey, 177 Pa. 128, 35 Atl. 704 (other instances of defective working of a plant for breaking steel, admitted to show its defective condition at the time in question); *Utah:* 1900, Konold *v.* R. Co., 21 Utah 379, 60 Pac. 1021 (experiments as to cause of explosion, held not improperly excluded in trial Court's discretion); *Vermont:* 1898, Perry *v.* Machine Co., 70 Vt. 276, 40 Atl. 731 (condition of a machine, as to operating, on the day of trial, admitted).

[8] *Federal:* 1917, May Department Stores *v.* Runge, 8th C. C. A., 241 Fed. 575 (injury at an elevator shaft; experiment as to the possibility of machinery operating in the manner alleged, held erroneously rejected; approving the text above in § 444); *Alabama:* 1880, Blackman *v.* Collier, 65 Ala. 312 (admitting the operations of similar machinery, to determine capacity); *California:* 1898, Stockton C. H. & A. W. *v.* Ins. Co., 121 Cal. 167, 53 Pac. 565 (machines destroyed by fire; to show that they were worthless, evidence by the defendant how other similar machines of the plaintiff had worked, excluded); *Georgia:* 1906, Standard C. Mills *v.* Cheatham, 125 Ga. 649, 54 S. E. 650 (condition of other machines on the same floor, with reference to a pulley slipping, admitted); *Indiana:* 1884, McCormick H. M. Co. *v.* Gray, 100 Ind. 285, 292 (sale of a harvester; defence, that it did not work well; that it ran harder than other machines, excluded, as "a comparison with standards not admitted to be true standards of excellence"); 1885, Nat'l B. & L. Co. *v.* Dunn, 106 Ind. 110, 115, 6 N. E. 131 (sale of a threshing engine; defence, that it was defective; the quantity of work of another engine of the same make and rated power, admitted, as merely showing "the possibilities" of such an engine, and not setting up a standard of quality); *Iowa:* 1887, Osborn *v.* Simerson, 73 Ia. 509, 512, 35 N. W. 615 (sale of a harvesting-machine; issue, its failure to work as represented; the way in which other similar machines worked, excluded, because it would be essential that the other machines should be similar and tried under similar circumstances, and this would introduce too many collateral and unforeseen issues); 1890, Davis' Sons *v.* Sweeney, 80 Ia. 393, 45 N. W. 1040 (showing that a machine was defective by telling what other similar machines would do, allowed); 1897, Kramer *v.* Messner, 101 Ia. 88, 69 N. W. 1142 (to show that a heating-apparatus did not fail because of defects in the building, the fact was admitted of favorable results obtained from another apparatus in the same house under severer conditions); 1911, Lehmann *v.* Minneapolis & St. L. R. Co., 153 Ia. 118, 133 N. W. 327 (other instances of the operation of handcars, admitted); *Massachusetts:* 1831, Bradford *v.* Ins. Co., 11 Pick. 161 (to prove that damaged blankets were not damaged by sea-water in transit but by wetting in the consignor's factory to increase the weight, the fact was admitted of the receipt by other consignees, in the same year, from the same consignor, by different vessels, of many similar goods damaged in a similar manner); 1905, Fountaine *v.* Wampanoag Mills, 189 Mass. 498, 75 N. E. 738 (injury by frame-gears; the defective operation of another frame, not shown to be similar, excluded); 1909, Dulligan *v.* Barber Asphalt P. Co., 201 Mass. 227, 87 N. E. 567 (prior explosion in a tank, admitted); 1922, McCarthy *v.* Curry, -- Mass. —, 134 N. E. 339 (manipulation of gas-engine machinery; experiments on the same car, held not improperly admitted in the trial Court's discretion); *Michigan:* 1886, Gage *v.* Meyers, 59 Mich. 300, 306, 26 N. W. 522 (contract to sell cutter-woods; the workmanship and materials of others of the same lot shipped to other persons, not received; no authority); 1886, Osborne *v.* Bell, 62 Mich. 214, 218, 28 N. W. 841 (harvesting-machine, alleged to operate defectively; that all the others of 100 sold the same year worked well, excluded, as not tending to show "that the operation of the one in question was in accordance with the promise of the plaintiff"); 1898, Avery *v.* Burrall, 118 Mich. 672, 77 N. W. 272 (guaranty of boilers' working; working of other similar boilers under similar circumstances, admitted to show that

2. The evidencing of a tendency — *e.g.* of a machine — by its material effects is to be distinguished from two other matters, one of them involving a wholly different principle: (1) The evidencing of a defective or dangerous machine or highway by the occurrence of *previous personal injuries* has a special line of other precedents (dealt with *post*, § 458). (2) The inference to one human *act of negligence* from another similar act (in using, for example, the same machine or in driving the same street-car) is governed by different principles, and is dealt with under the character-rule (*ante*, § 199). This distinction is pointed out in the following passage:

1894, PUTNAM, J., in *Central Vt. R. Co.* v. *Soper*, 8 C. C. A. 341, 59 Fed. 879, 890 (in an action for damage caused by spontaneous ignition of dust by heated pulley-bearings, admitting evidence that similar ignition at those bearings had occurred before): "[The facts objected to] relate entirely to the tendency of things, inanimate things, being in this case machinery. The plaintiff in error argued as though they related to the peculiar habits of certain specified human beings. The distinction is a broad one; and, if it is kept in mind, the evidence was clearly admissible for the purpose, not of showing that the employees of the defendant below were negligent, but of showing . . . that it is the tendency of certain parts of rapidly-running machinery to get heated, and of dust in mills where grain is ground or stored to be of a highly inflammable character, . . . both for the purpose of showing a point where the fire might have originated and also of showing the necessity of care to guard that point."

§ 452. **Sparks and Fires, as evidencing the Cause of a Fire; General Principle.** There has been some confusion of precedents over the evidencing of the *source of a fire* (usually, a fire attributed to a railroad locomotive engine) by the fact of the *emission of sparks* or the *setting of fires* at other times by the same or other apparatus. The solution of the problem seems not to be difficult if the different issues involved are discriminated.

Two issues may come for investigation:

(1) The effort may be to prove the *cause* of the fire in question. The locomotive, or other apparatus (factory or mine chimney), is alleged as the cause; and this is sought to be evidenced by the fact that at other times there

under proper management the boilers would work well); 1899, People *v.* Thompson, 122 Mich. 411, 81 N. W. 344 (explosion of boiler; experiments as to time of raising steam under similar conditions, admissible); *Montana:* 1905, Lander *v.* Sheehan, 32 Mont. 25, 79 Pac. 406 (action for the price of a stove; plea that it was defective and worthless; worthlessness of a similar stove sold to a third person by plaintiff, excluded; following Stockton C. H. & A. W. *v.* Ins. Co., Cal., *supra*); *New Hampshire:* 1898, Shute *v.* Mfg. Co., 69 N. H. 210, 40 Atl. 391 (cause of breaking of a pulley; breaking of another similar pulley, admitted); *Oregon:* 1919, Kohlhogen *v.* Cardwell, 93 Or. 610, 184 Pac. 261 (what space in an ordinary wagon-box 8 hogs would fill; experiments in loading hogs in a wagon under similar conditions, admitted); *Pennsylvania:* 1870, Tilton *v.* Miller, 66 Pa. 388 (refusal to accept gasburners purchased by sample, because they were not made according to sample; held, that while the maker did not guarantee a particular result or quality of work, and therefore evidence that they did not work well was immaterial, yet to determine whether they were made according to sample, the workings of the sample and the goods offered might be received for comparison); *So. Carolina:* 1921, Livingston *v.* Reid-Hart-Parr Co., — S. C. —, 109 S. E. 105 (sale of a defective farm tractor; faulty operation of similar machines sold by defendant to other persons, excluded, except on an issue of fraud); *Vermont:* 1885, Carpenter *v.* Corinth, 58 Vt. 216, *semble* (breaking of other horse-bits under similar conditions, admissible); *Wisconsin:* 1912, Guse *v.* Power & M. M. Co., 151 Wis. 400, 138 N. W. 195 (that similar hooks frequently broke or bent, admitted).

were emissions of sparks (*i.e.* flaming coals) from (*a*) the same engine or (*b*) other engines of the same owner. (*a*) The proposed inference, in the first case, is from the former spark-emissions to the existence of a capacity or tendency to such emissions by that specific engine, and thus to the possibility or probability of such an emission having occurred at the time in question and so having set the fire in question. (*b*) The proposed inference, in the second case, is to such a capacity or tendency in the class of engines passing over that line, and therefore to its probable existence in a particular engine passing by at the time in question, and thus to the same conclusion as before.

(2) In the preceding issue, the effort was merely to show that the defendant's engine caused the fire. But this alone will usually not suffice under the law;[1] it will be necessary further to show some kind of *negligence;* and this will commonly resolve itself into showing the maintenance of an engine so constructed as to be dangerously likely to emit sparks. This requires much more than a showing of mere capacity for emission. In the former issue the inquiry was merely whether the locomotive *did once emit* a spark and thus cause the specific fire, and the fact of capacity to do so was merely subsidiary and evidentiary to that; in the present issue the plaintiff proceeds directly to show *habitual emission, i.e.* a dangerous tendency, as a main element entering into legal negligence; and the showing must be not merely of a capacity to emit sparks, but of a tendency so strong that it may be regarded as negligence to maintain an engine so equipped. Such are the two issues; and the rulings upon the evidence for each may conceivably be different.

§ 453. **Same: Discriminations.** Before proceeding to examine the application of the present principles to the above issues, it is desirable to discriminate certain other evidential questions which often arise in such litigation but do not involve the present principles:

(3) In showing that a particular locomotive set a fire or emitted sparks, evidence is receivable that, shortly after it passed the place in question, stubble along the track was found on fire or *live coals were found* near the track. Here the inference is from the traces of fire to the origin of fire, — an argument of another kind (*ante*, §§ 148, 149), and not affected by the present principle.

(4) The question whether the mere fact of the setting of the fire in question, if brought home to the defendant, raises a *presumption of negligence* is a question of Presumptions (*post*, § 2509).

(5) The setting of fires by the same or other engines of the defendant at other times may be admissible to show *notice of the defect, if there was one;* here is involved the general principle of evidencing notice or Knowledge circumstantially (*ante*, § 252). Practically, there may be a serious difference in this use; since only *prior fires* could be relevant as indicating this fact of notice.

§ 452. [1] It might, in a jurisdiction where the railroad owner is by statute liable without negligence for the setting of fire by sparks.

(6) In order to show that a certain kind of spark-arrester or other piece of apparatus is such as a prudent person would use, the *usage* of other persons as to spark-arresters or like precautions may be offered; this raises a different question (*post*, § 461).

(7) In order to negative an argument drawn from the distance between the railroad track and the place fired, instances of the transmission of live coals to an *equal or greater distance* are receivable, as evidencing the *capacity of locomotives* in that respect; this inference is one of the elements in the evidential process of § 454.

Returning to the two issues stated in the preceding section, the situations thus presented are the following: (1) To show that a given locomotive *caused* the fire, by having the capacity to emit sparks, evidence is offered of spark-emissions at other times (*a*) by the *same* locomotive, or (*b*) by *other* locomotives on the same line; (2) To show a dangerously defective (and therefore *negligent*) *construction* in the locomotive, evidence is offered of spark-emissions at other times by the same locomotive or by others on the same line.

§ 454. **Same: (1) Cause of the Fire, as evidenced by other Spark-emissions (*a*) by the same Locomotive.** Here no difficulty seems to have arisen.[1] The

§ 454. [1] To the following precedents may be added those receiving the evidence under (1*b*) and (2), *post*; for the present point, though passed upon in comparatively few jurisdictions, would be regarded as involved in an affirmative ruling on those points: *Ala.* 1903, Alabama G. S. R. Co. *v.* Clark, 136 Ala. 450, 34 So. 971 (other emissions at or about the time, received); 1907, Sherrill *v.* Louisville & N. R. Co., 148 Ala. 1, 44 So. 153 (like Alabama G. S. R. Co. *v.* Clark); *Cal.* 1875, Henry *v.* R. Co., 50 Cal. 176, 183 (to show that the engine was the cause, other fires set by it are admissible); 1899, Liverpool, L. & G. Ins. Co. *v.* Southern Pac. Co., 125 Cal. 434, 58 Pac. 55 (previous emission of sparks by the same engine, admitted to show probable setting of a fire); *Ill.* 1898, Baltimore & O. S. W. R. Co. *v.* Tripp, 175 Ill. 251, 51 N. E. 833 (emission within ten days afterwards, admitted); *Ky.* 1901, Carpenter *v.* Laswell, — Ky. —, 63 S. W. 609 (setting of prior fires from defendant's smokestack, admitted); *Mass.* 1863, Ross *v.* R. Co., 6 All. 87 (sparks by the same engine under similar conditions, admitted to disprove the defendant's proposition that no sparks could reach the plaintiff's building, and thus to show "the physical possibility that fire could be so communicated"); 1881, Loring *v.* R. Co., 131 Mass. 469 (same); *Mich.* 1874, Hoyt *v.* Jeffers, 30 Mich. 181, 189 (mill-chimney; that it "had been in the habit of throwing sparks and setting fire to buildings, etc., for several years previous", the conditions of use, wind, etc., being the same, admitted to show that the chimney had caused this fire); *N. H.* 1888, Haseltine *v.* R. Co., 64 N. H. 545 (other fires set by the same engine a week later, admitted to show it to be the cause of the fire in question); *N. Y.* 1862, Hinds *v.* Barton, 25 N. Y. 544 (former emission of sparks, admitted to show "the capacity of this particular engine to emit igneous matter a greater distance than that intervening between it and the building" in question); 1888, Collins *v.* R. Co., 109 N. Y. 243, 249, 16 N. E. 50 (emission six months later; admitted only on a showing that the engine was permanently so constructed as to emit sparks or that it was in the same state of repair as before; no precedents cited; the ruling seems finical and unsound); *N. Car.* 1904, Cheek *v.* Oak G. L. Co., 134 N. C. 225, 46 S. E. 488 (setting of fire by the same engine one year later, excluded, on the ground of confusion of issues); 1906, Johnson *v.* Atlantic C. L. R. Co., 140 N. C. 574, 53 S. E. 362 (emissions of fire by the same engine shortly before or after, admissible; but here not the mere fact of a freight car being on fire without any other evidence of the engine causing it); *Pa.* 1876, Philadelphia & R. R. Co. *v.* Hendrickson, 80 Pa. 182, 189 (sparks and fires by the same engine, just before and after, admitted to show the cause); 1875, Pennsylvania Co. *v.* Watson, 81 Pa. 293, 296 (sparks and fires by the same engine, just before and after, admitted); 1891, Henderson *v.* R. Co., 144 Pa. 461, 477, 22 Atl. 851 (same; the time limit to be a reasonable one); *Va.* 1897, Patteson *v.* R. Co., 94 Va. 16, 26 S. E. 393 (other sparks by the same engine, admitted); *Wis.* 1882, Brusberg *v.* R. Co., 55 Wis. 106, 12 N. W. 416 (fires on the same trip of the same engine, close by, admitted to show it to be the cause of the fire).

emission of sparks by a locomotive at various times will naturally indicate a capacity to emit such sparks; the capacity rising into a tendency (*i.e.* the possibility rising towards a probability), in a given case, with the number or character of the instances (*ante*, § 446). Where the time of the other instances is somewhat removed, it is sometimes thought wise to require a preliminary showing that the condition of the engine had not changed in the meantime (*ante*, § 437); but the difficulty of such a showing by the plaintiff, and the ease for the defendant of showing such a change if it had occurred, make it much preferable to ignore this requirement and to leave it to the defendant, on the principle of Explanation (*ante*, § 449) to show such a change if he can. The other instances, moreover, may have occurred either before or after the time in question, for in either case they show the condition of the engine.

§ 455. **Same: (1) Cause of the Fire, as evidenced by other Spark-emissions (*b*) by other Locomotives.** Here there has been some difference of opinion, which can only be solved by an examination of the principles involved:

(1) *Relevancy;* (a) *in General.* The proposed inference, as already noted (*ante*, § 452), is to the defendant's engine as the possible *cause* of the fire, *i.e.* as having the capacity to cause it by emitting burning material. In evidencing that capacity by instances of it, one way — just examined — is to take instances of the specific engine's operation. But another and equally satisfactory way is to take instances of the operation of the class of engines of which it is a member; for what exists in the class is presumably to be found also in the individual, and to evidence such a capacity in the class is to evidence it in any one of the class. The argument up to this point has never been objected to, except in the following passage:

1883, ORTON, J., in *Gibbons* v. *R. Co.*, 58 Wis. 335, 17 N. W. 132: "Evidence that other fires had been set by the fire machinery managed by the company, before or after or about the time of the fire in question, is confined to the same machinery which caused such fire, and which may bear upon the question of the sufficiency of such machinery or its management. . . . [It is said that] such evidence might tend to prove the possibility and consequent probability that some locomotive of the company caused the fire. . . . But it is submitted that a possibility can never establish a probability of a fact required to be proved in order to make a railroad company, or any party, liable in any action whatever; and the proposition is no sounder in logic than in law."

In answer to this argument, two things may be said. First, a given instance or two may show only a possibility; but this is reason only for excluding such slight evidence in that case, and not for excluding all such evidence without regard to the number or significance of such instances. Secondly, even a possibility or capacity is properly relevant (*ante*, §§ 446, 448). The object is to narrow down the conceivable range of causes by finding out what things were capable of producing the fire, and by then cumulating other evidence upon one of them. If mice had set a fire in the house, but once only, by getting at matches, this would be relevant as showing a possible cause.

The statement in the above passage that no one can be made liable upon a mere possibility is of course beside the point; because the possibility is not offered as constituting 'per se' a test of liability, but merely as evidence admissible towards accumulating a preponderance of evidence. The sound principle, as applied to the present sort of evidence, is expounded in the following passage:

1846, *Piggot* v. *R. Co.*, 3 C. B. 229 (admitting evidence of sparks on other occasions from the defendant's locomotives). TINDAL, C. J. "[The evidence was admissible] to ascertain whether or not sparks such as those described *could* be emitted, from the engines used by the company, to the distance represented." MAULE, J.: "The evidence objected to was that other engines used on the defendant's line, of the same description as that which was said to have caused the injury here, had on various other occasions been seen to throw particles of ignited matter to a distance from the line as great or greater than the spot in question. The matter in issue was whether or not the plaintiff's property had been destroyed by fire proceeding from the defendant's engine, and involved in that issue was the question whether or not the fire *could* have been so caused. The evidence was offered for the purpose of showing that it could; and for that purpose it was clearly material and admissible."

1897, SAVAGE, J., in *Dunning* v. *R. Co.*, 91 Me. 87, 39 Atl. 352: "It is admissible as 'tending to prove the possibility, and a consequent probability, that some locomotive caused the fire', — language from *Railway Co.* v. *Richardson*,[1] which has often been cited with approval. To show a possibility is the first logical step. That other engines of the same company, under the same general management, passing over the same track, at the same grade, at about the same time, and surrounded by the same physical conditions, have scattered sparks or dropped coals, so as to cause fires, appeals legitimately to the mind as showing that it was possible for the engine in question to do likewise. The testimony is illustrative of the character of a locomotive, as such, with respect to the emission of sparks or the dropping of coals. If the possibility be proved, other facts and circumstances may lead to a probability, and then to satisfactory proof."

(1) (b) *Similarity of Construction.* But the foregoing inference is based on the assumption that the engine in question is one of a class, and what is true of the class is true of the individual engine upon this assumption only. Not all engines are of the same construction or in the same condition with reference to a capacity to emit sparks, and therefore the instancing of such a capacity in some of them does not evidence such a capacity in another unless they belong to the same class with reference to construction, etc.; in short, unless the principle of substantial similarity of conditions (*ante*, § 442) is fulfilled. Upon this all agree; but the question arises whether the detailed showing of similarity of construction should be required in advance from the plaintiff, or whether the similarity should be assumed in certain cases, leaving it to the defendant, on the principle of Explanation (*ante*, § 449), to show, if he can, that the construction or condition was not similar. It seems wiser, where the other engines belong to the *same owner* or run over the *same line*, to assume this similarity, — first, because it is a probable one, and, next, because it is comparatively difficult for a plaintiff, though comparatively easy for a defendant, to produce the proper evidence. This was long ago pointed out in one of the earlier cases:

§ 455. [1] 91 U. S. 464.

1856, DENIO, C. J., in *Sheldon* v. *R. Co.*, 14 N. Y. 220: "It is argued [that the evidence] . . . did not refer to any particular engine, and that it may be that the one which ran past the premises just before the discovery of the fire was quite a different one [from the others. . . . But] it would be practically quite impossible by any inquiries to find out the offending engine, for a large proportion of those owned by the company are constantly in rapid motion. The business of running the trains on a railroad presupposes a unity of management and a general similarity in the fashion of the engines and the character of the operations. . . . It is presumed to be in the power of the company, which has intimate relations with all its engineers and conductors, to controvert the fact sworn to, if it is untrue, or, if true in a particular instance, that it was not so in respect to the engines which passed the place at a proper time before the occurrence of the fire. The effect of the evidence would only be to shift the 'onus probandi' upon the company. . . . [It was in their power] to show that the special facts applicable directly to the occurrence of the fire were such as to overcome the general inference from the plaintiff's evidence."[2]

Where the other engines belong to *another road*, this assumption cannot be made; but upon a showing of such similarity, it would seem that instances of their operation would be receivable.[3]

(1) (c) *Time of other instances.* The other instances may be either before or after the time in question; though if the time was remote, a preliminary showing that no change had been made in construction would perhaps be proper.

(1) (d) *Nature of Sparks.* The setting of a fire is plainly an effect indicating a capacity to set fire. But the emission of burning coals of any sort is always regarded as sufficient, because it is clear that such a substance is always capable of setting fire.[4]

(2) *Auxiliary Policy.* The principle of auxiliary policy (*ante*, § 443), involving the considerations of unfair surprise and confusion of issues, has never been thought to exclude this sort of evidence;[5] for not only is the evidence of special importance, but it seldom involves any substantial risk of either of those sorts.

(3) *Known engine.* In Pennsylvania, the notion was early promulgated that the evidence of sparks from other engines is not receivable if the engine that passed at the time and must have been the one (if any) to set the fire is *specifically known and identified*.[6] It is not easy to see the precise reason for this limitation. The thought perhaps is that when the specific engine is known, there is no need of resorting to instances of the operation of other engines. But in reality the need may be and usually will be just as great; for it does not follow that, because it was known on this occasion, it was therefore known on the other occasions; and it may well be impossible to obtain instances of this particular engine's operation on other occasions. The principle that the operation of a specific machine may be learned from the

[2] *Accord:* Eng., Mo., Nev., N. Y., Or., U. S., Vt.

[3] Mass.

[4] Except that in Pennsylvania it is required that the evidence show repeated emission of sparks of *unusual size*.

[5] It was expressly repudiated in the following cases: 1875, Henry *v.* R. Co., 50 Cal. 176, 184 (at least for the case in hand); 1874, Hoyt *v.* Jeffers, 30 Mich. 181, 190.

[6] The earlier cases are cited *post*, § 456.

operations of its class is just as valid in the one case as in the other. A doctrine that proper evidence is always to be rejected because it is sometimes possible to get other and perhaps better evidence is certainly a novelty. This limitation about identified engines, which began as a local aberration, has threatened to spread into other jurisdictions, through their apparent ignorance of its purely local character.[7]

Subject to the occasional prevalence of the last limitation, this class of evidence for this purpose is accepted as admissible in virtually all jurisdictions.[8]

[7] *E.g.* Ill., Mo., N. C., S. C., U. S. C. C. A., Wis. (*post*, § 456).

[8] ENGLAND: 1846, Piggot *v.* R. Co., 3 C. B. 229 (the fact of sparks on other occasions from the defendant's engines was offered; it was objected that "it was not competent to the plaintiff in this case to prove the emission of sparks or ignited matter from the other engines, passing the spot on other occasions, without showing them to have been under the care of the same driver, driven at the same speed, with the same number of carriages and passengers, and of the same construction as the engine in use at the time of the accident"; admitted in spite of this objection).

UNITED STATES: *Fed.* 1875, Grand Trunk R. Co. *v* Richardson, 91 U. S. 454, 458, 470 (sparks by the defendant's engines, during the same summer, admitted to show that an engine of the defendant caused the fire; similarity of construction, etc., need not first be shown); 1892, Chicago S. P. M. & O. R. Co. *v.* Gilbert, 3 C. C. A. 264, 52 Fed. 711, 10 U. S. App. 375, 378 (emission of fire for several weeks previous in the same vicinity, admitted); 1893, Gulf C. & S. F. R. Co. *v.* Johnson, 4 C. C. A. 447, 54 Fed. 474, 10 U. S. App. 629, 631 (similar); 1902, Lesser Cotton Co. *v.* R. Co. 52 C. C. A. 95, 114 Fed. 133 (the engine being identified, and its spark-arrester being produced, the fact of emission of sparks by other engines of the defendant was held inadmissible, unless it appeared that they were constructed and operated similarly; the opinion does not clearly comprehend the principle); 1902, Texas & P. R. Co. *v.* Watson, 190 U. S. 287, 23 Sup. 681 (Grand T. R. Co. *v.* Richardson followed); 1914, Northern Pacific R. Co. *v.* Mentzer, 9th C. C. A., 214 Fed. 10 (fires set previously by other engines of the defendant admitted, no particular engine being designated in the complaint);
Alabama: 1901, Alabama G. S. R. Co. *v.* Johnston, 128 Ala. 283, 29 So. 771 (habitual emission of sparks by defendant's engines, admitted; the qualification about identified engines, not decided); 1906, Birmingham R. L. & P. Co. *v.* Martin, 148 Ala. 8, 42 So. 618 (prior emissions by the defendant's engines, admitted); 1921, Payne *v.* Hargrove, 206 Ala. 69, 89 So. 167 (spark-emissions from other engines of like equipment, admissible);
Arkansas: 1894, Railway Co. *v.* Jones, 59 Ark. 105, 111, 26 S. W. 595 (other fires by the same railroad's engines, perhaps admissible);
California: 1885, Butcher *v.* R. Co., 67 Cal. 518, 8 Pac. 174 (fires from other engines of the defendant, before and after, admissible "to show the cause of the injury"; two judges dissenting);
Delaware: 1921, Director-General of R. R. *v.* Johnston, — Del. —, 114 Atl. 759 (other fires by other engines, not admissible to show probable emission when the engine passing at the time is identified);
Georgia: 1897, Brown *v.* Benson, 101 Ga. 753, 29 S. E. (fires set "at various times before the fire occurred", by engines of the defendant, admissible; if remote in time, the conditions of repair must be shown the same);
Idaho: 1908, Osburn *v.* Oregon R. & N. Co., 15 Ida. 478, 98 Pac. 627 (other fires admitted; whether Pennsylvania rule applies, not decided); 1912, Fodey *v.* Northern Pacific R. Co., 21 Ida. 713, 123 Pac. 835 (Osburn *v.* R. Co., followed; admissible for other engines, even where the particular engine is identified);
Illinois: 1866, Illinois Cent. R. Co. *v.* McClelland, 42 Ill. 355 (sparks and fires by the defendant's engines, admitted to show that sparks could be thrown one hundred feet, all the engines being similar);
Indian Territory: 1903, St. Louis I. M. & S. R. Co. *v.* Lawrence, 4 Ind. T. 611, 76 S. W. 254 (admissible, where the engine in question is not identified);
Iowa: 1882, Babcock *v.* R. Co., 62 Ia. 593, 597, 13 N. W. 740, 17 N. W. 909 (another fire set by the defendant's engine in the right of way, not admitted to show that this one also caught there); 1884, Bell *v.* R. Co., 64 Ia. 321, 325 (other fires set by the defendant's engines in that region, excluded); 1919, International Harvester Co. *v.* Chicago M. & St. P. R. Co., 186 Ia. 86, 172 N. W. 471 (obscure);
Kansas: 1904, Sprague *v.* Atchison, T. & S. F. R. Co., 70 Kan. 359, 78 Pac. 828 (to show the origin of the fire, where it is disputed, emissions by other engines of the defendant are receivable, whether the engine is identified or not); 1921, Otey *v.* Midland Valley R. Co., 108 Kan. 755, 197 Pac. 203 (other fires set by same locomotive, admitted to evidence the cause);

Kentucky: 1883, Kentucky C. R. Co. *v.* Barrow, 89 Ky. 643, 20 S. W. 165 ("in the absence of direct evidence as to the condition of that particular locomotive", former fires by other engines were held admissible); 1900, Louisville & N. R. Co. *v.* Samuels, — Ky. —, 57 S. W. 235 (R. Co. *v.* Barrow approved); 1909, Illinois Central R. Co. *v.* Hicklin, 131 Ky. 624, 115 S. W. 752 ("The admissibility of such evidence is no longer an open question"); 1910, Cincinnati N. O. & T. P. R. Co. *v.* Sadieville M. Co., 137 Ky. 568, 126 S. W. 118 (Barrow Case approved and followed); 1912, Louisville & N. R. Co. *v.* Guttman, 148 Ky. 235, 146 S. W. 731 (like Ill. C. R. Co. *v.* Hicklin); 1916, Chesapeake & O. R. Co. *v.* Meek, 169 Ky. 775, 185 S. W. 160 (subsequent emissions by the same engine, admissible); 1916, Louisville & N. R. Co. *v.* Brewer, 170 Ky. 505, 186 S. W. 166 (emission of sparks to greater distances, admitted);

Maine: 1893, Thatcher *v.* R. Co., 85 Me. 502, 509, 27 Atl. 519 (fires set by the defendant's other locomotives about the same time and in the same vicinity, admitted); 1897, Dunning *v.* R. Co., 91 Me. 87, 39 Atl. 352 (other fires by other locomotives about the same time and in the same vicinity, admitted; the Pennsylvania rule about identity of engine rejected; see quotation *supra*); 1917, Libbey *v.* Maine Central R. Co., 116 Me. 231, 100 Atl. 1025 (fires set by other engines, admitted, to show tendency in the class of engines and thus to evidence causation, even though negligence was by statute not in issue);

Maryland: 1873, Annapolis & E. R. Co. *v.* Gantt, 39 Md. 115, 134 (sparks and fires by other engines of the defendant, shortly before, admitted to show the capacity to cause the fire);

Massachusetts: 1881, Ross *v.* R. Co., 5 All. 87 (sparks and fires by engines of a similar sort on other roads, admitted to show "the physical possibility that fire could be so communicated", which the defendant had denied); 1900, McGinn *v.* Platt, 177 Mass. 125, 58 N. E. 175 (emission by other engines on the same road in the vicinity, received); 1901, Bowen *v.* R. Co., 179 Mass. 524, 61 N. E. 141 (emission of sparks by engines similarly equipped, received);

Mississippi: 1903, Alabama & V. R. Co. *v.* Ins. Co., 82 Miss. 770, 35 So. 304 (emission of sparks by other engines, just before and after, admitted);

Missouri: 1893, Campbell *v.* R. Co., 121 Mo. 340, 349, 25 S. W. 396 (fires by other engines of the defendant, before and after, at different places on the line, admissible); 1897, Matthew *v.* R. Co., 142 Mo. 645, 44 S. W. 802 (sparks from another engine of the defendant, admitted; no previous showing of similarity of kind or condition required);

Nevada: 1874, Longabaugh *v.* R. Co., 9 Nev. 271, 284, 288 (sparks and fires from the defendant's engines, within a few weeks, admissible, to show that an engine of the defendant caused the fire; similarity of construction need not first be shown);

New Hampshire: 1860, Boyce *v.* R. Co., 42 N. H. 97, 100 (sparks and fires by other engines, admitted, to show capacity for setting fire, provided they are all of similar construction, repair, and management); 1862, Boyce *v.* R. Co., 43 N. H. 627 (similar evidence admissible; but the above proviso held to be a point undecided); 1884, Smith *v.* R. Co., 63 N. H. 25, 29 (fires by the defendant's engines, all of similar construction, admitted "to show that this fire could have been and probably was set in the same manner"); 1903, Gerrish *v.* Whitfield, 72 N. H. 222, 55 Atl. 551, *semble* (that "such a mill as W.'s" had thrown live sparks as far as in the present case, admissible); 1916, Bailey Lumber Co. *v.* Boston & M. R. Co., 78 N. H. 94, 97 Atl. 555 (sparks from other similar engines, admitted; careful opinion by Walker, J.);

New York: 1856, Sheldon *v.* R. Co., 14 N. Y. 218, 220 (sparks from other engines of the defendant on the same track, admitted, "after" refuting every other probable cause of the fire, to show that the engines "were so managed as to be likely to set on fire objects not more remote than the property burned"; similarity of engine-construction need not be first shown; see quotation *supra*); 1862, Hinds *v.* Barton, 25 N. Y. 544, 546, *semble* (approving the preceding case); 1866, Field *v.* R. Co., 32 N. Y. 338, 346, 348 (live coals dropped at other times from the fire-pan; foregoing cases approved);

North Carolina: 1920, Matthis *v.* Johnson, 180 N. C. 130, 104 S. E. 366 (sparks from same engine on prior occasions, admitted);

Oklahoma: 1910, St. Louis & S. F. R. Co. *v.* Shannon, 25 Okl. 754, 108 Pac. 401 (fires set by other engines of the defendant, admitted); 1922, Midland Valley R. Co. *v.* Taylor, — Okl. —, 204 Pac. 1102 (emission of sparks by other engines of identical construction, admitted);

Oregon: 1890, Koontz *v.* O. R. & N. Co., 20 Or. 3, 23 Pac. 820 (sparks and fire by other engines of the defendant, before and after, admissible, without showing similarity of make); 1907, Hawley *v.* Sumpter R. Co., 49 Or. 509, 90 Pac. 1106 (Grand Trunk R. Co. *v.* Richardson followed; but the mere occurrence of fires, without any connection shown with defendant's engines, is not enough);

Pennsylvania: 1875, Pennsylvania R. Co. *v.* Stranahan, 79 Pa. 405 (the emission of sparks in unusual quantities by other engines of the defendant, admitted to show the cause of the fire); 1891, Henderson *v.* R. Co., 144 Pa. 461, 487, 22 Atl. 851 (repeated sparks and fires about the same time, set by other engines of the defendant, admitted to show the cause of the fire, provided the engine is not identifiable; otherwise, the evidence of other fires and sparks must be restricted to it); 1909, American Ice Co. *v.* Pennsylvania R. Co., 221

§ 456. **Same: (2) Defective Construction, as an element of Negligence, evidenced by other Spark-emissions.** Here, as already noted (§ 452), the inference is in its nature broadly the same as in the preceding cases, *i.e.* from the observed operations of the engines to a construction or condition which, under the law of Torts and aided by other evidence, may be an element of negligence. But though the process of inference is the same, the present purpose is distinct from and additional to the preceding; and either one may be available without the other, — for example, where a statute makes the setting of fire by a locomotive negligence 'per se', in which case only the preceding use is required; or where the setting of the fire is conceded, in which case the present use alone is available. The principle is expounded in the following passages:

1858, BRAMWELL, B., in *Vaughan* v. *R. Co.*, 3 H. & N. 743, 745, 750 (fires by the defendant's engines at other times were admitted without objection): "It was admitted that, with these precautions, the locomotive was the cause of setting fire to the defendant's banks, not daily but occasionally; so that . . . its use was dangerous, and what had happened on this particular occasion — that is, setting fire to the defendant's grass — was not a particular accident, but one of the habitual incidents to the use of the locomotive."

1891, CLARK, J., in *Henderson* v. *R. Co.*, 144 Pa. 488: "If many of the company's engines, at or about the time, are without sufficient spark-arresters, and frequent fires are kindled in consequence, it may well be inferred, in view of the effectual character of mechanical inventions of this kind, not only that the fire in question originated from this cause, but that it occurred from the habitual negligence of the company in failing to provide sufficient spark-arresters."

1869, BARRETT, J., in *Clearelands* v. *R. Co.*, 42 Vt. 457: "The argument is this: The evidence tended to show, and the fact was not denied, that the fire was set from an engine of the defendants: . . . other evidence tended to show that about the time, and on the day of the fire, and before it occurred, the defendants were running engines by the place in question that did scatter fire to such an extent that fires were set by it. The inference is that, of the defendants' engines, the one by which the fire was set was one that scattered fire. But it is already in evidence that an engine that will do that to such an extent is not

Pa. 439, 73 Atl. 873 (emission of sparks at another time is not alone sufficient evidence of cause in the absence of emission at or near the time); 1916, Knickerbocker Ice Co. v. Pennsylvania R. Co., 253 Pa. 54, 97 Atl. 1051 (emissions of sparks from another locomotive, admitted, the causing engine not being identified; none of the above cases cited);
Rhode Island: 1871, Smith v. R. Co., 10 R. I. 24, 27 (other fires set by the defendant's engines, admissible "to show the possibility of communicating fire by sparks from a locomotive");
Tennessee: 1872, Burke v. Louisville & N. R. Co., 7 Heisk. 451, 456, 464 (emissions of sparks by other engines of defendant, admitted to show "the possibility of the building being fired in the manner alleged"); 1882, Nashville & C. R. Co. v. Tyne, 7 Am. & Eng. R. R. Cases, 515 (foregoing case approved); 1904, Louisville & N. R. Co. v. Fort, 112 Tenn. 432, 80 S. W. 429 (foregoing cases approved);
Vermont: 1894, Hoskison v. R. Co., 66 Vt. 618, 30 Atl. 24 (sparks and fires by other engines of the defendant, admitted to show the capacity of the engines to set fire; the particular engine not being identifiable; similarity of construction need not first be shown); 1909, Ide v. Boston & Maine R., 83 Vt. 66, 74 Atl. 401 (remoteness of time of other instances is in trial Court's discretion);
Virginia: 1897, Kimball v. Borden, 95 Va. 203, 28 S. E. 207 (sparks by other engines of the defendant near the time, admitted);
Washington: 1902, Abrams v. R. Co., 27 Wash. 507, 68 Pac. 78 (other fires, admitted); 1903, Noland v. R. Co., 31 Wash. 430, 71 Pac. 1098 (admissible, if the specific engine is not identified);
Wisconsin: 1883, Gibbons v. R. Co., 58 Wis. 335, 17 N. W. 132 (fires set by the defendant's engines at other times, not admissible to show that the engine of the defendant's caused the fire, the engine being identified; where not identified, *semble*, the same result).

of proper construction and suitable repair. The reasoning is direct to the condition of the defendants' engine by which the fire was set."

The general nature of the inference being the same as in the preceding cases, the incidental questions that arise are analogous.

(1) It might be supposed, since here the purpose is to show a tendency and not a mere capacity to emit sparks, that a *stronger quality of evidence* would have been required. This seems not to have been done anywhere;[1] and for these presumable reasons, namely, that even a capacity to emit sparks may in a given case become an element of negligence, and that in any case the distinction (*ante*, § 446) between a capacity and a tendency (possibility and probability) is impracticable with the object of requiring a higher quality for evidence of the latter. These reasons justify the failure to make such a distinction.

(2) The other instances may be received from the *same engine* or from *other engines* of the same line; discrimination between the two seems rarely to have been attempted, — a just result, as already noted (*ante*, § 455). But any Court that might require similarity of construction to be shown in advance[2] would apply the requirement equally in the preceding class of cases and the present.

(3) The *time* of the other instances may be either before or after the time in question; if the time was remote, a preliminary showing that no change of condition had occurred might be required.

(4) Where the *specific engine* is *known*, the evidence as to other engines is excluded in a few jurisdictions;[3] the impropriety of this limitation has been already considered (*ante*, § 455).

The *state of the law* in the various jurisdictions is not as harmonious as upon the foregoing class of evidence.[4] But in no jurisdiction, apparently, is the evidence excluded absolutely; in a few only it is excluded conditionally.

§ 456. [1] Except that Pa. requires the repeated setting of fires by sparks of unusual size; but this is required equally for the preceding case; see Ia. also.

[2] See note 2 in § 455.

[3] Ga., Ill., Mich., N. C., Pa., Wis., and perhaps others.

[4] The phrase used in some of the ensuing precedents, that the evidence indicates "negligent habit" is hardly correct; the evidence indicates defective construction of the engine, which may be equivalent to negligence; but that it can be used to indicate a habit or character of the defendant's agents is perhaps doubtful, for the learned Courts using this language would hardly mean to involve the principles of the character-rule (*ante*, § 199). The precedents are as follows:

ENGLAND: 1841, Aldridge *v.* R. Co., 3 M. & Gr. 515, 522 (Tindal, C. J.: "If the plaintiff had proved that the engines had frequently set fire to stacks, that would have shown negligence"; but whether by indicating defective condition of the engine, or merely by tending to show a notice of such conditions, does not appear); 1858, Vaughan *v.* R. Co., 3 H. & N. 743, 745, 750 (fires by the defendant's engines at other times, admitted to show the dangerousness of the construction; see quotation *supra;* the ruling on appeal, in 5 H. & N. 679, 688, probably did not mean to deny this);

CANADA: *N. Br.* 1883, Robinson *v.* N. B. R. Co., 23 N. Br. 323, 332 (that fires frequently occurred along the right of way after the passing of trains, admitted); *Ont.* 1883, Canada C. R. Co. *v.* McLaren, 8 Ont. App. 564, 571 (prior emission of sparks by defendant's engine, admitted to show defective construction, by two judges); 1900, Peacock *v.* Cooper, 27 Ont. App. 128 (prior and subsequent emission of sparks by a steamboat, held admissible to show defective construction; but here the evidence was not sufficient under the rule).

UNITED STATES: *Federal:* 1875, Grand T. R. Co. *v.* Richardson, 91 U. S. 454, 458, 470 (sparks by the defendant's engines, during the same summer, admitted to show "a negligent

habit of the officers and agents"; similarity of construction, etc., need not first be shown); 1892, Northern P. R. Co. *v.* Lewis, 2 C. C. A. 446, 51 Fed. 658, 7 U. S. App. 254, 272 (fires by other locomotives, admitted); 1902, Texas & P. R. Co. *v.* Watson, 190 U. S. 287, 23 Sup. 681 (Grand T. R. Co. *v.* Richardson followed);
Alabama: 1896, Louisville & N. R. Co. *v.* Miller, 109 Ala. 500, 19 So. 989 (the mere fact of adjacent fires long before, excluded); 1896, Louisville & N. R. Co. *v.* Malone, 109 Ala. 509, 20 So. 33 (that other fires had been set in the neighborhood by the defendant's engines, not admissible if "similar conditions did not exist");
Arkansas: 1894, Railway Co. *v.* Jones, 59 Ark. 105, 111, 26 S. W. 595 (other fires, as evidence of defective condition, must have been set by the same engine);
California: 1875, Henry *v.* R. Co., 50 Cal. 176, 183 (other fires by the same engine, admitted to show that its construction was defective); 1885, Butcher *v.* R. Co., 67 Cal. 518, 8 Pac. 174 (fires from other engines of the defendant, before and after, admissible to show "negligence in the construction or working" of the engines; two judges dissenting);
Florida: 1891, Jacksonville T. & K. W. R. Co. *v.* Peninsular L. T. & M. Co., 27 Fla. 1, 9 So. 661 ("former fires by the same engine", but not by others, admissible to show "defective condition or construction or improper management");
Georgia: 1892, East Tennessee V. & G. R. Co. *v.* Hesters, 90 Ga. 11, 15 S. E. 828 (in rebuttal of defendant's evidence of the proper condition of engines, the emission of sparks by other engines is receivable); 1900, Akins *v.* R. & B. Co., 111 Ga. 815, 35 S. E. 67 (emission by a locomotive not run on the day in issue, excluded); 1901, Central of Ga. R. Co. *v.* Trammell, 114 Ga. 312, 40 S. E. 259 (operation of other engines, not to be considered, if the engine setting the fire was identified);
Idaho: 1921, Allen-Wright Furniture Co. *v.* Hines, 34 Ida. 90, 200 Pac. 889 (fires set by other engines, admissible, even though the engine was identified, if equipment was the same);
Illinois: 1866, Illinois Cent. R. Co. *v.* McClelland, 42 Ill. 355, *semble* (fires by the defendant's engines, admitted, perhaps to show negligent construction); 1894, Lake Erie & W. R. Co. *v.* Middlecoff, 150 Ill. 27, 39, 37 N. E. 660 (setting of other fires by the same engine on the same day, admitted, to show negligence); 1898, First Nat'l Bank of Hoopeston *v.* R. Co., 174 Ill. 36, 50 N. E. 1023 (other fires by other engines of the defendant, not admissible, where the engine causing the fire is identified; erroneously assuming the Pa. and Wis. rule to represent the weight of authority); 1906, Illinois C. R. Co. *v.* Bailey, 222 Ill. 480, 78 N. E. 833 (rule of First Nat'l Bank *v.* R. Co. followed, but citing no authority);
Indiana: 1872, Gagg *v.* Vetter, 41 Ind. 228, 257 (fire attributed to sparks from the defendant's brewery-chimney; evidence that sparks had been seen coming from the chimney at other times, admitted to show that it was not well-constructed); 1900, Pittsburg C. C. & St. L. R. Co. *v.* Indiana H. Co., 154 Ind. 322, 56 N. E. 766 (setting of other fires, admitted to show negligence in the condition of the roadway); 1906, Cleveland C. C. & St. Louis R. Co. *v.* Loos, 38 Ind. App. 1, 77 N. E. 948 (where the engine is identified, fires by other engines are excluded);
Iowa: 1870, Gaudy *v.* R. Co., 30 Ia. 420 ("the repeated or unusual dropping of coals or excessive and continued emission of sparks, etc.," admissible to show "the fact of negligence"); 1882, Slossen *v.* R. Co., 60 Ia. 215, 14 N. W. 244 (other fires set on the same trip of the same engine, admitted to show that it "was not properly constructed or was out of repair"); 1886, Lanning *v.* R. Co., 68 Ia. 502, 505, 27 N. W. 478 (same, admitted as evidence of "defects in its construction, or that it was not in proper repair, or was negligently handled");
Kansas: 1873, St. Joseph & D. C. R. Co. *v.* Chase, 11 Kan. 47, 49, 54 (fires set by the defendant's engines within a few weeks, admitted to show "either that they were not properly constructed or that they were out of repair", the conditions in all the engines being similar); 1876, Atchison T. & F. R. Co. *v.* Campbell, 16 Kan. 200, 204 (previous fires by the same engine on the same day, with absence of fires from other engines, admitted to show that the former "was badly constructed and managed"); 1897, Atchison T. & S. F. R. Co. *v.* Osborn, 58 Kan. 768, 51 Pac. 286 (fires by other engines, excluded; no authorities cited); 1904, Sprague *v.* Atchison, T. & S. F. R. Co., 70 Kan. 359, 78 Pac. 828 (where the engine is identified, emissions by other engines of the defendant are not admissible to show negligent construction or operation; the Court cites fourteen decisions from other jurisdictions, but pays no attention to the last two in its own records; the Court's logic is also fallacious);
Kentucky: 1897, Taylor *v.* R. Co., — Ky. —, 41 S. W. 551 (previous emission of sparks from the same engine, admitted to show negligence); 1907, Chesapeake & O. R. Co. *v.* Richardson, — Ky. —, 99 S. W. 642 (spark-emissions by other engines under the same management and similarly equipped, admitted);
Maryland: 1873, Annapolis & E. R. Co. *v.* Gantt, 39 Md. 115, 134 (sparks and fires by other engines of the defendant, shortly before, admissible to show negligence "in the construction and management of its engines", though the particular engine was identified; distinguishing Baltimore & S. R. Co. *v.* Woodruff, 4 Md. 242, 254, 1854, where weaker evidence of the sort was excluded);
Michigan: 1890, Ireland *v.* R. Co., 79 Mich. 163, 165, 44 N. W. 426 (fire by another engine of the company, not admissible to show defective construction, because the engine was

identified; but other fires by the same engine are admissible); 1916, Stoddard *v.* Grand Trunk W. R. Co., 191 Mich. 507, 158 N. W. 7; 1918, Budd *v.* Ann Arbor R. Co., 200 Mich. 250, 166 N. W. 927 (omission of sparks by other engines, admitted to show physical possibility of sparks being carried beyond 450 feet);

Minnesota: 1885, Davidson *v.* R. Co., 34 Minn. 51, 24 N. W. 324 (sparks by the defendant's engines, "at or about the date" in question, admitted to show a "negligent habit"; but treated as "a matter not altogether free from doubt"; here the exceptions were the plaintiff's, and were based on the limit of time set, and the question of admissibility was thus not passed upon);

Mississippi: 1893, Tribette *v.* R. Co., 71 Miss. 212, 233, 13 So. 899 (emission of sparks by other engines of the defendant, excluded); 1903, Alabama & V. R. Co. *v.* Ins. Co., 82 Miss. 770, 35 So. 304 (fires by other engines, admitted, to show a "negligent habit" of the defendant);

Missouri: 1870, Fitch *v.* R. Co., 45 Mo. 322, 324, 327 (frequent fires by one of the defendant's engines, admitted to show defective construction); 1893, Campbell *v.* R. Co., 121 Mo. 340, 350, 25 S. W. 936 (fires by other engines inadmissible, where the engine is identified);

Nevada: 1874, Longabaugh *v.* R. Co., 9 Nev. 271, 284, 289 (fires and sparks by the defendant's engines, a few weeks before and after, admitted to show negligent management and construction);

New York: 1866, Field *v.* R. Co., 32 N. Y. 338, 346, 349 (after evidence that it is feasible to construct and manage engines so as to avoid scattering fires, the scattering of fire by other engines on former occasions is evidential that such engines are "out of order or improperly constructed", and thus are negligently managed); 1872, Webb *v.* R. Co., 49 N. Y. 420, 422, 424 (the dropping of live coals by the same engine for a month or two before, in the neighborhood, admitted to show defective construction); 1888, Collins *v.* R. Co., 109 N. Y. 243, 249, 16 N. E. 50 (the emission of large sparks by the same engine six months later, admitted only after a showing that its permanent mode of construction allowed such emissions or that its condition of repair was the same as to the time in question; no authority cited); 1894, Flinn *v.* R. Co., 142 N. Y. 11, 19, 36 N. E. 1046 (constant emission of sparks by the defendant's engines, considered, but held not to amount to negligence, but to show that upon the up-grade in question such emission was inevitable; the latter proposition seems to give the locomotive-owner the right to burn houses 'ad lib.');

North Carolina: 1900, Hygienic P. I. M. Co. *v.* R. Co., 126 N. C. 797, 36 S. E. 279 (the Henderson case, in Pennsylvania, followed in the limitation as to identified engines; Douglas, J., diss.); 1906, Knott *v.* Cape Fear & N. R. Co. 142 N. C. 238, 98 S. E. 150 (former emissions by the same engine, admitted); 1908, Whitehurst *v.* Atlantic C. L. R. Co., 146 N. C. 588, 60 S. E. 648 (other fire set by the same train the week before, admitted); 1918, Perry *v.* Branning Mfg. Co., 176 N. C. 68, 97 S. E. 162 (prior emission of sparks by the same engine, admitted);

Oregon: 1890, Koontz *v.* O. R. & N. Co., 20 Or. 3, 23 Pac. 820, *semble* (sparks and fires by other engines of the defendant, before and after, admissible to show "habitual negligence"); 1904, Anderson *v.* Oregon R. Co., 45 Or. 211, 77 Pac. 119 (Koontz *v.* R. Co. cited);

Pennsylvania: This inexcusable tangle of rulings was supposed to be unravelled by the Henderson case: 1848, R. Co. *v.* Yeiser, 8 Pa. 366, 371, 376 (the Court instructed that the fact of other fires by the defendant's engines was "of itself evidence of negligence"; this was disapproved on appeal; "It may be very true that there may be some difficulty in the proof, . . . but there is no reason that every principle of law should be uprooted by requiring no proof of negligence whatever"; thus treating the question as if it were whether the other fires amounted to negligence 'per se', and not whether they were merely evidence of negligence); 1854, Huyett *v.* R. Co., 23 Pa. 374 (distinctly ruling that the setting of other fires by the defendant's engines was some evidence of negligence, and thus removing the obscurity of the preceding case); 1875, Erie R. Co. *v.* Decker, 78 Pa. 293 (where the engine causing the fire is identified, the defects of other engines of the defendant are irrelevant); 1875, Pennsylvania Co. *v.* Watson, 81 Pa. 293, 296 (sparks and fires by the same engine, admitted as "evidence from which the jury may infer an imperfect and inferior spark-catcher and from this fact negligence"); 1879, Lehigh V. R. Co. *v.* McKeen, 90 Pa. 122, 123, 130 (sparks of unusual size, and fires, by the same engine at other times, admitted as evidence of negligence in the apparatus); 1880, Jennings *v.* R. Co., 93 Pa. 337, 340 ("evidence to prove defects in other engines of the company was irrelevant", citing R. Co. *v.* Yerger, 73 Pa. 121, which does not discuss that question at all; here the evidence was of unusually large sparks; also like the Latshaw case, *infra*); Philadephia & R. R. Co. *v.* Schultz, 93 Pa. 341 (like the McKeen case, *supra*); Reading & C. R. Co. *v.* Latshaw, 93 Pa. 449 ("the bare fact" of fires after the passing of the engine "was neither negligence, nor evidence from which a jury would be justified in finding negligence"); 1881, Albert *v.* R. Co., 98 Pa. 316, 321 (like the Decker case, *supra*, excluding sparks by other engines); 1886, Gowen *v.* Glaser, 3 Centr. Rep. 108 (sparks and fires by other engines, before and after, admitted (1) "to show that they have many engines with insufficient spark-arresters", and thus (2) "to lay the ground for an inference that it was one of these engines with insufficient spark-arresters which did this"); 1888, Pennsylvania R. Co. *v.* Page, 21 W. N. 52 (emis-

B. Instances of Corporal Effects, as Evidence

§ 457. **Corporal Effects and Symptoms; Miscellaneous Instances (Proximity, Calibre, or Direction of a Weapon inflicting a Wound; Operation of a Drug, Liquor, Poison, Food, or Disease, on Human Beings or on Animals).** So far as legal principle is concerned, no different one is here involved from that illustrated in the preceding general group of cases. But it is convenient to consider together the precedents in which the inference is made from the effects produced on the *body, human or animal,* to the tendency of a given thing.

Thus, the capacity or tendency of a *weapon* (gun or pistol) may be indicated

sion of sparks by engines just before the fire, no evidence of negligence); 1891, Henderson *v.* R. Co., 144 Pa. 461, 476 (*a:* the mere fact of fire caused by the defendant's engine is no evidence of negligence, approving the Jennings and Latshaw rulings; the feature of this doctrine is that this Court is constantly confusing three distinct things, namely, (1) evidence admissible, (2) evidence sufficient to go to the jury, (3) facts amounting to negligence 'per se' and thus as matter of law taking the case from the jury; *b:* the emission of sparks of unusual size and the setting of numerous fires by the defendant's engines may be evidence for the jury; *c:* where the engine is identifiable, such evidence of the defective action of other engines is irrelevant; otherwise it is admissible, but should be confined to a reasonable time before and after; this case is intended to clear up the conflict of rulings and settle the law); 1897, Thomas *v.* R. Co., 182 Pa. 538, 38 Atl. 413 (other fires by the same engine on the same day, near by, admitted); 1905, Shelly *v.* Phila. & R. R. Co., 211 Pa. 160, 60 Atl. 581 (Henderson Case approved); 1909, Byers *v.* Baltimore & O. R. Co., 222 Pa. 547, 72 Atl. 245 (Henderson *v.* R. Co. followed); 1911, John Hancock Ice Co. *v.* Perkiomen R. Co., 231 Pa. 117, 80 Atl. 63 (other emissions of sparks, admitted where the engine causing the fire was identified);

Tennessee: 1903, Louisville & N. R. Co. *v.* Short, 110 Tenn. 713, 77 S. W. 936 (fires set nine or ten months before, admitted, but not fires set when the engines were equipped differently; the rule as to identified engines, not passed upon); 1904, Louisville & N. R. Co. *v.* Fort, 112 Tenn. 432, 80 S. W. 429 (other emissions of sparks from other locomotives of the defendant, admitted, "to show habitual negligence"; Pennsylvania rule of identification repudiated);

Utah: 1917, Gleason *v.* San Pedro L. A. & S. L. R. Co., 49 Utah 405, 164 Pac. 484 (emission of sparks by other engines, admitted, *semble* regardless of identifying the engine);

Vermont: 1869, Cleavelands *v.* R. Co., 42 Vt. 449, 456 (sparks and fires by other engines of the defendant, in the same season, admitted to show defective condition);

Virginia: 1881, Brighthope R. Co. *v.* Rogers, 76 Va. 443, 448 (sparks and fires of the same engine, admitted to show "negligence on the part of the defendant's employees, or, it may be defects" in the engine); 1896, New York P. & N. R. Co. *v.* Thomas, 92 Va. 606, 24 S. E. 264 (fires by the defendant's engines, before and after the time in question, admitted to show "negligence on the part of the defendants' employees, or defects in the defendant's engine, and also for the purpose of showing a negligent habit" of the defendant's agents); 1897, Kimball *v.* Borden, 95 Va. 203, 28 S. E. 207 (sparks by other engines of the defendant near the time, admitted to show "a negligent habit"); 1904, Norfolk & W. R. Co. *v.* Briggs, 103 Va. 105, 48 S. E. 521 (fires set by other unidentified engines, not shown to be the same construction, excluded);

Wisconsin: 1882, Brusberg *v.* R. Co., 55 Wis. 106, 12 N. W. 416 (fires on the same trip of the same engine, close by, admitted to show defective construction or management); 1883, Gibbons *v.* R. Co., 58 Wis. 335, 17 N. W. 132 (fires set by the defendant's engines at other times; "such evidence might have weight in showing the negligence of the company", where the cause is shown to have been some engine of the defendant, but uni..entified); 1888, Allard *v.* R. Co., 73 Wis. 165, 40 N. W. 685 (the engine being identified, and its construction as to a screen being shown similar to the others of the defendant, fires set by the defendant's engines generally were not admitted to show defective construction); 1895, Menomenie R. S. & D. Co. *v.* R. Co., 91 Wis. 447, 65 N. W. 176 (other fires by the same engine, identified, during preceding months, excluded, because the engine had been repaired in the meantime; other fires by it after the time in question, absolutely excluded; other fires by it during the same month, excluded, because not shown to be from sparks of unusual size or thrown to unusual distance, and therefore not indicating any want of repair or improper management).

by the appearance of other wounds, with reference to size of bullet, proximity of weapon, nature of powder, or direction of the shot; [1] the specific tendency of a *drug, poison, disease, food,* or other substance, by the corporal symptoms or effects in other like situations, either on animals or on human beings; [2]

§ 457. [1] *Federal:* 1896, Ball *v.* U. S. 163 U. S. 662, 16 Sup. 1192 (a refusal to allow an experimental firing with the defendant's gun, held within the discretion of the trial Court): *Alabama:* 1896, Evans *v.* State, 109 Ala. 11, 19 So. 535 (experiments with a pistol to ascertain the relative size of the hole and the ball, excluded; no reason given); *Florida:* 1906, Hisler *v.* State, 52 Fla. 30, 42 So. 692 (target-experiments, to show the scattering of shot, admitted); *Georgia:* 1876, Wynne *v.* State, 56 Ga. 113, 118 (murder; experiments in firing the pistol found on the defendant, not allowed, because they might change the condition of the pistol); *Iowa:* 1897, State *v.* Cater, 100 Ia. 501, 69 N. W. 880 (to show the marks of shooting near at hand, experiments with a revolver of the same calibre were admitted); 1906, State *v.* Nowells, 135 Ia. 53, 109 N. W. 1016 (experiments as to powder-marks from gunshots, admitted, in discretion); 1910, Scott *v.* Homesteaders, 149 Ia. 541, 129 N. W. § 310 (experiments with pistol-shots on hog-flesh admitted); *Kansas:* 1896, State *v.* Asbell, 57 Kan. 398, 46 Pac. 770 (the effect of a pistol shot fired at human hair from a distance; experiments admitted); *Maryland:* 1919, Newkirk *v.* State, 134 Md. 310, 106 Atl. 694 (murder; experiments to show the distance of a gun-muzzle from the body of the victim, admitted); *Massachusetts:* 1905, Com. *v.* Tucker, 189 Mass. 457, 76 N. E. 127 (experiments as to cutting a body, excluded); *Minnesota:* 1897, Beckett *v.* Aid Assoc., 67 Minn. 298, 69 N. W. 923 (experiments made with a revolver and similar cartridges, admitted to show the effects of shooting near at hand); *Mississippi:* 1844, Vaughan *v.* State, 3 Sm. & M. 555 (evidence considered of experiments to show that the discharge of a gun at the same distance and with the same kind of shot was incapable of taking life); 880, Dillard *v.* State, 58 Miss. 386 (to learn whether a wound could have been inflicted from a certain position, experiments were received); *Nebraska:* 1904, Lillie *v.* State, 72 Nebr. 228, 100 N. W. 316 (experiments to show the distance of a pistol, as shown by powder-marks, admitted); *Oklahoma:* 1920, Irby *v.* State, —Okl. Cr. —, 192 Pac. 429 (murder; experiments to show distance of weapon from pistol wounds, admitted); 1921, Irby *v.* State, —Okl. Cr.—, 197 Pac. 526 (manslaughter; experiments as to marks made by powder burns, held admissible in the trial Court's discretion); *Oregon:* 1883, State *v.* Justus, 11 Or. 182, 8 Pac. 337 (to show that the marks of wounds on the deceased were those of near gunshot wounds, experiments on pasteboard targets were not received, because the conditions could not be made similar enough; see quotation *ante,* § 442); 1893, State *v.* Fletcher, 24 Or. 295, 298, 33 Pac. 575 (experiments as to the force of a bullet, with cartridges and pistol found on defendant, excluded because conditions were not shown similar); *Pennsylvania:* 1880, Sullivan *v.* Com., 93 Pa. 288, 296 (experiments were allowed to be described by which the effect, in blackening and tattooing the flesh, of a shot fired at short range, was demonstrated to be such that in the case at bar the deceased could not have committed suicide); *Rhode Island:* 1903, State *v.* Nagle, 25 R. I. 105, 54 Atl. 1063 (experiments with a pistol, to show the effect on a flesh-wound, admitted); *Tennessee:* 1884, Boyd *v.* State, 14 Lea 161, 171 (the allegation being that the deceased had committed suicide with a pistol, the Court admitted experiments made with pistols under similar conditions to show that the results would not be the same as those found upon the body of the deceased); 1896, Moore *v.* State, 96 Tenn. 209, 33 S. W. 1046 (an experiment, based on the appearances of a wound, to ascertain the relative positions of deceased and defendant, admitted); *Wisconsin:* 1908, Pollock *v.* State, 136 Wis. 136, 116 N. W. 851 (experiments with a pistol, admitted).

For cases dealing with *non-corporal effects* of weapons, see *ante,* § 451.

[2] ENGLAND: 1699, Spencer Cowper's Trial, 13 How. St. Tr. 1162 (murder; the body of the deceased was found in the river; the question was whether she had committed suicide or had been killed and thrown into the water; the prosecution advanced the proposition that the absence of water in the stomach showed that the person was dead before entering the water; the defence was allowed to testify to experiments, made by doctors, upon dogs, to show that a drowning person does not necessarily take water into the stomach); 1834, R. *v.* Webb, 1 Moo. & Rob. 405, 412 (manslaughter by administering noxious pills; to disprove the noxious quality, the fact was admitted of the cure of various diseases by them); 1836, R. *v.* Salmon, before Patteson, J., Pelham's Chronicles of Crime, ed. 1891, II. 417 (manslaughter by administering noxious pills; on behalf of the defendant, a medicine-vender, "a great many persons were called from all parts of the kingdom, who stated that they had taken large quantities of these pills, with the very best results, as a means of cure for almost every species of malady to which the human frame is subject; one person stated that he had taken no fewer than twenty thou-

sand of them in two years, and that he had found infinite relief from swallowing them in very large doses"); 1856, R. *v.* Palmer, Annual Register 1856, p. 403, also Notable British Trials Ser. (to determine the tendency of strychnia to produce certain symptoms, experiments upon dogs and rabbits were described, and the observed symptoms in human beings; but the Court refused to allow dogs to be brought into the courtyard and killed by strychnia before the jury); 1908, Hales *v.* Kerr, 2 K. B. 601 (action against a barber for negligent use of razors, etc. by which he had cut the plaintiff and caused the plaintiff to have barber's itch, about October, 1907; the plaintiff never went to any other barber-shop; the fact that two other persons had acquired the itch at the defendant's shop, held admissible, as showing the uncleanly condition of the razors, etc.)

UNITED STATES: *Federal:* Osborne *v.* Detroit, 32 Fed. 36 (the plaintiff claimed to have been paralyzed by a fall; to demonstrate this, a pin was allowed to be thrust into her face, arm, and leg, in the presence of the jury); 1897, The T. F. Oakes, 82 Fed. 759 (common symptoms in a crew of sailors during a long voyage, admitted to show lack of proper food as the cause); 1898, U. S. *v.* Reed, 86 Fed. 308, 311 (master of a vessel withholding suitable food; that every person on board not eating in the cabin had scurvy, admitted); 1918, Sharples Separator Co. *v.* Skinner, 9th C. C. A., 251 Fed. 25 (mechanical milker; successful or unsuccessful operation of the machine, as to injury to cows, under similar conditions, but not otherwise, allowable);

Alabama: 1854, Bush *v.* Jackson, 24 Ala., 274, *semble* (in a suit on a warranty of a slave alleged to be subject to chronic pneumonia, the use of evidence of symptoms of other supposed cases of pneumonia was held inadmissible, unless somehow connected); 1893, Alabama G. S. R. Co. *v.* Collier, 112 Ala. 681, 14 So. 327 (injury to passenger by breaking of fire-extinguisher bottle; experiments in court to test the liquid, rejected on the facts); 1918, Supreme Lodge *v.* Gustin, 202 Ala. 246, 80 So. 84 (death at a lodge-initiation when subjected to an electrical "branding-board"; the subjection of other initiates to the same apparatus without injury, on the same and prior occasions, admitted);

California: 1893, Remy *v.* Olds, 4 Cal. Unrep. Cases 240, 34 Pac. 216 (whether vines died from lack of water; that others similarly situated died though plentifully supplied with water, admitted);

Illinois: 1863, Wallace *v.* Wren, 32 Ill. 150 (for the purpose of showing that a warranted horse had the glanders, the court permitted the plaintiff to show that a mule which worked with the horse took the disease and died; Caton, C. J.: "There was proof that glanders is contagious, and if that be so, then the proof was undoubtedly pertinent"); 1900, Grand Lodge *v.* Randolph, 186 Ill. 89, 57 N. E. 882 (injury to ankle; experience of H., similarly injured, as to time of healing, and the exhibition of his ankle to the jury, excluded as confusing the issues);

Indiana: 1885, Epps *v.* State, 102 Ind. 549, 1 N. E. 490 (absence of injurious effect from the same kind of substance when administered to another person, admitted to show absence of arsenic);

Iowa: 1899, Ware Cattle Co. *v.* Anderson, 107 Ia. 231, 77 N. W. 1026 (whether cattle failed to fatten because of poor pasture; gain of other cattle in similar pastures, admitted); 1912, Boerner Fry Co. *v.* Mucci, 158 Ia. 315, 138 N. W. 866 (vanilla ice-cream; experiments as to the jury's tasting it, held not improperly excluded);

Kansas: 1912, State *v.* Buck, 88 Kan. 114, 127 Pac. 631 (murder by poisoning; the witnesses having smelled the doses given by defendant to deceased, a substance was mixed and presented to them at the trial for smelling, to testify whether it had the same odor);

Kentucky: 1859, Champ *v.* Com., 2 Metc. Ky. 17, 26 (rape while unconscious from a supposed violent chloroforming; experiments showing unconsciousness to be an impossible result under the supposed circumstances, admitted);

Massachusetts: 1864, Hunt *v.* Lowell Gaslight Co., 1 All. 343, 345, 350; s. c. 8 All. 169, 171 (to show the noxious effects of the gas escaping into the house where the plaintiffs were visitors and became ill, the similar illness of all the other inmates of the house at the same time was received; the extent to which the particulars of the illness should be inquired into being left to the trial Court's discretion); 1862, Emerson *v.* Lowell Gaslight Co., 3 All. 410, 417 (see quotation *ante*, § 442); 1886, Baxter *v.* Doe, 142 Mass. 558, 561, 8 N. E. 415 (action for sickness incurred through failure of ship-owners to provide the sailors with proper food and anti-scorbutics; evidence of the similar sickness of others of the crew on board the ship about the same time that the plaintiffs were sick, admitted; see quotation *ante*, § 442); 1887, Reeve *v.* Dennett, 145 Mass. 23, 11 N. E. 938 (whether a substance "naboli" was calculated to ensure painless extraction of teeth; the experience in that respect of various persons who had used it, admitted; see quotation *ante*, § 442); 1894, Shea *v.* Glendale E. F. Co., 162 Mass. 463, 38 N. E. 1123 (whether the plaintiff had been poisoned by white lead in the defendant's factory; the similar illnesses of other employees under similar conditions, admitted); 1897, Com. *v.* Kennedy, 170 Mass. 18, 48 N. E. 770 (tea drunk by several persons together; effects upon some of them, admitted, to show that it was poisoned); 1909, Mountford *v.* Cunard S. S. Co., 202 Mass. 345, 88 N. E. 782 (whether the plaintiff had trachoma, a contagious eye-disease; the fact that other persons intimately associating with her did

in particular, the *intoxicating* tendency of a *liquor*, by its effects upon others partaking it.[3]

In all these precedents, it is to be remembered, any and all of the principles and limitations already examined (§§ 441–449) may be involved; and further reference to them here is unnecessary.

§ 458. **Similar Injuries to Other Persons at the same Machine, Highway, Railroad, or Building.** If a white powder's tendency to produce illness may be evidenced by the symptoms following its administration, then in the

not contract such a disease, held admissible in discretion);

Michigan: 1882, Pinney *v.* Cahill, 48 Mich. 586, 12 N. W. 86 (to show that a horse had died not from the defendant's driving but from disease, two previous instances when the horse fell ill while driven by other persons were received); 1897, People *v.* Holmes, 111 Mich. 364, 69 N. W. 501 (other cases in which a similar injury caused insanity, not admitted to show a defendant's insanity); 1899, People *v.* Thompson, 122 Mich. 401, 81 N. W. 344 (boiler-explosion; charge of manslaughter; the killing and injuring of other persons, admitted, to show the effects; but not their stay at hospitals, etc.);

Montana: 1899, Proctor *v.* Irvin, 22 Mont. 547, 57 Pac. 183 (injury to cattle by unlawful driving; comparative increase of plaintiff's cattle in former years and average increase of other cattle in the same year, admitted); 1903, Bar *v.* Struck, 9 Mont. 45, 74 Pac. 69 (killing and injuring sheep by dipping into a poisonous mixture for quarantine purposes; defendant's offer to show a similar dipping of other sheep without fatal results, excluded, because not based on similarity of effects);

Nebraska: 1909, Young *v.* Kinney, 85 Nebr. 131, 122 N. W. 678 (identity of a brand on a horse: other horses bearing the defendant's brand, allowed to be examined to determine its features);

Oregon: 1921, Kelty *v.* Fisher, —Or.—, 199 Pac. 169 (malpractice in causing death of F.; S. and F. were ill together, and defendant treated them both for the same illness; symptoms of S., and defendant's treatment of him, admitted);

South Dakota: 1895, State *v.* Isaacson, 8 S. D. 69, 65 N. W. 430 (whether a horse was poisoned; the immediate death of a hen to whom the contents of the horse's stomach were experimentally fed, *semble*, admissible);

Vermont: 1881, Weeks *v.* Lyndon, 54 Vt. 645 (that other persons had cured themselves of hernia, excluded); 1897, Willett *v.* St. Albans, 69 Vt. 330, 38 Atl. 72 (illness attributed to sewer-gas; the illness, from sewer-gas, of others living near by, excluded, because of irrelevancy, surprise, and confusion of issues); 1898, Bateman *v.* Rutland, 70 Vt. 500, 41 Atl. 500 (illness attributed to sewer-gas; that others living in adjacent houses were not so affected, excluded); 1916, Davis *v.* Dunn, 90 Vt. 284, 98 Atl. 80 (malpractice; to identify an X-ray photograph of plaintiff's hand, showing an abnormality, the plaintiff was allowed to use several other X-ray photographs of plaintiff's hand; but was not allowed to use an X-ray photograph of a so-called normal hand, to show in rebuttal that certain marks on the hand-bones were not normal; the trial Court's discretion to exclude collateral issues being confirmed).

[3] 1885, Knowles *v.* State, 80 Ala. 9 (Somerville, J.: "The most available mode of testing the nature and properties of fluid or drug, next to that of chemical analysis, is by its effect on the human system; that a liquor when taken in certain quantities intoxicated or failed to intoxicate the person taking it is as competent to prove or disprove its intoxicating qualities as it would be to prove the poisonous nature of a drug by the effect following its administration"); 1891, Brantly *v.* State, 91 Ala. 47, 8 So. 816 (selling spirituous, etc., liquors; the effect of the liquors upon the purchasers, admitted); 1893, State *v.* Lindoen, 87 Ia. 702, 704, 54 N. W. 1075 (mixing ingredients of a drink before the jury, excluded as not bearing on its intoxicating quality; compare §§ 1159, 1160, *post*); 1886, State *v.* Pfefferle, 36 Kan. 90, 91, 12 Pac. 406 (whether a beverage "phœnix" was intoxicating; its effect in stimulating and intoxicating various persons, admitted); 1890, State *v.* Adams, 44 Kan. 135, 24 Pac. 71 (whether a beverage "cider" was intoxicating; its effect in intoxicating those who drank it, admitted); 1885, Fairly *v.* State, 63 Miss. 333 (that a person was made drunk by certain bitters, admitted to show that they were spirituous); 1889, Com. *v.* Reyburg, 122 Pa. 299, 305, 16 Atl. 351 (the effect felt by persons drinking a liquor, admissible to show whether it was spirituous); 1904, State *v.* Good, 56 W. Va. 215, 49 S. E. 121 (sale of an intoxicating liquor called "Rikk"; the purchase and use of the same drink in similar bottles by other persons about the same time, without intoxicating effect, admitted; citing other rulings).

Compare the citations in § 439, *ante*, § 1159, *post*.

same way the tendency of a projecting spike in a gate to catch and tear the garment of a passer-by may be evidenced by instances of such tearings, or the tendency of a part of a highway to make the feet trip upon it may be shown by instances of trippings. The mass of precedents dealing with the use of other injuries (or "accidents") as evidencing the dangerousness of a place or a machine are concerned with an inference of precisely this form, *i.e.* an inference as to the *harmful tendency or capacity* of the machine, highway, building, or track, as indicated by the occurrence of such harm to human beings in other instances.

1. There is no objection from the standpoint of the *character* rule (*ante*, § 199); for the object of the inference is not to show previous acts of human negligence, nor even (directly and necessarily) a present negligence. The purpose is merely to show the nature of the machine or the place, as having a tendency to produce such human injuries; just as copper acids may have a tendency to destroy herbage or strychnia a tendency to produce convulsions. If it can be shown what that tendency is, it may then be possible to show that the maintenance of a place or machine of that tendency — *i.e.* likely to cause such harm — is negligence. But this additional conclusion is not necessarily involved in the evidential purpose, which seeks simply the illustration of the nature of the thing or the place by its observed effects.

Nor is there any virtue in the invocation of the maxim 'res inter alios acta'; that principle concerns the law of Judgments, and has nothing to do with the logic or probative value of evidence.

Equally immaterial is the argument, occasionally heard, that "the jury are trying the merits of this particular accident and none other." This is true enough; but just because the "merits of this particular accident" have to be investigated, it is necessary to learn the nature of the machine or place involved; and in learning its nature, the evidential view cannot be confined to the precise moment of the accident in question. That nature, being more or less continuous, has exhibited itself at other times and in other instances; and it is both rational and practical to look at other instances from which that nature is to be ascertained.

The only principles that can effect the exclusion of such instances are those of Relevancy and of Auxiliary Policy. What is their bearing?

(*a*) The principle of *Relevancy*, as already noted (*ante*, § 442), requires that the other instances of injuries received should have occurred under substantially similar circumstances. The application of this principle has already been sufficiently illustrated. Note, however, that a *double inference* usually is necessary, *i.e.* from the other instances to the tendency or condition at the time of their occurrence, and then from the tendency or condition at that time to its persistence at the time in question. The principle governing the latter inference has also been examined (*ante*, § 437). But often this double inference is treated by the Court as a single one, and an instance occurring at a remote time is disposed of as not occurring under

similar circumstances. Yet there is in reality a second inference involved, — as may be seen where a prior tendency or condition is shown by direct testimony (*ante*, § 437) and not by instances of its effect, and then the inference is made from the prior to the later condition. It is enough to point out that there do come into play these two inferences, and that hence an instance may be excluded either because the circumstances were not similar or because the time was too remote.

(*b*) The principle of *Auxiliary Probative Policy*, as already noted (*ante*, § 443), requires the exclusion of such instances wherever, by the introduction of many new controversial points, there would result a confusion of issues, an unfair surprise, or an undue prejudice, *i.e.* disproportionate to the usefulness of the evidence. Occasionally a Court is found excluding such evidence absolutely and invariably because of this general possibility, and without regard to its actual operation in the case in hand. Such a treatment is unnecessary and finical. The rational and practical way is to exclude such evidence when it does in the case in hand clearly involve such consequences, but not otherwise; and to leave its treatment to the discretion of the trial Court, guided by this principle (*ante*, § 444).[1]

§ 458. [1] All the foregoing principles of §§ 442–449 are here illustrated; in particular, the principle for negative instances (§ 448) is important.

ENGLAND: 1866, Crofter *v.* R. Co., L. R. 1, C. P. 300 (injury on a defective staircase; evidence from the defendant was admitted without question, that about 43,000 persons had passed over it without injury during the previous year, in which alone it had been used).

UNITED STATES: *Federal:* 1882, District of Columbia *v.* Armes, 107 U. S. 519, 524, 2 Sup. 840 (injury on a sidewalk; that other persons had fallen at the same place, admitted; the objection of confusion of issues held not applicable where the evidence was not disputed; a much cited case, and a good opinion); 1886, Osborne *v.* Detroit, 32 Fed. 36 (injury at a defective sidewalk; a former injury of the same sort at the "same neighborhood" to two other persons, admitted, both to show the defective condition and to show notice to the defendant); 1896, Scott *v.* New Orleans, 21 C. C. A. 402, 75 Fed. 373 (injury on a sidewalk; other previous accidents at the same place, admitted); 1897, Patton *v.* R. Co., 27 C. C. A. 287, 82 Fed. 979 (previous derailments at the same place, received); 1914, Evans *v.* Erie R. Co., 6th C. C. A., 213 Fed. 129 (collision of a train with an automobile at a crossing; other accidents at the same crossing, admitted to show "the dangerous character of the place");
Alabama: 1872, Mobile & M. R. Co. *v.* Ashcraft, 48 Ala. 15, 32, *semble* (that the trains had run off the track seven or eight times in the previous month, admitted, to show its condition); 1891, Birmingham Union R. Co. *v.* Alexander, 93 Ala. 133, 9 So. 525 (injury by a wagon striking a car-rail; the fact admitted for the plaintiff that other similar injuries had been thus received, and for the defendant that the rail was constantly crossed in safety; "a knowledge of the experience of others . . . may enable the jury to weigh all the evidence before them in the light of the rule that like causes operating under like conditions produce like results"); 1893, Schlaff *v.* R. Co., 100 Ala. 377, 378, 388, 14 So. 105 (former injuries of other persons at a bridge, excluded); 1896, Birmingham *v.* Starr, 112 Ala. 98, 20 So. 424 (similar falls at the same place about the same time, *e.g.* a month before or after, admitted; but not of falls at other times or at times unspecified); 1897, Mayer *v.* Building Co., 116 Ala. 634, 22 So. 859 (defective cornice; evidence that one or more persons had stood safely upon another cornice of the same building similarly constructed, excluded); 1899, Southern R. Co. *v.* Posey, 124 Ala. 486, 26 So. 914 (another's experience at same guard-rail three weeks before, admitted); 1904, Davis *v.* Kornman, 141 Ala. 479, 37 So. 789 (injury at a machine; prior defects of operation, admitted); 1915, Southern R. Co. *v.* Lefan, 195 Ala. 295, 70 So. 249 (injury at a switch; whether the switch had continued in use for a year thereafter without repairs, held admissible; one judge diss.); 1915, Woodward Iron Co. *v.* Spencer, 194 Ala. 285, 69 So. 902 (injury at a slippery track; whether anybody had slipped there before, inadmissible);
California: 1869, Martinez *v.* Planel, 36 Cal. 578 (fall of another person at the same passageway six weeks before, excluded; following Collins *v.* Dorchester, Mass.); 1903, Dyas *v.* Southern P. Co., 140 Cal. 296, 73 Pac. 972

2. There would probably have been little difference of practice in the use of this class of evidence, if there had not been an early series of precedents in Massachusetts, beginning with Collins *v.* Dorchester, which attempted to cast discredit on the use of this evidence, and laid down an absolute rule of exclusion. That ruling proceeded from the point of view both of Relevancy and of Auxiliary Probative Policy, though without any full consideration of either reason; and, coming at a comparatively early date, served for a long time as a stumbling-block to many Courts whose instinct would have

(prior fall of a derrick, admitted, to show its defectiveness); 1906, Sheehan *v.* Hammond, 2 Cal. App. 371, 84 Pac. 340 (injury at a telephone factory; that no such injury had been received before, excluded, but on the futile and absurd ground that "the owner cannot by way of excuse show that no prior injury had occurred"); 1917, Sellars *v.* Southern P. R. Co., 33 Cal. App. 701, 166 Pac. 599 (injury in a railroad yard; lack of prior accidents, here excluded because conditions were not shown similar); 1918, Long *v.* John Breuner Co., 36 Cal. App. 630, 172 Pac. 1132 (slipping at a store-entrance; that another person had twice slipped at the same place, held admissible on the facts);

Colorado: 1907, Diamond Rubber Co. *v.* Harryman, 41 Colo. 415, 92 Pac. 922 (injury at a sidewalk obstruction; that other persons also had tripped on it, excluded; an old-fashioned decision, citing Collins *v.* Dorchester, et al.);

Connecticut: 1863, Bailey *v.* Trumbull, 31 Conn. 581 (omnibus upset into a ditch by an alleged highway defect; the fact received that on the next morning, before any change in the place, a loaded cart also upset at a place 15 or 20 feet distant, the distance not being such as to destroy the substantial similarity of conditions); 1865, Calkins *v.* Hartford, 33 Conn. 57 (injury by a fall on an icy sidewalk; that many persons had passed at the time without inconvenience, admitted; "if the plaintiff had offered evidence that a number of people had actually slipped upon it, this would have been strong proof that it was in a slippery and dangerous condition. . . . Men always act on such evidence in deciding whether they will risk their limbs or not. Why then should not proof that a number of persons passed over it and did not slip be admitted as tending to show that it was not in a slippery condition?"); 1875, Taylor *v.* Monroe, 43 Conn. 42 (see citation *ante*, § 439); 1876, Tomlinson *v.* Derby, 43 Conn. 562 (that other wagons ran into the same hole in the road, admitted); 1879, Wilson *v.* Granby, 47 Conn. 75 (previous similar loads carried over other bridges, admitted to show whether or not they were beyond the capacity of the bridge);

Georgia: 1878, Augusta *v.* Hafers, 61 Ga. 48 (injury by falling into a cellar-door opening on the street; two instances within five or six years of children falling into other such cellars, admitted, as "bearing remotely" on the question); 1886, Gilmer *v.* Atlanta, 77 Ga. 688 (injury by tripping over roots of a tree projecting across a sidewalk; the fact of another person having tripped at the same place some days before, admitted);

Illinois: 1882, Aurora *v.* Brown, 12 Ill. App. 131 (Lacey, J.: "The defect claimed in the walk was that it was so smooth that it was dangerous to travel on account of travellers slipping down upon it. How could it be told whether men's feet would slip while passing over it unless by experiment or trial, or to what extent or how badly they would slide? . . . Where it is attempted to be shown what has happened to others simply to illustrate a physical fact before or after the occurrence being investigated, if the conditions are the same, we can see no objection"); 1889, Hodges *v.* Bearse, 129 Ill. 89, 21 N. E. 613 (that no accident had happened during the 4½ years of an elevator's use, rejected, apparently because the evidence of negligence was strong); 1893, Libby *v.* Scherman, 146 Ill. 540, 34 N. E. 801 (whether the taking out of a barrel from a pile of barrels could be done without causing the pile to fall; experiment with similar barrels similarly arranged, in which they did not fall, excluded, partly because it was impossible to secure identical conditions, and because a confusion of issues would occur, partly because the question was not whether the pile would necessarily fall, but whether it was dangerously likely to fall if the single barrel were taken out); 1894, Bloomington *v.* Legg, 151 Ill. 9, 13, 37 N. E. 696 (injury at a drinking-fountain; similar injuries admitted to show dangerousness of the place; quoted *ante*, § 451); 1897, West Chicago St. R. Co. *v.* Kennelly, 170 Ill. 508, 48 N. E. 996 (that in a car-accident, others were thrown down in the same car, admitted); 1899, Illinois C. R. Co. *v.* Treat, 179 Ill. 576, 54 N. E. 290 (injury at railroad platform; prior injury to another at same place, admitted, after defendant's evidence that no other such injuries had been received); 1902, Taylorville *v.* Stafford, 196 Ill. 288, 63 N. E. 824 (that others had stumbled over the same place, admitted, as showing "that the common cause of the accidents is a dangerous and unsafe thing"); 1905, Mobile & O. R. Co. *v.* Vallowe, 214 Ill. 124, 73 N. E. 416 (injury at a coal

led them to receive such evidence. Its fallacies, from both points of view, were first clearly exposed by Mr. Justice Doe, of New Hampshire, in his classical opinion in Darling *v.* Westmoreland (quoted *ante*, §§ 444, 445); and from that time the tide of rulings began to turn. The ensuing cases show how an absolute rule of exclusion, like that of Collins *v.* Dorchester, is

chute; absence of injuries at that place for the several years it had been in use, offered to show its safety, excluded, on the ground of multifarious issues; the only "legitimate purpose of such evidence is to show notice", under § 252, *ante*); 1907, Chicago, R. I. & P. R. Co. *v.* Rathneau, 225 Ill. 278, 80 N. E. 119 (freight car injury; that the witness did not know of any prior instance of a "stake being high enough to strike the rail", allowed); 1907, Chicago *v.* Jarvis, 226 Ill. 614, 80 N. E. 1079 (fall at a coal-hole; prior falls of ten or eleven other people, admitted to show "that the common cause of the accidents was a dangerous and unsafe thing"); 1920, Moore *v.* Bloomington D. & C. R. Co., 295 Ill. 63, 128 N. E. 721 (death at a railroad crossing; former accidents at the same crossing, excluded, the conditions not being similar);

Indiana: 1881, Delphi *v.* Lowery, 74 Ind. 520, 525 (former injuries to other persons at the same bridge, admitted; following Darling *v.* Westmoreland and repudiating Collins *v.* Dorchester, but not distinguishing between the present principle and that of showing notice to the city, *ante*, § 252); 1883, Nave *v.* Flack, 90 Ind. 205, 209, 214 (injury at the drive-way of grain-scales; the fact that others had passed in safety, excluded, because "men may and do use unsafe places without receiving injury, but this does not show that a place proved to be really dangerous is not so"; but evidence of other injuries there was received to show knowledge; compare § 448, *ante*); 1884, Bauer *v.* Indianapolis, 99 Ind. 56, 60 (injury at a sidewalk; that others had passed the same place in safety, excluded; first, because of the collateral issues involved, following Kidder *v.* Dunstable, Mass., *infra;* and, secondly, because the evidence proved nothing, as in Nave *v.* Flack, *supra*); 1888, Louisville N. A. & C. R. Co. *v.* Wright, 115 Ind. 378, 393, 16 N. E. 145, 17 N. E. 584 (injury at a low bridge on a railway; the former occurrence of three similar accidents at the same place, admitted); 1894, Salem S. & L. Co. *v.* Griffin, 139 Ind. 141, 38 N. E. 411 (injury at a mill-tramway, by being caught between a window and a car; another's prior injury in the same way, admitted); 1909, Laurie Co. *v.* McCullough, 174 Ind. 477, 90 N. E. 1014 (personal injury by slipping on an oiled floor in a store; that no similar accidents had occurred during a number of years of user of such floor-dressing, admitted); 1910, Laurie Co. *v.* McCullough, 174 Ind. 477, 92 N. E. 337 (injury on a floor dressed with oil; that no accidents had occurred elsewhere from the use of such oil under similar circumstances, admitted; Nave *v.* Flack and other cases, distinguished);

Iowa: In this jurisdiction the principle of notice (*ante*, § 252) is frequently not distinguished from the present principle; 1882, Hudson *v.* R. Co., 59 Ia. 581, 13 N. W. 735 (a horse caught his foot between rail and plank at a crossing; a similar injury at the same place to another person's horse six months before, excluded, for reasons of auxiliary policy); 1888, Hoyt *v.* Des Moines, 76 Ia. 430, 41 N. W. 63 (injury at a sidewalk; the fall of another person on the same sidewalk, excluded, because it did not appear that it occurred at the same place); 1890, Matthews *v.* Cedar Rapids, 80 Ia. 459, 45 N. W. 894 (states that the preceding ruling would be doubtful, if the question were an open one); 1890, Brooke *v.* R. Co., 81 Ia. 511, 47 N. W. 74 (Granger, J.: "It is also urged that the testimony of K. as to the experiments in placing his foot between the rails, showing where the foot would be caught, and where not, were erroneously admitted. We regard it as clearly competent. A very important fact to be known was whether, with the situation of the rails, a foot could or would be likely to be caught. We can hardly imagine testimony that would better show the fact than such experiments. The shoe that Brooke wore was before the jury, and the witness who made the experiments was there, and the relative size of the shoes worn by each could be known"); 1895, Hunt *v.* Dubuque, 96 Ia. 314, 65 N. W. 319 (that other people had stumbled at the part of the sidewalk in question, admitted); 1897, Bryce *v.* R. Co., 103 Ia. 665, 72 N. W. 780 (that no accident had occurred at a bridge during its nine years' use, excluded); 1901, Bailey *v.* Centerville, 115 Ia. 271, 88 N. W. 379 (sidewalk; that other persons had fallen at the same place, admitted, "for the purpose of calling the witness' attention to the walk"; compare § 655, *post*); 1906, Heinmiller *v.* Winston Bros., 131 Ia. 32, 107 N. W. 1102 (cited *post*, § 461, n. 2; Hudson *v.* R. Co., *supra*, apparently approved, ignoring the intervening cases);

Kansas: 1880, Topeka *v.* Sherwood, 39 Kan. 690, 18 Pac. 933 (injury by tripping against a projecting plank in December, by tilting it up in passing; the fact received of constant tiltings of this sort from March to December, and of four other falls, three before and one after the fall in question, at the same place but not on the same plank; "the plaintiff must prove that it was unsafe to walk over . . . ; the

nowadays rarely attempted; and the two principles of relevancy and auxiliary policy are usually applied anew to each instance, as they ought to be. Strictly as a precedent, Collins *v.* Dorchester applied only to injuries in a highway, but its influence was to be seen in opinions upon evidence involving other sorts of injuries, and even, to some extent, over this whole group of

simple fact that there were frequent accidents on this part of the sidewalk would tend to show that it was unsafe; . . . this walk had been tested by actual use, and this evidence tended to show that it was dangerous and unsafe"; the argument of surprise rejected, for the question was as to the condition of the sidewalk and the defendant ought to be prepared); 1904, Cunningham *v.* Clay, 69 Kan. 373, 76 Pac. 907 (Topeka *v.* Sherwood followed; admitting the fright of other teams to show the nature of a highway obstruction);

Kentucky: 1904, Yates *v.* Covington, 119 Ky. 228, 83 S. W. 592 (defective sidewalk; frequent instances of falls by other persons at the same place, admitted; following Dist. Columbia *v.* Armes, U. S., etc.);

Maine: 1855, Hubbard *v.* R. Co., 39 Me. 506 (injury at a place where the highway was dug away; previous upsettings of carriages at that place, excluded, for the reasons of auxiliary policy and because there were other ways of ascertaining the nature of the place); 1879, Parker *v.* Publishing Co., 69 Me. 173 (fall at an elevator-well; former injuries at the place, excluded, for reasons of auxiliary policy and on the authority of Collins *v.* Dorchester, Mass.); 1886, Branch *v.* Libbey, 78 Me. 321, 5 Atl. 71 (injury in the highway; that others had driven safely over the same place, excluded, for reasons of surprise and confusion of issues);

Maryland: 1886, Baltimore & Y. T. R. *v.* Leonhardt, 66 Md. 70, 78, 5 Atl. 346 (injury on a horse-car; whether an accident had ever before happened in that way, excluded; "the jury was trying the merits of this particular accident and none other"); 1889, Baltimore & Y. T. R. *v.* State, 71 Md. 573, 575, 584, 18 Atl. 884 (injury at a dangerous place in a road; whether during 32 years past there had been any complaint of the dangerousness of this place, excluded, because "it was no answer" if the place was unsafe; no authorities cited and no understanding of the question shown, in either of these two cases); 1892, Wise *v.* Ackerman, 76 Md. 375, 390, 25 Atl. 424 (elevator-injury; similar injury to another employee at a like elevator in the same building, excluded); 1919, Hagerstown & F. R. Co. *v.* Wingert, 133 Md. 455, 105 Atl. 537 (personal injury alighting from a car; the carriage of 100,000 passengers in the same car without injury, considered); 1921, Cordish *v.* Bloom, 81 Md. 138, 113 Atl. 578 (injury on sidewalk; injuries sustained by other persons at the same point, held admissible "under the peculiar circumstances of this case", as cumulative evidence of notice, not expressly disapproving Wise *v.* Ackerman in rejecting such facts as evidence of condition, but virtually allowing such use of it; why should not the Court frankly acknowledge the correct rule?);

Massachusetts: 1850, Collins *v.* Dorchester, 6 Cush. 396 (injury on a highway, through a supposed failure of a railing; that another person, riding there under similar circumstances, had suffered a similar accident, excluded below, as "a collateral issue", which would "result in testing one point in dispute by another"; this ruling was affirmed; Metcalf, J.: "It was testimony concerning collateral facts, which furnished no legal presumption as to the principal facts in dispute, and which the defendants were not bound to be prepared to meet"; citing Standish *v.* Washburn, *ante*, § 451); 1854, Aldrich *v.* Pelham, 1 Gray 510 (want of a railing as a defect in a highway, when two teams passed each other; the defendant offered to show that various other persons had passed each other at that place in the same way without injury; held, improperly admitted, because "each of these cases would present a distinct issue with all its attendant circumstances, and involve the consequences contemplated in Collins *v.* Dorchester"); 1858, Kidder *v.* Dunstable, 11 Gray 342 (issue as to the condition of a snowy road; that others had passed in safety, excluded); 1871, Lewis *v.* Smith, 107 Mass. 334 (action for mules lost by insufficient arrangements on the ferryboat transporting them; that such a boat had been run for thirty years previously without such an injury, excluded); 1872, Schoonmaker *v.* Wilbraham, 110 Mass. 134 (following Collins *v.* Dorchester, Aldrich *v.* Pelham); 1884, Peverly *v.* Boston, 136 Mass. 366 (injury on a ferryboat through catching the hand in a gate raised by an unauthorized person; issue as to the necessity of protecting the gate; that no accident had ever before happened at the gate, excluded); 1893, Marvin *v.* New Bedford, 158 Mass. 464, 466, 33 N. E. 605 (that no injury had ever occurred there before, excluded); 1894, Knowlton, J., in Bemis *v.* Temple, 162 Mass. 342, 345, 38 N. E. 970 (referring to these cases as decided on the ground of surprise and confusion of issues, he remarks that "in most of these cases" the applications of the principle to the facts "are generally deemed satisfactory", while "in others . . . apart from authority, it may be" that the fact offered "as a simple experiment might well have been proved"; the majority approve this opinion; see quotation *ante*, § 444);

evidential material. But Mr. Justice Doe's opinion utterly discredited it as an obstacle to the investigation of truth; even in its own jurisdiction it was gradually narrowed in its effect; and it would there presumably no longer be followed, even upon its precise state of facts. The precedents, how-

1896, Flaherty *v.* Powers, 167 Mass. 61, 44 N. E. 1074 (injury at a machine; "the habit of the machine to spatter, down to just before the accident", admitted to show the "behavior of the machine"); 1898, Spaulding *v.* Lithograph M. Co., 171 Mass. 271, 50 N. E. 543 (injury by the seat of machinery tipping up; that it had tipped up before, admitted, as "instructive as to what happened to the plaintiff"); 1904, Cohen *v.* Hamblin & Russell Mfg. Co., 186 Mass. 544, 71 N. E. 948 (injury to a child at a machine; prior injuries to other children at the same machine, excluded); 1907, Yore *v.* Newton, 194 Mass. 250, 80 N. E. 472 (upsetting of a wagon in a highway; the effect of the highway on other wagons during five years, held not improperly excluded in the trial Court's discretion); 1910, Walker *v.* Williamson, 205 Mass. 514, 91 N. E. 885 (prior fall of a block, held not improperly excluded in discretion); 1913, Williams *v.* Winthrop, 213 Mass. 581, 100 N. E. 1101 (highway defect; Collins *v.* Dorchester followed); 1913 Williams *v.* Holbrook, 216 Mass. 239, 103 N. E. 633 (that other machines had skidded at that place, held admissible in discretion);

Michigan: 1885, McCool *v.* Grand Rapids, 58 Mich. 41, 46, 24 N. W. 631 (that another person had constantly driven over the same part of the highway without injury, admitted); 1889, Dundas *v.* Lansing, 75 Mich. 499, 508, 42 N. W. 1011 (other accidents to other people at the particular place, admissible to show that the place "was not reasonably safe and fit for travel"); 1891, Lombar *v.* East Tawas, 86 Mich. 14, 48 N. W. 947 (injury at a hole in a plank in the walk; that others had before fallen into the same hole, admitted, to show the existence and nature of the defect); 1892, Retan *v.* R. Co., 94 Mich. 146, 53 N. W. 1094 (injury in a sidewalk-hole; that others had caught their feet in the hole, admitted); 1893, Corcoran *v.* Detroit, 95 Mich. 84, 54 N. W. 692 (highway defect; that another person "broke his buggy" at the same place about the same time, excluded; no authorities cited); 1904, Gregory *v.* Detroit U. R. Co., 138 Mich. 368, 101 N. W. 546 (prior accidents at the same place, excluded; "such testimony is only admissible to show notice and knowledge of the defects", which was here conceded; the above cases prior to Corcoran *v.* Detroit are ignored); 1905, Vander Velde *v.* Leroy, 140 Mich. 359, 103 N. W. 812 (that others had fallen off the same sidewalk, excluded, the conditions having been materially changed); 1908, Woodworth *v.* Detroit United R. Co., 153 Mich. 108, 116 N. W. 549 (similar prior wagon-accidents at the same place in a highway, admitted; overruling Gregory *v.* Detroit U. R. Co.; admitting the evidence not merely to show notice, but to show the defective condition of the highway);

Minnesota: 1877, Phelps *v.* Mankato, 23 Minn. 276, 279 (injury at a post in the street; that "other teams had run into it", admitted to show its "dangerous character"); 1881, Kelly *v.* R. Co., 28 Minn. 98, 100, 9 N. W. 568 (injury at a crossing; that "similar accidents occurred by reason of the same defect, as tending to show that the absence of the plank rendered the crossing unsafe", admissible; but an accident at a different place and in a different mode was excluded); 1887, Phelps *v.* R. Co., 37 Minn. 487, 35 N. W. 273 (difficulties experienced by other travellers in crossing a place alleged to be unsafe were admitted; Mitchell, J.: "There was evidence tending to show that the highway was in substantially the same condition during this time as on the day of the accident, except that the obstruction was increased. . . . As to the materiality and competence of this evidence there is no room for doubt. . . . It is the practical test of common experience, often the most satisfactory evidence"); 1889, Doyle *v.* R. Co., 42 Minn. 79, 82, 43 N. W. 787 (whether a rail was dangerous by being worn out and splintered; that a witness had in 23 years' experience never heard of an injury from a rail so splintered, admitted; "if such evidence [of former injuries] is admissible to show that what is complained of was of a dangerous character, it must be that evidence would be admissible on the other side to show that in a long and constant use of such instrumentalities accidents had been unknown; that would be a proper means of showing that a thing which was not obviously dangerous was not in fact so"); 1895, Burrows *v.* Lake Crystal, 61 Minn. 357, 63 N. W. 745 (similar accidents to other pedestrians at the same place in a walk; question reserved);

Missouri: 1885, Hipsley *v.* R. Co., 88 Mo. 348, 354 (injury by derailment; "other accidents on other parts" of the road, excluded); 1897, Graney *v.* R. Co., 140 Mo. 89, 41 S. W. 246 (a boy thrown down by the alleged suction of air from a passing train; the effect of air upon mail sacks thrown from moving trains, excluded as not analogous in conditions); 1906, Charlton *v.* St. Louis & S. F. R. Co., 200 Mo. 413, 98 S. W. 529 (proximity of a crane; another person's former experience, admitted);

New Hampshire: 1877, Griffin *v.* Auburn, 58 N. H. 121 (whether a tree was dangerously near the highway; collisions of other persons with the tree, admitted, in the trial Court's

ever, in the various jurisdictions still show traces of its early misleading influence.

3. Distinguish here (1) the use of other injuries to show *notice of a defective or dangerous place* (*ante*, § 252); in some of the rulings, both points are decided; in others, the present principle is ignored; (2) the inference of a

discretion); 1895, Dow *v.* Weare, 68 N. H. 345, 44 Atl. 489 (highway injury; similar accident to another person at that place several days before, held admissible in the trial Court's discretion); 1900, Whitcher *v.* R. Co., 70 N. H. 242, 46, Atl. 740 (experiments made since the accident, in stepping from cars, admitted); 1909, Fisher *v.* Boston & M. R. Co., 75 N. H. 184, 72 Atl. 212 (injury at a platform; passage of other persons without injury, admitted);
New Jersey: 1869, Temperance Hall Ass'n *v.* Giles, 33 N. J. L. 260 (injury by falling into an area by the sidewalk; testimony of a witness that there had been no such injury there before, though 10,000 persons had passed there yearly, excluded, partly because similarity of conditions was not shown, partly because of surprise and confusion of issues; the opinion, which is not consistent in its language, is often understood by other Courts to go further than it does, and next to Collins *v.* Dorchester it has done most to influence erroneous rulings); 1907, Bobbink *v.* Erie R. Co., 75 N. J. L. 913, 69 Atl. 204 (that other horses had caught their feet in a railroad frog, excluded); 1909, Alcott *v.* Public Service Corp., 78 N. J. L. 482, 74 Atl. 499 (wagon caught in a track-switch; other incidents of a similar sort at the same place, from 3 to 13 days before, held admissible; Temperance Hall Case distinguished, and impliedly disapproved);
New York: 1873, Dougan *v.* Champlain Co., 56 N. Y. 7 (dangerousness of a place on a steamboat deck; *semble*, that others had fallen overboard there, or that no accident had before occurred there, admissible); 1877, Baird *v.* Daly, 68 N. Y. 550 (that a scow, alleged to be unseaworthy, had or had not experienced similar accidents on previous similar occasions, admitted); 1877, Quinlan *v.* Utica, 74 N. Y. 603, affirming 11 Hun 217 (injury by slipping on a sidewalk; the slipping and falling of others upon it while it was in the same condition, admitted); 1887, Pomfrey *v.* Saratoga Springs, 104 N. Y. 459, 469, 11 N. E. 43 (injury by slipping on snow and ice; that another person had fallen in the same place, admitted); 1890, Hoyt *v.* R. Co., 118 N. Y. 399, 23 N. E. 565 (a wagon getting into a hole in the street; to show that the wagon was defective, a similar happening to it the next day in another place was received, as showing "that such defect tended in theory and operated in practice to overturn the wagon, and thus put this case in line with that numerous class of cases holding that, where a defect is shown to exist, that fact may be legitimately strengthened by proof of other and similar effects, both before and after the effects were produced which form the subject of the trial"); 1890, Gillrie *v.* Lockport, 122 N. Y. 403, 25 N. E. 357 (injury in the highway; the fall of another person two years before at the same place, excluded; previous injuries declared generally admissible to show that the place as tested by use is unsafe; but here the time was too remote; see *ante*, § 437); 1899, Fordham *v.* Gouverneur, 160 N. Y. 541, 55 N. E. 290 (injury on sidewalk; stumbling of others on the same evening on the same plank, admitted);
North Carolina: 1900, Raper *v.* R. Co., 126 N. C. 563, 36 S. E. 115 (accidents at other crossings similarly constructed, admitted);
Ohio: 1877, Insurance Co. *v.* Tobin, 32 Oh. St. 90 (previous instances of steamboat disasters occurring through snags, etc., and yet without any shock or other coincident indication, excluded, on account of surprise and confusion of issues); 1883, Sinton *v.* Butler, 40 Oh. St. 158, 168 (falling of an elevator; that it was "in constant use for well nigh five years without accident", admitted);
Oklahoma: 1903, Kingfisher *v.* Altizer, 13 Okl. 121, 74 Pac. 107 (injury on a defective bridge; other prior accidents at the same place, admitted to show the "state of repair"); 1915, Chickasha *v.* White, 45 Okl. 631, 146 Pac. 578 (other accidents in the highway, admitted; following Kingfisher *v.* Altizer);
Pennsylvania: 1879, Mansfield C. & C. Co. *v.* McEnery, 91 Pa. 185, 192 (defective bridge; experience of others in passing over it, admitted to show its condition); 1920, Lynch *v.* Meyersdale E. L. H. & P. Co., 268 Pa. 337, 112 Atl. 58 (death from an electric shock by a wire in the plaintiff's house; shocks received by other persons served by defendant's plant, both through the same transformer and through a different one, held admissible to show condition of the plant);
Rhode Island: 1898, Anderson *v.* Taft, 20 R. I. 362, 39 Atl. 191 (injury in a highway; that no such accident had happened there for 20 years, excluded; following Temp. Assoc. *v.* Giles, N. J.; ignoring Darling *v.* Westmoreland); 1899, State *v.* Mowry, 21 R. I. 376, 43 Atl. 871 (injury by diversion of uninsulated current; shocks received subsequently by others at the same place, admitted to show the condition as to insulation);
South Carolina: 1887, Bridger *v.* R. Co., 27 S. C. 456, 3 S. E. 860 (injury at a turntable: former injuries of others there, excluded, unless brought to defendant's knowledge; no authori-

defect from the very *fact of the injury in issue* (*ante*, § 442), and the related *presumption of negligence* from the *mere fact of injury* (*post*, § 2509); (3) the *fixing of the memory* of a highway defect by the occurrence of a *prior accident* (*post*, §§ 655, 730); and (4) the inference of an admission of negligence from *subsequent repairs* (*ante*, § 283).

C. INSTANCES OF MENTAL AND MORAL EFFECTS, AS EVIDENCE

§ 459. **General Principle.** There is no reason why the tendency or quality of an object of external nature should not sometimes be as easily ascertainable from its *mental or moral* (psychological) effects as from its corporal or its material effects. Where the issue is as to the existence of a tendency to produce psychological effects, the tendency can usually best be proved by adducing instances of such effects, if they have attended the use or operation of the thing in question. For example, if on looking out of the window of a com-

ties cited, and no appreciation of the nature of the question); 1898, Pearson *v.* Spartanburg Co., 51 S. C. 480, 29 S. E. 193 (bridge collapsing under a road-engine; cracking of the bridge at the former passing of such an engine, admitted);
Utah: 1892, Hurd *v.* R. Co., 8 Utah 241, 243, 244, 30 Pac. 982 (whether an engine started of itself; similar startings of other engines, excluded, but of the same engine, admitted); 1898, Snowden *v.* Coal Co., 16 Utah 366, 52 Pac. 599 (injury in a mine by the falling of a "clod"; that others had been injured by the falling of this "clod", rejected, on the theory that it was an attempt to use other negligent acts, under § 199, *ante;* no notice taken of the present principle); 1920, Barlow *v.* Salt Lake & U. R. Co., 57 Utah 312, 194 Pac. 665 (injury by slipping on a gravelled platform; to negative the platform's dangerous condition, defendant offered to show that in 18 months 50,000 tickets were sold to that station and no other injury was reported, excluded; "the proposed testimony . . . has no evidentiary force whatsoever"; the opinion's failure to perceive the logical distinction between proof and evidence is discouraging; all that logicians ever wrote on the principle of § 448, *ante*, might as well not have been written);
Vermont: 1835, Lester *v.* Pittsford, 7 Vt. 158 (admitting a previous passing over the same road with safety; no question raised); 1860, Kent *v.* Lincoln, 32 Vt. 591 (injury by being thrown from a wagon while crossing a waterbar; that others were thrown or jolted at the same place, admitted; such effects would be "in the nature of experiments to show the actual condition of the road"); 1867, Walker *v.* Westfield, 39 Vt. 247 (injury by being thrown out of a wagon which got into a mudhole; C.'s similar experience a day or two later, received, as no more irrelevant than "if the witness had testified that he went there the next day and with a measuring rule found the ditch to be three feet wide and two feet deep"); 1900, Sullivan *v.* D. & H. Canal Co., 72 Vt. 353, 47 Atl. 1084 (absence of accidents at railroad platform for 30 years, excluded, because the conditions were not shown the same); 1901, Lynds *v.* Plymouth, 73 Vt. 216, 50 Atl. 1083 (prior injuries to other persons at the same bridge, admitted); 1919, Thayer *v.* Glynn, 93 Vt. 257, 106 Atl. 834 (experiment as to a collision, with a different horse and automobile, admitted);
Washington: 1897, Elster *v.* Seattle, 18 Wash. 304, 51 Pac. 394 (injuries at the same place in the sidewalk to other persons a week or ten days before, admitted); 1901, Hansen *v.* Seattle L. Co., 41 Wash. 349, 83 Pac. 102 (prior accidents at the same and similar cog-wheels, admitted); 1903, Smith *v.* Seattle, 33 Wash. 481, 74 Pac. 674 (trap-door in a sidewalk; falls of other persons at the same place, admissible to show the condition of the sidewalk; following Elster *v.* Seattle and District *v.* Armes, U. S., *supra*); 1904, Franklin *v.* Engel, 34 Wash. 480, 76 Pac. 84 (preceding cases followed); 1913, Armstrong *v.* Yakima Hotel Co., 75 Wash. 477, 135 Pac. 233 (another fall at a step 47 days before, admitted, no change of conditions being shown: but improperly limited to the purpose of showing notice);
Wisconsin: 1887, Phillips *v.* Willow, 70 Wis. 6, 34 N. W. 731 (a stone obstructing the highway and overturning a sleigh; that others about the same time had collided with the stone, excluded; see quotation *ante*, § 443); 1894, Barrett *v.* Hammond, 87 Wis. 654, 657, 58 N. W. 1053 (prior injuries at the same place, excluded); 1901, Kroider *v.* Wisconsin R. P. & P. Co., 110 Wis. 645, 86 N. W. 662 (prior injuries at a machine, excluded); 1905, Garske *v.* Ridgeville, 123 Wis. 503, 102 N. W. 22 (prior instances of safe driving at a highway defect, excluded).

fortable home the persons on the highway are observed to be shuddering and turning up their ulster-collars, a natural inference is that the temperature without is extremely cold. Or, if on looking some distance ahead, as one drives through a street, all the vehicles are observed to be turning aside at a certain apparently vacant spot in the road, a natural inference is made that some obstruction exists, such as a pavement-hole or a broken electric wire.

This sort of inference from human or animal conduct is of constant service in daily life, and claims also an important part in the realm of evidence for litigated issues. It is of especial importance and utility, because of the absurd and fantastical extent to which the prohibitions of the Opinion-rule (*post*, § 1917) have been pushed; for if no direct testimony is to be permitted, by persons who can say (for example) whether a place was dangerous or safe, it becomes all the more necessary to grant the largest possible scope to circumstantial evidence by specific instances of the effects produced on human or animal conduct by the use or operation of the thing in question.

A possible objection is found in the *Hearsay rule; i.e.* in looking to a person's conduct as evidencing the material cause of the conduct, are we not virtually receiving the person's hearsay assertion as to the cause? The Hearsay rule excludes extra-judicial assertions only, *i.e.* deliberate utterances in terms affirming a fact (*post*, § 1362); and, although in effect an inference from conduct may be the same in result as an inference from assertion, nevertheless the two are distinct. Nor does the policy or spirit of the Hearsay rule apply; for that policy is to test the assertions of persons regarded as witnesses, by learning the source of their knowledge and by exposing its elements of weakness and error, if possible; and where the evidence is not dealing with a person's assertion as deriving force from his personal character, knowledge, or experience, it is not within the scope of the policy of the Hearsay rule. No doubt the line is sometimes hard to draw between conduct used as circumstantial evidence and assertion used testimonially.[1] Nevertheless the difference is a real one; and the preceding topics illustrate amply the acknowledged propriety of using conduct circumstantially.

Another objection that may occur is that the conduct of another person is not to be taken as a *standard determining legal duty*. This is undoubtedly true; but it is easy to distinguish between the conduct of another person as a standard of duty and the same conduct merely as evidence of the nature of the thing which is the subject of the duty. The importance and sufficiency of this distinction is dealt with elsewhere (*post*, § 461).[2]

§ **459.** [1] One of the difficult cases where the line has to be drawn — the use of Conduct as evidencing Consciousness — has been fully discussed (*ante*, § 265), and reference may be made to that exposition for a more extended examination of the question, as also to the discussion *post*, §§ 1362, 1788, under the Hearsay rule.

[2] It is here impossible to collect all the cases defining this standard of care; yet many of them indirectly lead to an evidential rule.

In a few jurisdictions it is settled that the usual conduct of other persons is of itself a legal standard of care; *e.g.*: 1905, Boop *v.* Laurelton L. Co., 212 Pa. 523, 61 Atl. 1021.

In general, then, the *phenomena of others' sensations and conduct* — effects psychological, or mental and moral (for the term is immaterial, and no one word expresses the entire notion) — *may serve to evidence the tendency, capacity, or quality of a material object of external nature*, precisely as corporal or material phenomena may evidence it. The principles of Relevancy and of Auxiliary Probative Policy, as already examined (*ante*, §§ 442, 443), will determine the admissibility of a given piece of evidence. In general, the former requires that the circumstances under which the other conduct occurs should be substantially similar; the latter allows the exclusion of relevant evidence wherever it would, in the case in hand, involve an unfair surprise, an undue prejudice, or a disproportionate confusion of issues and waste of time.

§ 460. **Measures of Time, Space, Light, Sound, Difficulty, or Capacity, as evidenced by Human Sensations or Conduct (Noises heard, Objects seen, Distances walked, Trains stopped, Work performed, etc.).** In general, all those material conditions and qualities of material objects in external nature which become effective with reference to the ordinary sense-perceptions and muscular activities of human beings or animals may be evidenced by specific instances of such effects, — used subject to the limitations of the general principles already noticed.

Thus, a condition of *light* may be evidenced by instances of other persons' experience in *seeing* or *identifying* under similar circumstances;[1] this appli-

§ 460. [1] *Federal:* 1898, Baltimore & O. R. Co. *v.* Helenthall, 31 C. C. A. 414, 88 Fed. 116 (whether a child could be seen on the track; experiments assumed admissible, but whether the similarity of conditions was for judge or jury, left undecided; it need not have been; of course it is for the judge); *Alabama:* 1897, Louisville & N. R. Co. *v.* Hill, 114 Ala. 587, 22 So. 169 (whether children could be recognized on a trestle at a certain distance; witnesses placed similar children on the trestle and then observed them from various distances; excluded because the conditions were "too variant"); 1903, Sherrill *v.* State, 138 Ala. 3, 35 So. 129 (experiments, as to the possibility of seeing an affray, made afterwards, under conditions not shown to be the same, excluded); *California:* 1898, People *v.* Woon Tuck Wo, 120 Cal. 294, 52 Pac. 833 (experiments three months later as to the possibility of distinguishing persons from a certain point, not improperly rejected in discretion, the conditions not being similar); *Florida:* 1905, Spires *v.* State, 50 Fla. 121, 39 So. 181 (whether a person could be recognized by the flash of a gun; an experiment for that purpose in the jury-room, held not improperly refused in the trial Court's discretion, chiefly because similarity of conditions was not shown); *Georgia:* 1846, Sealy *v.* State, 1 Kelly 220 (whether an object could be distinguished at night at a certain distance; evidence of one who had experimented, in company with another, "between the same hours of a similar star-light night", was rejected, because "the difference in men's visions and the uncertainty as to the exact quantity of light on both nights would render the proof too uncertain"); *Illinois:* 1893, Painter *v.* People, 147 Ill. 444, 459, 35 N. E. 64 (whether from a certain position a person below in the house could be recognized; experiments tried by both sides, "if competent at all", held of little weight, owing to the difficulty of testing the substantial similarity of conditions as to light, etc.); 1904, Hauser *v.* People, 210 Ill. 253, 71 N. E. 416 (burglary; whether the accused could be identified as testified to, allowed to be shown by tests of visibility made under the same conditions); 1905, Chicago & E. I. R. Co. *v.* Crose, 214 Ill. 602, 73 N. E. 865 (experiment as to seeing a railroad track, excluded, because the conditions were dissimilar); *Indiana:* 1880, Jones *v.* State, 70 Ind. 83, 84 (murder; experiments by sitting at night near the window in a room with a fire and a lamp to see whether a person without could be recognized, rejected; Worden, J.: "The experiments were not made at the house where Pigg was shot, but elsewhere; it would probably be difficult, if not impossible, to make an experiment elsewhere under just the circumstances that existed at the time Pigg was shot, including the extent and situation of the lights in the room,

nation of the principle includes broadly all cases of the possibility of *mistaken identity*, as shown by other instances of mistaken recognition;[2] a condition of *sound* may be evidenced by instances of other persons' experience in hearing under similar conditions;[3] — the *time* required for walking or riding

the extent of light or darkness outside, the quality of the window glass, etc."); *Iowa:* 1894, Burg *v.* R. Co., 90 Ia. 106, 116, 57 N. W. 680 (tests under similar conditions, to determine whether a person could be seen on a track, admitted); *Maryland:* 1899, Richardson *v.* State, 90 Md. 109, 44 Atl. 999 (experiments in identifying other persons by the light of the same street-lamp under similar conditions, admissible); *Massachusetts:* 1907, Baker *v.* Harrington, 196 Mass. 339, 82 N. E. 33 (fall on a hall-stairway; experiments and observations under conditions substantially the same, to test the light, held not improperly admitted in the trial Court's discretion); 1914, Trask *v.* Boston & Maine R. Co., 219 Mass. 410, 106 N. E. 1022 (collision at grade crossing; to evidence the dazzling effect of an electric light there placed, a witness' repeated experience at the same place was held properly excluded, because the conditions were not shown to be substantially similar); *Michigan:* 1888, Stone *v.* Ins. Co., 71 Mich. 81, 38 N. W. 710 (death by slipping into an excavation in the sidewalk; the impression received by one approaching it on the next night under the same circumstances, admitted); *Mississippi:* 1908, Harrison *v.* Southern R. Co., 93 Miss. 40, 46 So. 408 (experiments as to distance at which a trespasser could be seen on the track, allowed); *New Hampshire:* 1904, Healey *v.* Bartlett, 73 N. H. 110, 59 Atl. 617 (whether a testator was in such a position that he could see the attesting witnesses; experiments allowed in the trial Court's discretion); *New Jersey:* 1863, Berckmans *v.* Berckmans, 16 N. J. Eq. 127 (admitting experiments as to the possibility of seeing a certain event testified to); *North Carolina:* 1900, Cox *v.* R. Co., 126 N. C. 103, 35 S. E. 237 (experiments as to how far a man could be seen, admitted); *Ohio:* 1853, Smith *v.* State, 2 Oh. St. 517 (the injured person asserted that he had recognized the accused in the dark by the flash of the pistol as it was discharged outside his window at him; evidence of experiments under similar conditions showing the impossibility of such a recognition was declared admissible; Thurman, J.: "It was certainly lawful to disprove this statement by showing the impossibility or natural improbability of its being true. This is not denied, but it is said it could not be done by proof of experiments. If not, how could the proof be made? . . . Again, it is urged that the experiments in question were not made by looking through the same window pane that H. looked through. But does that deprive them of all value? Is there such a difference in common window-glass that the judgment could not in any degree be aided by an experiment made with an other pane?"); 1899, Schweinfurth *v.* R. Co., 60 Oh. 215, 54 N. E. 89 (experiments with men in a buggy, and an engine and train, made under circumstances similar to those of an injury sued for, and on the spot in the jury's presence, admitted); *Oregon:* 1920, State *v.* Holbrook, 98 Or. 43, 192 Pac. 640 (murder; whether the smoke of a gunshot could have been seen; experiments admitted); *Texas:* 1921, Panhandle *v.* S. R. F. Co., Haywood, — Tex. Civ. App. —, 227 S. W. 323 (experiments with a child on a track, admitted); *Utah:* 1897, Young *v.* Clark, 16 Utah 42, 50 Pac. 832 (experiments as to the possibility of seeing a child on a railroad bridge, received); *Virginia:* 1922, Norfolk & W. R. Co. *v.* Henderson, Va., 111 S. E. 277 (death of a child: tests as to visibility on the track, held admissible in the trial Court's discretion); *West Virginia:* 1899, Bias *v.* R. Co., 46 W. Va. 349, 33 S. E. 240 (experiments made on the railroad-track, in the jury's presence, to show how far a person could be seen, allowed); *Wisconsin:* 1899, Emery *v.* State, 101 Wis. 627, 78 N. W. 145 (experiments as to time of disappearance of daylight, not admitted, because not under sufficiently similar conditions).

[2] 1824, R. *v.* Robinson, Annual Register, 1824, App. 23 (larceny, evidenced by a witness to the act; the defendant, to show mistaken identity, called a witness who "had seen two persons in custody very much resembling the prisoner"; "about six weeks ago he met a young man so much like the prisoner that he was quite surprised at the resemblance"); 1882, White *v.* Com. 80 Ky. 483 (the witness met the accused's double and was so strongly impressed by the identity that he twice approached him to speak to him as the defendant); 1850, Com. *v.* Webster, Bemis' Rep. 281, 5 Cush. 295, 302 (murder; after testimony that the deceased had been seen alive on the streets since the time alleged, evidence in rebuttal was offered that other persons had mistaken a certain man for the deceased, the fact indicating the existence of a similar person; excluded, unless the person himself was produced; unsound).

[3] *Cal.* 1899, People *v.* Phelan, 123 Cal. 551, 56 Pac. 424 (experiments as to hearing of sounds, made under conditions substantially similar, admitted); 1899, Sonoma Co. *v.* Stofen, 125 Cal. 32, 57 Pac. 681 (experiments as to the sound produced by kicking a safe-door, admitted, as made under substantially similar conditions); *Colo.* 1900, Starr *v.* People, 28 Colo. 184, 63 Pac. 299 (whether a con-

a certain *distance*,[4] or for stopping a train within a certain distance,[5] may be evidenced by other instances under similar conditions; the *height* of a *cattle-guard*, with reference to the possibility of cattle leaping it, may be evidenced by instances of what cattle have done with similar fences; or the amount of animal *feed*, by the quantity consumed by others.[6]

There is therefore no reason why other miscellaneous instances of observation and experiment should not be received, subject to the foregoing limitations of principle.[7]

versation could be heard at a certain point; experiments under essentially the same conditions, held admissible); *Kan.* 1896, Missouri P. R. Co. *v.* Moffatt, 56 Kan. 667, 44 Pac. 607 (railway killing at a crossing; to show whether the sound-signals could have been heard, evidence was held admissible from persons who had stood at the spot and listened, "if the test is made at the place and under substantially similar circumstances"); 1909, Johnson *v.* Chicago, R. I. & P. R. Co., 80 Kan. 456, 103 Pac. 90 (railway-crossing injury; experiments made under similar conditions to determine whether train noise would be deadened by adjacent land formation, etc., held admissible); *Md.* 1902, Gambrill *v.* Schooley, 95 Md. 260, 52 Atl. 500 (experiments as to the range of hearing of a voice, held admissible); *Mass.* 1906, Dow *v.* Bulfinch, 192 Mass. 281, 78 N. E. 416 (experiments to show whether conversation could be distinguished in an adjacent room, held not improperly excluded in discretion); *Minn.* 1899, State *v.* Smith, 78 Minn. 362, 81 N. W. 17 (whether a voice could be heard, etc., at a certain point; results of experiments, admitted). Compare § 222, *ante*.

[4] 1699, Spencer Cowper's Trial, 13 How. St. Tr. 1162, 1178 (evidence received of experiments made in walking to the river, to show that it was impossible for the defendant to go and return within a certain time); 1887, Klanowski *v.* R. Co., 64 Mich. 279, 286, 31 N. W. 275 (experiments made by proceeding along the same road as the plaintiff just before the same train approached the crossing, to determine whether it could be safely made, excluded, because the distances and other conditions were not shown to be similar; Morse, J., diss.); 1900, People *v.* Gotshall, 123 Mich. 474, 82 N. W. 274 (time of going a distance; time taken by certain young men experimentally, not admitted to show time taken by an old man who was ill); 1888, State *v.* Flint, 60 Vt. 304, 308, 317, 14 Atl. 178 (time required to walk a certain distance; experiments in walking it, admitted in spite of partial dissimilarity of conditions).

[5] 1881, Augusta & S. R. Co. *v.* Dorsey, 68 Ga. 235 (to show whether an engine could have been stopped in time, the engineer related another instance in which he had done it under similar circumstances); 1914, Holzemer *v.* Metrop. St. R. Co., 261 Mo. 379, 169 S. W. 102 (test of time of car-stoppage, excluded for lack of a proper showing); 1914, Beckley *v.* Alexander, 77 N. H. 255, 90 Atl. 878 (experiments in stopping an automobile; left to the trial Court's discretion); 1895, Byers *v.* R. Co., 94 Tenn. 345, 29 S. W. 129 (an experiment evidenced that it was impossible to stop a train under the conditions in which the defendant failed to stop the train); 1903, Richmond P. & P. Co. *v.* Racks, 101 Va. 487, 44 S. E. 709 (time required for stopping cars of a substantially different construction, excluded).

[6] 1886, Chicago & N. W. R. Co. *v.* Hart, 22 Ill. App. 209 (on the question whether a cattle-guard was of such a construction that domestic animals could readily step over, evidence was offered that cows, heifers, steers, and horses had repeatedly been seen passing over; Baker, P. J.: "A fact that illustrates by experiment the condition of the subject-matter of the issue in controversy is not collateral to that issue, but is direct evidence bearing on it"); 1871, Carlton *v.* Hescox, 107 Mass. 410 (price of hay fed to the defendant's horse; the quantity fed being in issue, evidence of "how much hay an ordinary horse will eat or consume in a week", excluded, since the horse was with the defendant to be doctored, and therefore not in ordinary condition); 1895, Harwood's Adm'x *v.* R. Co., 67 Vt. 664, 32 Atl. 720, *semble* (that other cattle-guards, similarly circumstanced, and of like pattern, had sufficiently restrained cattle, received to show that the one in question was adequate).

[7] *Federal:* 1897, West Pub. Co. *v.* Lawyers' Coöp. P. Co., 25 C. C. A. 648, 79 Fed. 756 (the issue being whether the headnotes made by the defendant's editors from the plaintiff's reports were merely copied from the plaintiff's headnotes to these reports or were made by original labor and study of the reports, the plaintiff argued that the period of time between the publication of these reports and that of the defendant's headnotes made original study impossible; the defendant's offer to have his editors show their capacity for speed in the master's presence was held not improperly rejected in the trial Court's discretion, in view of the conditions being there much more favorable to high speed than at the time of the making of the headnotes in question); 1899, Golden Reward M. Co. *v.* Buxton M. Co., 38 C. C. A. 228, 97

In general, when a question arises whether at a certain machine, house, field, mine, or other thing, a certain act can be done, under given conditions of time, strength, skill, or achievement, "one way to do", in the language of Mr. Justice Doe (*quoted ante*, § 445) "is to speculate about it; and another way is to try it"; and it is a crude error to suppose that the law of evidence here "prefers speculation to experience, abhors actual experiment, and delights in guesswork."

Compare here (1) the use of other instances of a *particular person's strength or skill*, to show his individual strength or skill (*ante*, §§ 220–223); and (2) the propriety, in the present class of cases, of performing the experiments *before the jury*, instead of proving them by witnesses (*post*, §§ 1150–1161).

§ 461. **Measure of Negligence, Danger, Insufficiency, Unreasonableness, Cruelty, Unskilfulness, or their opposites, as evidenced by Similar Conduct or Habits of other Persons or Animals (Horses' Fright, Passengers' Behavior, Safeguards for Railroads, Highways, and Machines, Commercial Customs,**

Fed. 413 (trespass by mining a quantity of ore on the plaintiff's premises; to prove the total amount taken, the defendant offered to prove that the rate of output in its various slopes was the same, and that the total output divided by the total number of workmen, and multiplied by the number of men working in the slopes on the plaintiff's premises, would give the total tons of ore wrongfully taken; excluded, because on the facts confusing, unfair, and unnecessary); *California:* 1899, People v. Hill, 123 Cal. 571, 56 Pac. 443 (experiment as to getting over a fence, improper because not shown to be under similar conditions); *Iowa:* 1890, McMurrin v. Rigby, 80 Ia. 325, 45 N. W. 877 (experiments as to the possibility of a rape on a stairway as described by the plaintiff; rejected, because "the experiments were not made under such conditions as to size of persons as that the results would prove or disprove the claim of the plaintiff"); 1905, State v. Donovan, 128 Ia. 41, 102 N. W. 791 (seduction under hypnotism; defendant's power evidenced by other instances); 1906, Tackman v. Brotherhood, 132 Ia. 64, 106 N. W. 350 (suicide by hanging with a bridle; experiments with other persons under similar conditions, admitted to show the probability of accidental death); *Illinois:* 1859, Jumpertz v. People, 21 Ill. 408 (the defence having alleged that the deceased committed suicide, experiments were made before the jury with screws, ropes, hooks, etc., to test the possibility of the deceased having hung himself in the manner alleged by the accused; the objection was made, among others, that the conditions were not the same. The majority of the Court held that the verdict would not have been reversed for this alone, but declared that such experiments "should be permitted by the Court with great caution"); *Louisiana:* 1910, State v. McKowen, 126 La. 1075, 53 So. 353 (experiment as to the possibility of carrying a corpse in a wagon, allowed); *Maryland:* 1898, Baltimore C. P. R. Co. v. Conney, 87 Md. 261, 39 Atl. 859 (to show whether a person could ride on a street-car in a certain way, the fact that persons had ridden or could ride on similar cars of the same line was excluded); *Massachusetts:* 1839, Salem I. R. Co. v. Adams, 23 Pick. 256, 258, 264 (deceit in the sale of shoes; the plaintiff claimed that they were so packed in boxes, and the boxes so arranged, as to induce deception; to disprove this, their apparent condition, etc., as examined about the same time and under the same circumstances by another person, was admitted); *Michigan:* 1874, People v. Morrigan, 29 Mich. 5 (a pocketbook had been stolen from a coat-pocket while on the wearer; the fact was admitted of experiments made at a tailor's to determine the possibility of the theft, the coat being then "in the same condition in which it had been at the alleged robbery"); 1878, Ulrich v. People, 39 Mich. 245 (rape; experiments made in lifting girls over a fence as alleged by the complainant, to show the impossibility of this, excluded, because of liability to unfairness and because the lifting was not material); *Nebraska:* 1897, Davis v. State, 51 Neb. 301, 70 N. W. 984 (train-wrecking; to answer testimony that it was impossible with a monkey-wrench to remove certain nuts, testimony was admitted of one who had so removed similar nuts, the conditions being similar); *Utah:* 1898, Hayes v. R. Co., 17 Utah 99, 53 Pac. 1001 (whether an engine could pass a shed safely; experiment with another engine under similar conditions, allowed); *Wisconsin:* 1904, Zimmer v. Fox R. V. E. R. Co., 123 Wis. 643, 101 N. W. 1099 (experiments as to riding on a car, held allowable in the trial Court's determination as to similarity).

Malpractice, etc.). If a person is in the house and wishes to know whether he needs to take out his umbrella with him, and the condition of the atmosphere makes it difficult to see whether it is raining, he may look at the passers-by, and observe whether their umbrellas are lifted. If he wished to ascertain whether a hill was too steep to descend in a wagon without a brake, he would learn something by observing whether the brake was applied to others' wagons in descending. If he observed the workmen in a powder-factory wearing felt shoes, he might infer that the tendency of the powder was to explode from the concussion or friction of ordinary shoes, and that felt shoes were necessary with reference to obviating this tendency. In all these cases, he is judging of the nature or tendency of a material object from its effects on the conduct of others.

1. This tendency of the material object is usually not shown (as in preceding classes of cases) by its direct effects upon senses or muscles — as where a person uses his vision in sighting an object or feels pain upon eating a substance — but by its indirect effects, *i.e.* usually, by *voluntary conduct*, exhibited in *avoiding* or *conforming to the supposed tendency of the object.* Thus, the wearing of the felt shoes is that sort of conduct which the person is forced into in order to avoid the consequences of explosion by friction; the raising by the traveler of the protective umbrella is what he is put to in order to escape a drenching; and the use of the brake is resorted to for avoiding the danger of slipping down the hill. Nevertheless, the conduct is equally cogent evidentially as indicating the tendency of the material object. The only difference is that it approaches a degree nearer to the line between testimonial and circumstantial evidence, and thus raises more distinctly the question of the Hearsay rule. This possible application of the Hearsay rule was the reason for the exclusion of such evidence in *Wright* v. *Tatham;* but this question has already been referred to (*ante*, § 459), and it is enough to say that the rule has never been thought applicable except in *Wright* v. *Tatham.*

2. The chief difficulty here is of another sort. It arises from the necessity of distinguishing between the use of such facts *evidentially* and their use as involving a *standard of conduct* in substantive law. The distinction is in itself a simple one. (1) The conduct of others *evidences* the tendency of the thing in question; and such conduct — *e.g.* in using brakes on a hill, felt shoes in a powder-factory, railings around a machine, or in not using them — is receivable with other evidence showing the tendency of the thing as dangerous, defective, or the reverse. But this is only evidence. The jury may find from other evidence that the thing was in fact dangerous, defective, or the reverse, and the maintenance was or was not negligence, in spite of the above evidence. (2) Meanwhile, the *substantive law* tells them what the *standard of conduct* for negligence is; and this standard is a fixed one, independent of the actual conduct of others. To take that conduct as furnishing a sufficient legal standard of negligence would be to abandon the standard set by the substantive law, and would be improper. This conduct

of others, then, (1) is receivable as some evidence of the nature of the thing in question, because it indicates what is the influence of the thing on the ordinary person in that situation; but (2) it is not to be taken as fixing a legal standard for the conduct required by law.

This distinction is patent enough, but it is sometimes judicially ignored. Such evidence is sometimes improperly excluded on the erroneous supposition that the mere reception of it implies that it is to serve as a legal standard of conduct. The proper method is to receive it, with an express caution that it is merely evidential and is not to serve as a legal standard. The correct treatment of it is well illustrated in the following two cases from the same jurisdiction:

1867, COLT, J., in *Cass* v. *R. Co.*, 14 All. 448 (issue as to the care due from a bailee for hire): "What constituted such care [due and ordinary care] was a question of fact to be judged of with reference to all the circumstances, and especially with reference to the degree of care which other persons engaged in similar business in the vicinity were in the habit of bestowing on property similarly situated."

1868, WELLS, J., in *Maynard* v. *Buck*, 100 Mass. 40 (issue as to the negligence of a drover in losing cattle; an instruction was refused, that "if the defendant did the things that drovers of common prudence, engaged in the same business, ordinarily do, he was not guilty of such negligence as will make him liable"): "This is not the legitimate application of evidence admitted to show the usual practice in similar cases. . . . What had been done by others previously, however uniform in mode it may be shown to have been, does not make a rule of conduct by which the jury are to be limited and governed; it is not to control the judgment of the jury, if they see that in the case under consideration it is not such conduct as a prudent man would adopt in his own affairs. . . . It is evidence of what is proper and reasonable to be done, from which, together with all the other facts and circumstances of the case, the jury are to determine whether the conduct in question in the case before them was proper and justifiable."

3. It is to be remembered that the principles of Relevancy and of Auxiliary Policy (*ante*, §§ 442–444) apply here, with the same limitations as in the preceding topics; *i.e.* (1) the conduct of others must have occurred under circumstances substantially similar, and (2) there may be an exclusion of relevant evidence where in the case in hand it would, in the trial Court's opinion, involve a confusion of issues and undue waste of time.

In the application of this principle, then, the dangerous tendency of an object to *frighten horses* may be evidenced by instances of other horses being frightened by it under similar circumstances.[1] So, too, the tendency of an

§ **461.** [1] ENGLAND: 1889, Brown v. R. Co., 22 Q. B. D. 391 (a heap of refuse and earth in a highway: to show its tendency to frighten horses, the fact was received of the shying of various other horses than the plaintiff's in passing the heap);

UNITED STATES: *Connecticut:* 1858, House v. Metcalf, 27 Conn. 631 (fright at a mill-wheel; to show that the wheel in motion was calculated to frighten horses, other instances of such fright were received); 1871, Knight v. Goodyear Mfg. Co., 38 Conn. 438, 442 (fright of other horses of ordinary gentleness by the same whistle at the same place, admitted to show the whistle's horse-frightening capacity); 1876, Tomlinson v. Derby, 43 Conn. 562 (that another horse was frightened by a highway-defect, admitted); *Indiana:* 1888, Cleveland R. Co. v. Wynant, 114 Ind. 525, 17 N. E. 118 (injury through fright of a horse at a box-car; previous fright of other horses at it, excluded; "it is not a subject to be pleaded or proved, whether a box-car or any other particular object is naturally cal-

extraordinary situation to *frighten human beings* (as when in a collision the reasonableness of a person's conduct in jumping or rushing out is in issue) may be evidenced by the conduct of other persons similarly situated.[2] Where

culated to frighten horses; this is to be determined by the Court and the jury, as applied to all the facts of the particular case before them"; the mere statement of such a reason is its own refutation); *Iowa:* 1906, Heinmiller *v.* Winston Bros., 131 Ia. 32, 107 N. W. 1102 (horse frightened by a steam shovel; fright of two other horses on the same day at the same place, admitted); 1913, Schmidt *v.* Dubuque Co., 136 Ia. 401, 113 N. W. 820 (fright of other horses at the same bridge, admitted); *Kansas:* 1897, Topeka Water Co. *v.* Whiting, 58 Kan. 639, 50 Pac. 877 (fright of other horses at an open hydrant, received); *Maine:* 1867, Hill *v.* R. Co., 55 Me. 438 (horse's fright at a whistle; fright of other horses at the same whistle, admitted, to shew "the usual effect of this whistle on horses of ordinary character"; the defendant might have shown that "no horse had ever been alarmed by it"); 1884, Crocker *v.* McGregor, 76 Me. 282 (whether escaping steam was likely to frighten horses; the fright of other horses, well-broken and ordinarily safe, admitted; "it tends to show the capacity of the inanimate thing to do the mischief complained of"); *Massachusetts:* 1894, Bemis *v.* Temple, 162 Mass. 342, 38 N. E. 970 (whether a campaign-flag overhanging a street was calculated to frighten horses; the effect of the flag under the same conditions upon other ordinary horses, admitted by the majority; Knowlton, J.: "The inquiry was in regard to the effect of an inanimate object upon an animal acting from instinct; the only way in which knowledge on this subject could be acquired is by observation of the effect of the object or of similar objects upon the animal. . . . The only possible difference in the results of different observations would arise from the difference in the horses", but this possible difference is not substantial); *Michigan:* 1889, Smith *v.* Sherwood, 62 Mich. 159, 28 N. W. 806 (fright of a horse at a hole in a bridge; the shying of other horses at the same hole admitted); *Minnesota:* 1903, Nye *v.* Dibley, 88 Minn. 465, 93 N. W. 524 (fright of other horses of ordinary gentleness, at a pile of stone, admitted); *Nevada:* 1904, Powell *v.* Nevada C. & O. R. Co., 28 Nev. 40, 78 Pac. 978 (fright of a horse at a whistle; fright of another horse at the same whistle, admitted); *New Hampshire:* 1872, Darling *v.* Westmoreland, 52 N. H. 40 (injury by the fright of a horse at a pile of lumber; previous fright of another horse, admitted; see quotations, *ante*, §§ 443, 444, 445); 1878, Gordon *v.* R. Co., 58 N. H. 396 (whether the noise of steam escaping from a locomotive was likely to frighten horses; the fright of other horses passing under like circumstances, admitted); 1896, Folsom *v.* R. Co., 68 N. H. 454, 38 Atl. 209 (fright of other horses "in the same or similar situation", admitted); 1897, Valley *v.* R. Co., 68 N. H. 546, 38 Atl. 383 (conduct of the same horse in passing the same pile of lumber at other times on the same day, admissible); *Pennsylvania:* 1898, Potter *v.* Natural Gas Co., 183 Pa. 575, 39 Atl. 7 (previous fright of another horse at the same noise, admitted); *Rhode Island:* 1899, Stone *v.* Pendleton, 21 R. I. 332, 43 Atl. 643 (horse frightened by a heap of sand; non-occurrence of fright by other horses at such heaps, excluded because too remote and because the conditions were not the same); *Utah:* 1894, Thomas *v.* Springville, 9 Utah 426, 430, 35 Pac. 503 (shying of other horses at a hole, admissible); *Washington:* 1909, Wilkie *v.* Chehalis Co. L. & T. Co., 55 Wash. 324, 104 Pac. 616 (one instance of another horse being frightened at fresh meat, excluded, apparently on the principle of § 41, *ante;* the present line of authorities not considered); *Wisconsin:* 1887, Bloor *v.* Town of Delafield, 56 Wis. 273, 34 N. W. 115 (fright of a horse at a box-car; that numerous other horses had been driven past without fright, excluded, on grounds of auxiliary policy; no authorities cited).

[2] 1872, Mobile & M. R. Co. *v.* Ashcroft, 48 Ala. 31 (conduct of others in jumping from the train, admitted); 1890, Mitchell *v.* R. Co., 87 Cal. 62, 25 Pac. 245 (conduct of other passengers, admitted to "show what they, being in the same dangerous situation, deemed prudent conduct"); 1899, Atlanta C. S. R. Co. *v.* Bagwell, 107 Ga. 157, 33 S. E. 191 (screams of other people in a car just before a collision, admitted to show plaintiff's state of mind before jumping); 1855, Galena & C. U. R. Co. *v.* Fay, 16 Ill. 558, 568 (conduct of other passengers, admitted "as tending to show how the circumstances of apparent danger impressed every one, and . . . vindicate it [the plaintiff's conduct] from rashness and imprudence from undue alarm"); 1899, Leary *v.* R. Co., 173 Mass. 373, 53 N. E. 817 (that other passengers were frequently confused and got out on the wrong side of the train, left to trial Court's discretion); 1904, Mullin *v.* Boston Elev. R. Co., 185 Mass. 522, 70 N. E. 1021 (injury received, while a passenger, during a collision of cars; that no other passengers received any injury, admitted to show the force of the collision, etc.); 1897, Holman *v.* R. Co., 114 Mich. 208, 72 N. W. 202 (conduct of other passengers in the same car at the time of a collision, admitted as indicating the existence of danger); 1877, Twomley *v.* R. Co., 69 N. Y. 161 (the issue being the danger of a particular situation and therefore the reasonableness of the plaintiff's

the ordinary operation of a vehicle or place of work is in issue, with reference to the care to be used by *passengers*, *employees*, or *highway travellers*, or the possibility of *safely riding*, *standing*, *passing*, *coupling*, or *climbing* in a certain manner, the same principle applies, though the risk is greater of the jury's improperly confusing the evidential effect with the legal standard of care.[3] Where the

conduct in jumping from a train, the action of other passengers was received, "as evidence of what was deemed prudent by those in the same situation, having an interest to take the least and avoid the greater hazard"); 1886, Hallahan *v.* R. Co., 102 N. Y. 199, 6 N. E. 287 (the plaintiff was injured by a collision between the car and a mail-crane; he was allowed "to show that others in the car heard the noise of the collision of the crane with the car, the confusion being the result of the collision and showing the nature thereof"); 1899, Agulino *v.* R. Co., 21 R. I. 263, 43 Atl. 63 (whether a plaintiff was negligent in believing that a train had come to a full stop; experience of others on the same train at other times, excluded).

Distinguish the following: 1905, Foss *v.* Portsmouth D. & Y. R. Co., 73 N. H. 246, 60 Atl. 747 (collision; that no other passenger had made complaint or claim, excluded, on the principle of § 1080, *post*).

[3] For this reason, and also because the evidence is frequently offered from the wrong point of view, most of the rulings exclude such evidence: *Alabama:* 1891, Warden *v.* R. Co., 94 Ala. 277, 285, 10 So. 276 (brakeman riding on a cross-beam in front of the engine; a custom so to ride, held admissible usually as throwing light on the propriety of conduct, but not admissible where the act was 'per se' negligent, as here); 1892, Kansas C. M. & B. R. Co. *v.* Burton, 97 Ala. 240, 251, 12 So. 88 (car left near the main line; similar principle laid down); 1892, Andrews *v.* R. Co., 99 Ala. 439, 12 So. 432 (similar facts and ruling as in Warden *v.* R. Co.); 1893, Hill *v.* R. Co., 100 Ala. 447, 451, 14 So. 201 (stepping from one street-car to another by the foot-boards, the cars being in motion; a custom of others excluded, for the above reason); 1896, George *v.* R. Co., 109 Ala. 245, 19 So. 785 (going between engine and car, while in motion, to uncouple them; same ruling); *Georgia:* 1893, Metropolitan S. R. Co. *v.* Johnson, 91 Ga. 466, 470, 18 S. E. 816 (crossing the street in front of a car; "usual custom" of pedestrians, excluded, as "no measure of diligence" for plaintiff); *Illinois:* 1883, Chicago R. I. & P. R. Co. *v.* Clark, 108 Ill. 118 (usual mode of coupling cars, excluded; the Court not noticing the evidential use of the fact); 1900, North Chicago S. R. Co. *v.* Kaspers, 186 Ill. 246, 57 N. E. 849 (that other passengers were accustomed to jump on a car in motion, not admitted "for the purpose of establishing a standard of ordinary care"; correct distinction not noticed); *Indiana:* 1910, Grand Trunk Western R. Co. *v.* Poole, 175 Ind. 567, 93 N. E. 26 (contributory negligence in going in front of cars to make couplings; custom in defendant's yards to do so, admitted); *Kansas:* 1890, Southern K. R. Co. *v.* Robbins, 43 Kan. 145, 23 Pac. 113 (climbing the ladder of a box-car; the practice of others, excluded as creating collateral issues); *Massachusetts:* 1867, Hickey *v.* R. Co., 14 All. 429 (riding upon a car-platform; a custom of others, excluded as "not tending to show that it was safe"); 1867, Caswell *v.* R. Co., 98 Mass. 194, 200 (whether the plaintiff was careless in going out on the platform from the waiting-room before the train arrived; the custom of passengers to do this, admissible as evidence); *Michigan:* 1890, Glover *v.* Scotten, 82 Mich. 369, 46 N. W. 936 (switchmen riding upon cow-catchers; a custom of others held not to be considered, the act being negligent 'per se'); 1903, De Cair *v.* Manistee & G. R. R. Co., 133 Mich. 578, 95 N. W. 726 (custom of employees to go in front of moving cars when coupling, admitted to show the plaintiff's care; Hooker, C. J., and Grant, J., diss., on the ground that such a fact is admissible only to show a waiver by the defendant of a rule forbidding such conduct); *Minnesota:* 1915, O'Neil *v.* Potts, 130 Minn. 353, 153 N. W. 856 (negligence in an automobile collision; custom as to signalling, admitted); 1918, Carson *v.* Turrish, 140 Minn. 445, 168 N. W. 349 (automobile collision; custom as to right of way, excluded on the facts); *North Carolina:* 1906, Wallace *v.* Seaboard A. L. R. Co., 141 N. C. 646, 54 S. E. 399 (custom as to coupling cars, adopted by the master carbuilders' association, admitted); *Texas:* 1882, Houston & T. C. R. Co. *v.* Cowser, 57 Tex. 293, 303 (the usual mode of switching by prudent railroad men under similar circumstances, admitted); *Utah:* 1898, Nelson *v.* South. P. Co., 18 Utah 244, 55 Pac. 364 (contributory negligence in passing over the roof of a car; custom for persons to do so under such circumstances, admitted); *West Virginia:* 1889, Humphreys *v.* N. N. & M. V. Co., 33 W. Va. 135, 10 S. E. 39 (a locomotive fireman standing out on the tank-spout while watering the engine; a custom of others held not to prevent the act from being negligent 'per se'); *Wisconsin:* 1894, Colf *v.* R. Co., 87 Wis. 273, 276, 58 N. W. 408 (switchman jumping off a moving engine; the practice of employees, excluded, as involving confusion of issues; only one precedent cited, and that erroneously); 1897, Andrews *v.* R. Co., 96 Wis. 348, 71 N. W. 372 (custom as to other employees' mode of coupling, admitted, on the issue of contributory negligence).

care required of the *owner of a railroad* is in issue, this sort of evidence may serve in a variety of ways, — to indicate, for example, the adequate *construction or operation* of tracks, platforms, bridges, cars, turntables, spark-arresters, switches, or any object whose qualities are exhibited by the specific conduct or habitual practice of other persons or *other railroads* in using it.[4]

[4] CANADA: 1883, Robinson *v.* N. B. R. Co., 23 N. Br. 323 (railway fire set by sparks; the kind of fuel used on other railways, admitted);

UNITED STATES: *Federal:* 1875, Grand Trunk R. Co. *v.* Richardson, 91 U. S. 454, 458, 469 (fire set by locomotives; the defendant's negligence in not having the track properly watched was an issue; that "it was not the usual practice among railroads in that section of the country to employ a man", etc., excluded, because "the standard by which the defendant's conduct was to be measured was not the conduct of other railroad companies in the vicinity"); 1897, Henion *v.* R. Co., 25 C. C. A. 223, 79 Fed. 903 (injury at a platform by an approaching train; mode of construction of other platforms, excluded, because the platform could show for itself its safety or danger; *semble*, modes of approach of trains in other companies "possibly" pertinent ordinarily); 1905, Pittsburgh S. & N. R. Co. *v.* Lamphere, 137 Fed. 20, 69 C. C. A. 542 (custom as to telltales on low bridges, admitted);
Alabama: 1903, Northern Ala. R. Co. *v.* Mansell, 138 Ala. 548, 36 So. 459 (death at a stock-gap; the usage on other well-regulated roads, admitted, but not taken as a standard); 1909, Birmingham R. L. & P. Co. *v.* Morris, 163 Ala. 190, 50 So. 198 (rule and custom of a street railroad as to mode of stopping cars, admitted; approving the above distinction);
Colorado: 1906, Denver & R. G. R. Co. *v.* Burchard, 35 Colo. 539, 86 Pac. 749 (experience of other railroads as to the location of mail cranes, admitted);
Columbia (Dist.): 1894, Weaver *v.* R. Co., 3 D. C. App. 436, 448 (injury at a bridge; width of bridges on one other railroad, excluded; general principle undecided);
Illinois: 1893, Cleveland C. C. & St. L. R. Co. *v.* Walter, 147 Ill. 60, 64, 35 N. E. 529 (injury at a low bridge; usual height of bridges on other roads, excluded; yet conceding that it "might tend to prove" negligence); 1897, Chicago City R. Co. *v.* Taylor, 170 Ill. 49, 48 N. E. 831 (collision between horse-car and cable-car; the custom as to priority of passage at the time and place, received, but not the custom in another city);
Indiana: 1886, Louisville N. A. & C. R. Co. *v.* Pedigo, 108 Ind. 481, 484, 8 N. E. 627 (injury at a bridge; the use of tools and methods similar to those ordinarily so used, excluded as immaterial); 1888, Louisville N. A. & C. R. Co. *v.* Wright, 115 Ind. 378, 389, 390, 16 N. E. 145, 17 N. E. 584 (injury of a brakeman at a low bridge on a railway; that on other railways were maintained many bridges equally low, excluded; but *semble* that a general custom not to exceed that height might have been received); 1892, Lake Erie & W. R. Co. *v.* Mugg, 132 Ind. 168, 175, 31 N. E. 564 (condition of a track; custom of others to maintain a track in the same condition, excluded);
Iowa: 1872, Hamilton *v.* R. Co., 36 Ia. 31, 37 (freight-car loaded with timber; that a mode of loading as "usually and commonly loaded and carried over defendants' and all other railroads" would not be negligent, was denied by the Court); 1888, Hosic *v.* R. Co., 75 Ia. 683, 685, 37 N. W. 693 (absence of a footboard on a freight-car peculiarly loaded; a customary omission of footboards, held not to negative negligence); 1888, Metzgar *v.* R. Co., 76 Ia. 387, 389, 41 N. W. 49 (fire set by a locomotive; evidence that a similar style of smoke-stack was used on four other railroads, excluded as neither negativing negligence, nor tending "to establish any fact material"); 1894, Miller *v.* R. Co., 89 Ia. 567, 570, 57 N. W. 418 (fireman falling into a tender-manhole; usual construction of a manhole, excluded, because the good construction was conceded; custom of fireman to act as plaintiff did, admitted to show care); 1899, Keist *v.* R. Co., 110 Ia. 32, 81 N. W. 181 (construction of stock chutes; usual custom on other roads, excluded);
Kentucky: 1898, Berberich *v.* Bridge Co., — Ky. —, 46 S. W. 691 (custom of other railroads to give notice to carpenters working on a bridge, admissible);
Massachusetts: 1871, Bailey *v.* N. H. & N. Co., 107 Mass. 497 (absence of a flagman at a railroad crossing, excluded as evidence because the circumstances of other crossings would not be exactly similar and because collateral issues would be raised as to each crossing); 1916, Smith *v.* Gammino, 225 Mass. 285, 114 N. E. 205 (mode of guarding a pump, ruling not clear);
Michigan: 1874, Hoyt *v.* Jeffers, 30 Mich. 181, 191 (negligent mill-chimney; the use of spark-arresters elsewhere for locomotives, steamboats, saw-mills, etc., admissible as showing that there was an effective remedy available; not admissible to show negligence or care, except under similar circumstances; and, *semble*, not affording a test of legal duty in any event; leading case);
Minnesota: 1881, Kelly *v.* R. Co., 28 Minn. 98, 99, 9 N. W. 588 (defective planking at a crossing; the usual mode of planking, admit-

Thus also may be evidenced the condition of a *factory*, *mine*, *house*, *vessel*, *machine*, *boiler*, or other apparatus, with reference to the propriety of certain precautions in construction and operation; [5] or of a pavement, ditch, or other

ted, because the care required was "that which men of prudence would usually exercise under like circumstances"); 1884, Kolsti *v.* R. Co., 32 Minn. 133, 134, 19 N. W. 655 (injury at a turntable; similarity of method of securing other turntables, admitted, because "the test is the amount of care ordinarily used by men in general in similar circumstances"; this is clearly wrong in the substantive law, but not the preceding case); 1889, Doyle *v.* R. Co., 42 Minn. 79, 43 N. W. 787 (condition of tracks; the use of old rails being shown, a general custom to do so was admitted as evidence of "care such as ordinary prudent men are accustomed" to use); 1900, Moldenhaur *v.* R. Co., 80 Minn. 700, 83 N. W. 381 (condition of headlights on other cars of defendant, under dissimilar circumstances, excluded);
Mississippi: 1902, Southern R. Co. *v.* McLellan, 80 Miss. 700, 32 So. 283 (that "other responsible railway companies used slag to ballast their roads", admitted on the issue of negligence);
Missouri: 1877, Koons *v.* R. Co., 65 Mo. 592, 597 (turntable injury; the custom of other railroads to leave turntables locked, excluded, the conduct of others being "no defence");
Montana: 1904, Orient Ins. Co. *v.* Northern P. R. Co., 31 Mont. 502, 78 Pac. 1036 (relative quantity of spark-emissions of other engines, admitted);
New Jersey: 1899, Exton *v.* R. Co., 62 N. J. L. 7, 42 Atl. 486 (injury to a passenger by scuffling of two hackmen standing on carrier's premises; former repeated similar conduct of these and other hackmen, admitted "to show the dangers connected with the use of this way to the baggage-room");
New York: 1864, Wilds *v.* R. Co., 29 N. Y. 315, 326 (injury by a railroad train; that the speed of the train in the city was not negligently fast, was held to be clear, if it was "not greater than that which had been usually practised for a considerable period, with the tacit consent of the community, and without accident"); 1912, Egelston *v.* New York C. & St. L. R. Co., 205 N. Y. 579, 98 N. E. 748 (regulations of other railroads as to shunting, admitted);
North Carolina: 1900, Raper *v.* R. Co., 126 N. C. 563, 36 S. E. 115 (mode of construction of other crossings of defendant, not admitted to show a standard of defectiveness);
Oregon: 1919, Garvin *v.* Western Cooperage Co., 94 Or. 487, 184 Pac. 555 (injury on a logging railroad; use of safety lines on other logging roads, admitted);
Pennsylvania: 1867, Frankford & B. T. Co. *v.* R. Co., 54 Pa. 345, 351 (use of similar spark-arresters on other lines, admissible "not as a rule of decision, but as a matter of evidence assisting the jury to judge what sort is ordinarily safe");
Rhode Island: 1901, Benson *v.* R. Co., 23 R. I. 147, 49 Atl. 689 (that cars were of a sort in common use on other railroads, allowed);
South Carolina: 1887, Bridger *v.* R. Co., 27 S. C. 456, 3 S. E. 860 (injury at a turntable; the practice of other railroads as to locking and guarding, admitted as evidence, but not as constituting a standard of care);
Texas: 1884, Gulf C. & S. F. R. Co. *v.* Evansich, 61 Tex. 3, 5 (the custom of other railroads not to lock turntables, held no standard of the defendant's care; also, *semble*, not admissible because the conditions of other turntables may be entirely dissimilar); 1890, Gulf C. & S. F. R. Co. *v.* Compton, 75 Tex. 667, 671, 13 S. W. 667 (custom of other railroads as to number of hands for a train, admissible, but not to constitute a standard of care); 1891, Gulf C. & S. F. R. Co. *v.* Harriett, 80 Tex. 73, 81, 15 S. W. 556 (similar evidence; "the custom of other railroads was legal evidence to the jury upon the question of negligence in sending out the train, but it was not conclusive upon the question"); 1894, Gulf C. & S. F. R. Co. *v.* Smith, 87 Tex. 348, 357, 28 S. W. 520 (custom of other railroads as to flying switches, not to be made "the absolute standard of judgment");
Vermont: 1884, Bryant *v.* R. Co., 56 Vt. 710, 712 (cutting away brushwood by a railway track; practice of others not allowable as a legal standard, but the Court does not clearly express the principle); 1895, Ranney *v.* R. Co., 67 Vt. 594, 32 Atl. 810 (that the station and track arrangements at other places were the same as at the place alleged to be dangerous, excluded, partly because substantial similarity was not shown);
Virginia: 1900, Southern R. Co. *v.* Mauzy, 98 Va. 692, 37 S. E. 285 (usual practice of loading among railroads in general, admitted, but not the mode used by a single other road); 1906, Southern R. Co. *v.* Blanford's Adm'x, 105 Va. 373, 54 S. E. 1 (custom of other railroads in Virginia, and other parts of defendant's railroad, as to switchlights, admitted).

[5] *Federal:* 1908, Chicago Gt. Western R. Co. *v.* McDonough, 8th C. C. A., 161 Fed. 657, 665 (boiler explosion; custom of other boiler owners as to annual inspection, admitted; careful opinion by Van Devanter, J.); 1913, Stone & Webster E. Co. *v.* Melovich, 9th C. C. A., 202 Fed. 438 (custom to guard cogwheels, admitted); 1917, Ketterer *v.* Armour & Co., 2d C. C. A., 247 Fed. 921 (trichinosis from damaged meat; general

custom "to conduct the business in a given way", admissible);
Alabama: 1858, Hilders *v.* McCartney, 31 Ala. 501 (fire set by a torch on a steamer; custom of other steamers to carry such a torch, held not a justification); 1904, Davis *v.* Kornman, 141 Ala. 479, 37 So. 789 (injury at a machine; correct rule laid down);
Arkansas: 1893, Jones *v.* Lumber Co., 58 Ark. 125, 128, 23 S. W. 679 (whether a boiler was properly tested; usual tests used in the region, admitted, but not the conduct of another owner);
California: 1893, Burns *v.* Sennett, 99 Cal. 363, 373, 33 Pac. 916 (hoisting strap; usual mode of construction, admitted, not as a conclusive test, but as evidence of care);
Columbia (Dist.): 1905, Clements *v.* Potomac E. P. Co., 26 D. C. App. 482, 495 (custom as to uninsulated wires, excluded because here an express municipal prohibition applied);
Connecticut: 1905, Hazard P. Co. *v.* Somerville M. Co., 78 Conn. 171, 61 Atl. 519 (time of running of mills, on an issue as to unreasonable diversion of water; custom of other mills, admitted);
Florida: 1922, Atlantic Coast Line R. Co. *v.* Shouse, — Fla. —, 91 So. 90 (personal injury; usual method of railroads in making flying switches, excluded; unsound);
Georgia: 1903, Arrington *v.* Fleming, 117 Ga. 449, 43 S. E. 691 (agistment; custom of other agisters as to fencing, admitted);
Illinois: 1898, Hartford Deposit Co. *v.* Sollitt, 172 Ill. 222, 50 N. E. 178 (negligence with an elevator; operating mode of other elevators, excluded; no authority cited); 1904, Illinois C. R. Co. *v.* Prickett, 210 Ill. 140, 71 N. E. 435 (boiler-explosion; the custom of other companies as to inspection must be that of "well regulated and prudently managed" ones); 1905, Hansell-Elcock F. Co. *v.* Clark, 214 Ill. 399, 73 N. E. 787 (iron column causing injury; the Court ignore the distinction between admitting evidence and fixing a standard of care; "usual and customary manner" of construction, said to be inadmissible); 1905, Siegel, Cooper & Co. *v.* Treka, 218 Ill. 559, 75 N. E. 1053 (usual manner of constructing elevator doors, excluded); 1908, Franey *v.* Union Stockyard & T. Co., 235 Ill. 522, 85 N. E. 750 (injury in climbing over a fence between stockpens; custom of others admitted as evidence of the degree of care required);
Indiana: 1908, Knickerbocker Ice Co. *v.* Gray, 171 Ind. 395, 84 N. E. 341 (oil pans and drains; custom "in most places", admitted); 1909, Laurie Co. *v.* McCullough, 174 Ind. 477, 90 N. E. 1014 (personal injury by slipping on an oiled floor in a store; the custom of using such floor-dressing in other stores in the same city, admitted; leading case);
Iowa: 1899, Taylor *v.* Star Coal Co., 110 Ia. 40, 81 N. W. 249 (admissible "in certain cases to prove what is negligence", though not "for the purpose of excusing negligence"; here, a custom as to mine-roofing, admitted); 1903, Hamilton *v.* Mendota C. & M. Co., 120 Ia. 147, 94 N. W. 282 (custom of other mines as to entries admitted); 1906, Wilder *v.* Gt. Western C. Co., 134 Ia. 451, 109 N. W. 789 (usual method of fastening pile drivers, admitted); 1917, Ricardo *v.* Central Coal & Coke Co., 100 Kan. 95, 163 Pac. 641 (injury in a mine; custom of "putting a room in safe condition", etc., admitted);
Kentucky: 1905, Mahan *v.* Daggett, — Ky. —, 84 S. W. 525 (nuisance; manner of disposing of sawdust in other mills, admitted); 1906, Louisville B. & I. Co. *v.* Hart, 122 Ky. 731, 92 S. W. 951 (custom in rolling-mills, admitted; good opinion, by O'Rear, J.); 1919, White's Admir. *v.* Kentucky P. Elev. Co., 186 Ky. 91, 216 S. W. 837 (death in a grain tank; custom as to using a rope in that elevator, admitted);
Maine: 1884, Mayhew *v.* Mining Co., 76 Me. 100, 111 (that a railing around a ladder-hole in a mine was not customary in other mines, excluded, because custom was no excuse for negligence);
Maryland: 1909, Consolidated G. E. L. & P. Co. *v.* State, 109 Md. 186, 72 Atl. 651 (electric lineman's practice);
Massachusetts: 1875, Hill Mfg. Co. *v.* P. & N. Y. S. Co., 125 Mass. 292, 298, 303 (careless construction of a New York pier with reference to fire; the mode of construction of similar piers in Boston under similar circumstances of risk, held not improperly excluded in the trial Court's discretion as involving collateral issues); 1894, Rooney *v.* S. & D. C. Co., 161 Mass. 153, 161, 36 N. E. 789 (employee injured at machinery; custom of guarding in other factories, excluded, because plaintiff assumed the risk of danger here); 1897, French *v.* Spinning, 169 Mass. 531, 48 N. E. 269 (running-board near shafting; that other mills were differently arranged, excluded, apparently because the plaintiff had assumed the risk); 1899, McMahon *v.* McHale, 174 Mass. 320, 54 N. E. 854 (usual play of part of derrick as elsewhere used, etc., admissible in trial Court's discretion); 1904, Dolan *v.* Boott Cotton Mills, 185 Mass. 576, 70 N. E. 1025 (uncovered machine-gearing; the condition of such gearing in other mills, held admissible, in the trial Court's discretion; distinguishing the rulings as to actions against towns for defective highways); 1906, Erickson *v.* American S. & W. Co., 193 Mass. 119, 78 N. E. 761 (boiler-tests; trial Court's discretion controls); 1918, Draper *v.* Cotting, 231 Mass. 51, 120 N. E. 365 (injury in a passenger elevator; the use elsewhere of safer appliances, held admissible); 1918, Wilson *v.* Alexander, 230 Mass. 242, 119 N. E. 754 (injury at a derrick; use of similar appliances by other employers "does not as matter of law relieve the defendant", though it is evidence admissible);
Minnesota: 1909, Anderson *v.* Pitt I. M. Co., 108 Minn. 261, 121 N. W. 915 (custom as to

part of the *highway*,[6] with reference to its proper mode of use; or of *money*

timbering mines, admitted); 1904, Anderson *v.* Fielding, 92 Minn. 42, 99 N. W. 357 (custom to use a certain tool, admitted, but not as conclusive); 1904, Dell *v.* McGrath, 92 Minn. 187, 99 N. W. 629 (customary number of men in skidding, admitted);
Missouri: 1896, Helfenstein *v.* Medart, 136 Mo. 595, 36 S. W. 863 (negligent running of a grindstone; the rate of speed in other similar factories, excluded, because it "was immaterial, and furnished no defence to the action");
New Hampshire: 1903, Saucier *v.* N. H. Spinning Mills, 72 N. H. 292, 56 Atl. 545 (equipment of other machines not shown to be in common use, excluded, but equipment in general use, admitted); 1918, Kier *v.* Parks, 79 N. H. 67, 104 Atl. 158 ("common practice" as to construction of garages, held admissible; but excluded on the facts);
New Jersey: 1898, Belleville Stone Co. *v.* Comben, 61 N. J. L. 353, 39 Atl. 641 (methods of other quarries as to the use of hanging ropes, admitted as evidence of negligence);
New York: 1904, Jenks *v.* Thompson, 179 N. Y. 20, 71 N. E. 266 (injury on a scaffold; general custom as to building scaffolds, admitted);
North Carolina: 1906, Jones *v.* Reynolds T. Co., 141 N. C. 202, 53 S. E. 849 (general custom as to protecting a machine, admitted);
Pennsylvania: 1894, Reese *v.* Hershey, 163 Pa. 253, 257, 29 Atl. 907 (general mode of use of machine in the trade, admissible); 1909, McGeehan *v.* Hughes, 223 Pa. 524, 72 Atl. 856 (bucket);
Rhode Island: 1901, McGar *v.* Worsted Mills, 22 R. I. 347, 47 Atl. 1092 (mode of lacing belts in other mills, admitted to show lack of safety);
Utah: 1903, Fritz *v.* Tel. Co., 25 Utah 263, 71 Pac. 209 (usual method of providing insulators, stringing wires, etc., admitted); 1904, Pence *v.* California M. Co., 27 Utah 378, 75 Pac. 934 (custom as to using inexperienced miners, admitted); 1922, Burke *v.* South Boulder C. D. Co., — Utah —, 203 Pac. 1098 (negligent operation of a ditch; custom as to construction and operation of ditches in the vicinity, excluded; unsound);
Vermont: 1894, Congdon *v.* Scale Co., 66 Vt. 255, 29 Atl. 253 (whether a wheel was properly guarded; the absence of guards on similar wheels in other factories, excluded, because the conditions of use were not similar);
Virginia: 1897, Richmond L. & M. W. *v.* Ford, 94 Va. 627, 27 S. E. 509 (injury in wheel-moving; the general practice of other such shops, but not of a single other, admissible); 1904, Parlett *v.* Dunn, 102 Va. 459, 46 S. E. 467 (usual method of putting up a derrick, allowed); 1904, Richmond & P. E. R. Co. *v.* Rubin, 102 Va. 809, 47 S. E. 834 (guard wires on telephone lines); 1906, Norfolk & W. R. Co. *v.* Bell, 104 Va. 836, 52 S. E. 700 (water-gauge; making a peculiar distinction against testimony that other appliances are safer);
Washington: 1904, Crooker *v.* Pacific L. & M. Co., 34 Wash. 191, 75 Pac. 632 (custom as to guarding ripsaws, admitted); 1905, Dossett *v.* St. Paul & T. L. Co., 40 Wash. 276, 82 Pac. 273 (customs in other mills as to sawyers' duties, admitted); 1909, Smith *v.* Hewitt-Lea L. Co., 55 Wash. 357, 104 Pac. 651 (machinery; the precise decision is here difficult to discover);
Wisconsin: 1893, Faerber *v.* Lumber Co., 86 Wis. 226, 234, 56 N. W. 745 (use of similar burners elsewhere, excluded on the issue); 1905, Rylander *v.* Laursen, 124 Wis. 2, 102 N. W. 341 (spark-arrester of a mill; distinguishing between the evidence and the standard of care); 1908, Hamann *v.* Milwaukee Bridge Co., 136 Wis. 39, 116 N. W. 854 (custom elsewhere as to safeguards for a machine, admitted).

[6] *Connecticut:* 1893, Bassett *v.* Shares, 63 Conn. 39, 43, 27 Atl. 421 (team left unhitched; ordinary practice, excluded; no precedents cited); 1919, Jackson *v.* District, 48 D. C. App. 396 (manhole and cover; that the device was a standard one, admitted); *Illinois:* 1869, Champaign *v.* Patterson, 50 Ill. 61, 65 (manner of constructing sidewalks, etc., in other cities and towns of similar size, excluded, on the theory that this would be no justification); *Iowa:* 1904, Norris *v.* Cudahy P. Co., 124 Ia. 748, 100 N. W. 853 (conduct of other people at a highway trench, admitted); 1904, Kein *v.* Ft. Dodge, 126 Ia. 27, 101 N. W. 443 (highway injury; that the mode of construction was similar to that in general use in the city, admitted, but only to show the plaintiff's knowledge); *Kansas:* 1913, Howard *v.* Osage City, 89 Kan. 205, 132 Pac. 187 (injury at a ditch; plaintiff allowed to show that defendant had filled or bridged every other crossing except this one, to show "whether they had exercised even their own usual care" at this one); *Louisiana:* 1841, Barataria & S. C. Co. *v.* Field, 17 La. 422 (that many persons had been obliged to quit their houses on account of an overflow, admitted to show its nature); *Massachusetts:* 1868, Maynard *v.* Buck, 100 Mass. 40 (see quotation *supra*); 1871, Judd *v.* Fargo, 107 Mass. 264, 268 (the plaintiff's horse was frightened by the defendant's maple-sugar apparatus in the highway; that other persons in the vicinity were accustomed to use the highway in the same manner, excluded); 1893, Marvin *v.* New Bedford, 158 Mass. 464, 466, 33 N. E. 605 (that similar depressions in the sidewalk were common in other cities, excluded as irrelevant and confusing); 1906, Moynihan *v.* Holyoke, 193 Mass. 26, 78 N. E. 742 (slippery cellar-lights in a sidewalk; usual use of similar lights in other sidewalks, held admissible or not in the trial Court's determination; good opinion by Knowlton, J. C.); *Michigan:* 1904, Comstock *v.* Georgetown, 137 Mich. 541, 100 N. W. 788 (custom as to the

or *chattels*,[7] with reference to the proper method of loading, warehousing, using, mending, or otherwise handling; and, in particular, of a *business*, or a *stock of goods*, with reference to the prudence of carrying it.[8]

Whether in *medical matters* a certain kind of remedy, skill, or treatment is necessary or sufficient, may often be evidenced in this manner.[9]

load taken upon a bridge, admitted in an action for an injury to the driver of a traction engine); *North Carolina:* 1904, Chaffin *v.* Fries M. & P. Co., 135 N. C. 95, 47 S. E. 226 (overflow by a dam; certain similar effects excluded and others admitted); *Rhode Island:* 1901, Laporte *v.* Cook, 22 R. I. 554, 48 Atl. 798 (custom of shoring up ditches of like character under similar circumstances, admitted); *Utah:* 1896, Jenkins *v.* Irrigation Co., 13 Utah 100, 44 Pac. 829 (to show negligence in cleaning out ditches, the practice of other irrigators in the same region was excluded); *Washington:* 1903, Smith *v.* Seattle, 33 Wash. 481, 74 Pac. 674 (protected condition of other sidewalks in the same city, admitted, partly on the present ground and partly as negativing contributory negligence).

[7] *Ala.* 1848, Hatchett *v.* Gibson, 13 Ala. 587, 598 (like the next case); 1854, Gibson *v.* Hatchett, 24 Ala. 201 (whether a warehouse was negligently destroyed by fire; the precautions taken and efforts made for another warehouse, saved from burning, admissible, *semble*, if the conditions were the same); *Cal.* 1900, Arnold *v.* Fruit Co., 128 Cal. 637, 61 Pac. 283 (under a contract to handle fruit "in the most approved manner", the methods of the majority of fruit-handlers were allowed to be proved; the issue not being whether these were the best methods); *Ia.* 1885, McPherrin *v.* Jennings, 66 Ia. 625, 24 N. W. 242 (that no other person in that business had similar arrangements, excluded); *Me.* 1884, Mayhew *v.* Mining Co., 76 Me. 112 ("Defendant's counsel argue that . . . 'if one conforms to custom he is so far exercising average ordinary care.' The argument proceeds upon an erroneous idea of what constitutes ordinary care. 'Custom' and 'average' have no proper place in its definition"); *Mass.* 1867, Cass *v.* R. Co., 14 All. 448 (see quotation *supra*); 1878, Eastham *v.* Riedell, 125 Mass. 586, *semble* (what other persons in the same business do, admitted to evidence care); 1897, Hendrick *v.* R. Co., 170 Mass. 44, 48 N. E. 835 (general course of business of defendant in shipping cattle, admissible on the question of negligence); *N. Y.* 1894, Isham *v.* Post, 141 N. Y. 100, 110, 35 N. E. 1084 (action for negligence in lending the plaintiff's money on poor security; custom of other bankers and of the defendant to lend money on similar security, admitted); *Pa.* 1905, Pauksztis *v.* Raeder B. L. & P. Co., 212 Pa. 403, 61 Atl. 901 (customer's books burned at a book-binder's; the usage of book-binders to insure customers' books, admitted); *Vt.* 1902, Benedict *v.* Union Agricultural Soc'y, 74 Vt. 91, 52 Atl. 110 (custom of wheelmen as to the manner of riding in a race, admitted on an issue of contributory negligence); *Wis.* 1901, Chase *v.* Blodgett Milling Co., 111 Wis. 655, 87 N. W. 826 (negligence in shelling popcorn delivered to defendant; to show the fitness of the corn, the fact was admitted that corn of identical quality had been successfully shelled by other persons with similar machines).

[8] 1919, Friedman *v.* U. S., 6th C. C. A., 260 Fed. 388 (unlawfully dispensing narcotic drugs not in the course of professional practice, under U. S. St. Dec. 17, 1914, Anti-Narcotic Act; evidence admitted of the excessive quantities of the drug purchased and sold by defendant, in comparison with the quantities sold by other druggists in the vicinity in the ordinary course of business); 1907, Long *v.* Athol, 196 Mass. 497, 82 N. E. 665 (rescission for mutual mistake, the plaintiff being the accepted bidder on a contract based on erroneous engineer's estimates; that other bidders also relied on the estimate, held admissible on the issue of the plaintiff's negligence); 1872, Jones *v.* Ins. Co., 36 N. J. L. 29, 43 (to throw light on the amount of stock in a store in M. when burned, evidence of a resident of N. as to the prudent proportion of stock to sales in the same business was rejected; the principle of Ins. Co. *v.* Weide, *infra*, being conceded, but here, the towns being of very different size, etc., the difference of conditions was so great that "such testimony does not afford any reasonable inference" on the subject).

Distinguish the principle of § 379, *ante*, where the question is only of the fact, not of its prudence; the following case illustrates the difference: 1870, Ins. Co. *v.* Weide, 11 Wall. U. S. 438 (usual proportion of stock to sales, kept by persons in the same business and same city, received; here the evidence was really used to show a custom or habit, and was properly admissible from that point of view; in Jones *v.* Ins. Co., N. J., *supra*, the ostensible purpose of the evidence was to show the "prudent" proportion of stock).

Compare the cases cited in § 462, *post*.

[9] 1857, Wilkinson *v.* Moseley, 30 Ala. 574 (what prudent planters do in caring for sick slaves, admitted); 1902, Baker *v.* Hancock, 29 Ind. App. 456, 63 N. E. 323 (malpractice; instances of defendant's successful treatment of other persons for the same ailment, excluded on the facts; the ruling appears unsound);

Even in matters more nearly involving *moral standards*, some light may properly thus be obtained from the conduct of other persons, — as when the propriety of a *schoolmaster's* or *ship-captain's* discipline or treatment is evidenced by the practice of others;[10] or when a standard of *cruelty* or *violence* in general is evidence by other person's like methods;[11] or when the propriety of a method of *commercial competition*, judged by a standard of *unfair trade*, is evidenced by the custom or recorded practice of representative persons in the trade.[12]

It is sometimes said that a *statute* or *municipal ordinance* forbidding or enjoining certain conduct is *evidence of negligence*, on the question whether the doing or not doing of that kind act was negligent.[13] Now it is true that such an ordinance might be used evidentially, on the same theory as the numerous instances cited *supra*, because it is virtually a custom or usage having orthodox status. But in many of such opinions the Court has rather in mind the operation of the ordinance in substantive law, fixing a standard of negligence 'per se', on the theory explained in all treatises on Torts.[14] It seems

1881, DeMay *v.* Roberts, 46 Mich. 160, 163, 9 N. W. 146 (action against a physician for wrongfully bringing a lay assistant; custom of physicians as to calling such assistance, admitted); 1901, Challis *v.* Lake, 71 N. H. 90, 51 Atl. 260 (malpractice; the treatment of similar cases by other physicians, as offered to be proved by nurses, held properly excluded on the facts).

Compare the cases cited *ante*, § 457.

[10] 1824, Boldron *v.* Widdows, 1 C. & P. 65 (action for slander charging that the boys in the plaintiff's school were ill-fed, etc.; the quality of the provisions in another school, excluded, apparently because this was not the proper test); 1858, Hall *v.* Goodson, 32 Ala. 287 (whether a whipping was such as masters generally give, allowed); 1859, Lander *v.* Goodenough, 32 Vt. 114, 119, 125 (beating given by a schoolmaster; to show whether a rawhide was an instrument unreasonably severe, the fact was admitted that it was used in other schools in the vicinity).

[11] 1877, Murphy *v.* Manning, L. R. 2 Ex. D. 307 (whether the cutting of combs of fighting-cocks was a cruel ill-treatment under the statute; the custom as to such cutting, received without objection, but treated as not legalizing the operation or showing it a necessary one); 1884, Brady *v.* McArdle, 15 Cox Cr. 516, 523 (cruelty in dishorning cattle; the practice of so doing, *semble*, held no excuse); 1885, Callaghan *v.* S. P. C. A., 16 Cox Cr. 101, 104 (same charge; extent of the practice and its results, considered, upon the question whether it was a reasonable and necessary one); 1887, Lewis *v.* Fermor, L. R. 18 Q. B. D. 532 (prosecution for cruelly treating sows; that the treatment was a surgical operation, supposed to increase weight, and practised extensively, was considered, as affecting good faith); 1889, Ford *v.* Wiley, L. R. 23 Q. B. D. 203, 221 (prosecution for cruelly dishorning cattle; that cattle were not dishorned in most cattle-districts, considered, as showing by the results that the operation was not necessary for fattening, etc.).

Distinguish the following: 1854, Ward's Trial, Ky., 3 Amer. St. Tr. 70, 91 (homicide; plea, self-defence; custom in the community to carry arms, admitted, as rebutting the inference of malice from the accused having armed himself on the occasion in question).

[12] 1921, Kinney-Rome Co. *v.* Federal Trade Commission, 7th C. C. A., 275 Fed. 665 (whether it was an "unfair method of competition" under U. S. St. 1914, Sept. 26, § 5, for a manufacturer selling to wholesalers to "subsidize" the wholesaler's salesmen by secret commissions unknown to the retailers or to the purchasers; held not to be unfair; the practice, however, had been condemned as unfair, upon a "trade practice submittal" to manufacturers in the line involved, by all the answers except one, and by resolutions of various trade associations declaring it to be "manifestly unfair, vicious, and demoralizing"; this evidence was not offered in the Kinney-Rome case, but is the kind of evidence that should be admissible on the present principle, to show the standard of unfairness).

[13] 1905, Finnegan *v.* S. W. S. Mfg. Co., 189 Mass. 580, 76 N. E. 192; 1904, Frontier Steam Laundry Co. *v.* Connolly, 72 Nebr. 767, 101 N. W. 995 (ordinance requiring fire-shutters).

[14] See the present writer's exposition in Cases on Torts (1911), vol. I, Nos. 344, 529, pp. 766, 1050. Compare the instances cited *ante*, § 283, n. 8, § 459, n. 2.

unwise, therefore, to give any secondary status to such an ordinance, as evidence of negligence, whenever it is not to have the substantive status of a rule of negligence 'per se.' The *regulations of a railroad* or *industrial company* may have a bearing in cases like the present; but they are then virtually *admissions* by the company that certain conduct is or is not negligent (*ante*, §§ 282, 283); the present principle, as applied here in par. 3, deals with the evidential use of custom or regulations of *third persons*, not with the conduct of the party himself.

4. From the foregoing applications of the present principle, distinguish some questions commonly associated in litigation: (1) Whether (for example) a railroad or a factory is bound to provide the *best available appliances*, or appliances as good as those used by any one else in the same occupation, or whether a physician is bound to possess the *skill* commonly possessed in his locality or in the entire profession. These questions arise under the general principle of substantive law already noted (*ante*, § 459, *supra*, par. 2), and relate to the legal standard of duty for the case in hand. There are scores of precedents on this subject, but they have been noted here only so far as they tend to illustrate the distinction between the rule of substantive law and the rule of evidence. Facts rejected under the former may nevertheless be admissible under the latter. (2) The *Opinion* rule may forbid direct testimony by a witness upon care, prudence, reasonableness, safety, or skill of the conduct or the place or machine in issue (*post*, §§ 1949–1951); but that rule does not affect the present use of specific instances of conduct as circumstantial evidence. Much may depend, in a given ruling, on the form in which the witness' knowledge is asked for. (3) In actions for personal injury, the known *custom of other persons* (for example, to trepass on a railroad track) may in substantive law amount to a *license* or *waiver*, so as to exonerate the plaintiff from the rule of contributory negligence or assumption of risk. This is distinct from the present rule of Evidence. (4) On any issue of negligence, the respective functions of judge and jury may raise the question (*post*, § 2552) how far the judge, without laying down a rule of substantive law, is justified in ruling that there is *not sufficient evidence of negligence*, in the case in hand, to go to the jury.

§ 462. **Business Patronage, as evidencing the Quality of a Place or Article.** Where persons are found avoiding a particular region or repudiating a particular article, their conduct serves to evidence for us some defective or annoying or dangerous or other quality in it.

Thus, the *patronage* given to an *article* (as observed in the number of customers or amount of sales) may be resorted to for evidencing its quality;[1]

§ 462. [1] The rulings are not all as liberal as they might be: *England:* 1810, Holcombe *v.* Hewson, 2 Camp. 391 (assumpsit by a brewer against a publican for beer contracted to be bought; defence, that the beer was not of a fair merchantable quality; "the defendant afterwards proved that the beer supplied to him by the plaintiff was very bad, and that he had lost almost the whole of his customers before he began to deal with another brewer, since which he has carried on a thriving trade"; the plaintiff was not allowed to show that other purchasers of his beer were satisfied, since "the plaintiff might deal well with one

or the *patronage* given to a *place* or *house* may indicate its discomforts.[2] The offer is usually of the difference of patronage before and after the alleged disturbing cause, *i.e.* a resort to the logical method of differences (*ante*, § 442).

Upon the same principle, a decrease in *rental value*, as involving a decrease in the patronage of lessees, will also serve to indicate the existence of a defective quality from some disturbing cause.[3] The difference between these and the ensuing cases of § 463 is merely that here the patronage, as expressed in sales or customers numbered, indicates some particular defect, discomfort, or other quality likely to affect patronage; in the other cases, the money-terms (price or value) indicate the net total effect or sum of all the qualities of the article, for purpose of transfer on the market. The propriety or impropriety of the evidence is the same in both cases; if it is received or rejected in the one, it should be received or rejected in the other.[4]

§ 463. **Same: Value or Sales of Similar Land, Chattels, or Services.** When the conduct of others indicating the nature of a salable article consists in offering this or that sum of money, it creates the phenomena of value, so-called. For evidential purposes, Sale-Value is nothing more than the nature or quality of the article as measured by the money which others are willing to lay out in purchasing it. Their offers of money not merely indicate the value; they *are* the value; *i.e.* value being merely a standard or measure in figures, those sums taken in net potential result, are that standard.

and not with the others", *i.e.* the article sold might not be the same).

United States: 1918, Kenney *v.* U. S., 5th C. C. A., 254 Fed. 262 (false accounts by a postmaster in returns of cancelled stamps; the fact that in the ordinary course of business in 98% of fourth-class offices the sales bore a certain relation to the cancellations, admitted); 1918, Lee *v.* Malleable Iron R. Co., D. C. E. D. Wis., 247 Fed. 795 (profits by infringement of patent; comparison of profits made with a new structure with those not containing the invention, to ascertain whether profits made were attributable to the invention infringed, not allowed); 1907, Hutchinson L. Co. *v.* Dickerson, 127 Ga. 328, 56 S. E. 491 (that similar lumber sold to other sawmills was sound, not admitted); 1884, Cunningham *v.* Stein, 109 Ill. 377 (the difference in sales of beer before and after the opening of the defendant's factory, alleged to have polluted the beer, admitted: "it was not conclusive; it was open to proof that other causes, and what causes, affected the sale of the beer"); 1913, Noyes *v.* Meharry, 213 Mass. 598, 100 N. E. 1090 (false representations as to patronage-value of a theater; the falling off in receipts immediately after the purchase, admitted); 1863, Barton *v.* Kane, 17 Wis. 37, 43 (contract for cigars; issue as to their quality; "that the plaintiff about the same time forwarded to other purchasers cigars the same in kind as those furnished the defendant, and that those purchasers made no complaint that the cigars received by them were damp, unseasoned, or unfit for use", excluded).

Compare the cases cited *ante*, § 377; there the question involves the variability of human conduct in forming contracts; here, the uniformity of quality of some inanimate substance; and in the present class of cases the doubt arises only to the extent that the variability of human conduct in the performance of similar contracts is involved.

[2] 1887, Drucker *v.* R. Co., 106 N. Y. 157, 164, 12 N. E. 568 (falling off of customers on account of smoke, noise, etc., of a railway, admitted); 1891, Doyle *v.* R. Co., 128 N. Y. 488, 497, 28 N. E. 495 (same); 1918, Chambers *v.* Spruce Lighting Co., 81 W. Va. 714, 95 S. E. 192 (breach of public utility service to a hotel; loss of profits evidenced by records of average patronage of customs before and after).

Compare § 461, n. 8, *ante*.

[3] 1891, Kane *v.* R. Co., 125 N. Y. 164, 187, 26 N. E. 278, *semble* (to show that the real cause of a decrease of rental value was not the defendant's act, such a decrease in neighboring property not affected by the defendant's act was held admissible); 1894, Cook *v.* R. Co., 144 N. Y. 115, 118, 39 N. E. 2 (rental values of "similar properties on the same street", used to show the defendant's act to be the cause of decrease; like the Kane case, *supra*).

[4] Yet in New York a distinction seems to be taken, as noted in the next section.

But the evidential question is not concerned with the many subsidiary principles of the law of Damages, or *standard of value*, that come into play. Whether an unaccepted offer of purchase at a certain figure may be looked to as determining value, or whether the price of a sale or the cost of making may be looked to, — these are questions which arise because value is a test formed by averaging results and because it is necessary to define the range over which the true idea of value permits the estimate to go. That is not an evidential process, but a process of average calculation. So, too, the question whether the value of the article at another time or another place may be resorted to depends on whether, in defining the range of data, it is fair for the purposes in hand to allow marketability at another place or time to be considered; there the process is still one of defining the range of the value-idea. It is true that there may occur here some applications of the principles already considered (*ante*, §§ 437, 438) for inferring the existence of a thing at one *time* or *place* from its existence at another time or place. But these applications of the principles of Evidence are in the rulings so bound up with the substantive principles of the standard of value that it would be impracticable to consider them here.[1]

1. There is, however, one question indirectly involving a rule of Evidence, — the question whether the value of *another article* is receivable in order to show the value of the article in issue. As the price at a sale is, by the law of Damages, conceded to be an element in the test of value (except perhaps in forced sales), this question is usually presented in the form, whether a *sale of other property* is admissible as evidence of the value of the property in question. In answering this question, it is found that the two leading princi-

§ **463**. [1] Examples of these principles are found in the following cases: Whether value at a particular *time* may be evidenced by value at a *prior* or *subsequent time:* 1858, McLaren *v.* Birdsong, 24 Ga. 265, 270 (stock of goods attached; value some eight months previous, excluded); 1895, Bowden *v.* Achor, 95 Ga. 243, 22 S. E. 271; 1886, Denton *v.* Smith, 61 Mich. 431, 433, 28 N. W. 160 (value of a cow a year beforehand, admitted); 1887, French *v.* Fitch, 67 Mich. 492, 495, 35 N. W. 258 (sale-price of corporation stock three years subsequently, when business had been abandoned, excluded); 1890, Showman *v.* Lee, 79 Mich. 653, 661, 44 N. W. 1061 (sale-price of a stock of goods eight months subsequently, excluded); 1895, Johnston *v.* Ins. Co., 106 Mich. 96, 64 N. W. 5 (value some years before, admitted, the property having no settled market value); 1921, Budd *v.* Northern Pacific R. Co., 59 Mont. 238, 195 Pac. 1109 (heifer); 1869, Kelsea *v.* Fletcher, 48 N. H. 282 (price of a cow three years later, admitted); 1854, Dana *v.* Fiedler, 12 N. Y. 40, 49; 1895, Nelson *v.* Bank, 16 C. C. A. 425, 69 Fed. 805 (sale by court of an insolvent's assets three years seven months after the transaction; the Court pointing out that where assets are in court custody a sale after a considerable period may well be satisfactory evidence).

Whether value at a particular *place* may be evidenced by value at an *adjacent place:* 1894, Hudson *v.* R. Co., 92 Ia. 231, 60 N. W. 608 (beef-cattle; price at South Omaha and Chicago, admitted to show the value at Sioux City); 1871, Gilbert *v.* Kennedy, 22 Mich. 117, 137 (value elsewhere, admissible so far as it tends to regulate or control the home value); 1895, Blumenthal *v.* Meat Co., 12 Wash. 331, 41 Pac. 47; 1876, Siegbert *v.* Stiles, 39 Wis. 533, 536 (hogs; the price in McGregor, admitted to show value in Prairie du Chien).

Whether an *offer* to purchase or sell, as distinguished from an actual sale, is admissible, is a question of the standard of value: 1906, Yellowstone P. R. Co. *v.* Bridger C. Co., 34 Mont. 545, 87 Pac. 963 (collecting cases).

Whether business *profits* in one year may be evidenced by profits in another year, involves the present principle: 1913, Nelson Theater Co. *v.* Nelson, 216 Mass. 30, 102 N. E. 926 (value of a leasehold to an evicted theater operator; receipts and profits in prior years, held admissible).

ples already expounded come into joint application, — the principle of Relevancy and the principle of Auxiliary Policy (*ante*, §§ 442–444). According to the former, the value or sale-price of the other property is irrelevant unless the property is *substantially similar in conditions;* according to the second, it may also be excluded, though relevant, if it involves in the case in hand a disproportionate *confusion of issues* and loss of time.

The latter consideration has weighed so much with a few Courts that they have treated it as requiring the absolute and invariable exclusion of such evidence. This view is represented in the following passages:

1861, THOMPSON, J., in *East Pennsylvania R. Co.* v. *Hiester*, 40 Pa. 55: "If allowed, each special instance adduced on the one side must be permitted to be assailed and its merits investigated on the other; and thus there would be as many branching issues as instances, which if numerous would prolong the contest interminably. But even this is not the most serious objection. Such testimony does not disclose the public and general estimate, which in such cases we have seen is a test of value. It would be as liable to be the result of fancy, caprice, or folly, as of sound judgment in regard to the intrinsic worth of the subject-matter of it, and consequently would prove nothing on the point to be investigated. The fact as to what one man may have sold or received for his property is certainly a collateral fact to an issue involving what another should receive, and, if in no way connected with it, proves nothing. It is therefore irrelevant, improper, and dangerous."

1891, PARKER, J., in *Matter of Thompson*, 127 N. Y. 468, 28 N. E. 389: "[If such sales are some evidence of value], then 'prima facie' a case may be made out — so far as the question of damages is concerned — by proof of a single sale — , and thus the agreement of the parties, which may have been the result of necessity or caprice, would be evidence of the market value of land similarly situated, and become a standard by which to measure the value of land in controversy. This would lead to an attempt by the opposing party to show first, the dissimilarity of the two parcels of land; and, second, the circumstances surrounding the parties which induced the conveyance, — such as a sale by one in danger of insolvency, in order to realize money to support his business, or a sale in any other emergency which forbids a grantor to wait a reasonable time for the public to be informed of the fact that his property is in the market, or, on the other hand, that the price paid was excessive and occasioned by the fact that the grantee was not a resident of the locality nor acquainted with real values, and was thus readily induced to pay a sum far exceeding the market value. Thus, each transaction in real estate claimed to be similarly situated might present two side issues, which could be made the subject of as vigorous contention as the main issue; and, if the transactions were numerous, it would result in unduly prolonging the trial and unnecessarily confusing the issues; with the added disadvantage of rendering preparation for trial difficult."

It is enough to note (1) in answer to the argument from Relevancy, that since value is a money-estimate of a marketable article possessing certain definable qualities, the value of other marketable articles possessing substantially similar qualities is strongly evidential and is so treated in commercial life; all the argument and protestation conceivable cannot alter the fact that the commercial world perceives and acts on this relevancy; (2) in answer to the argument from Auxiliary Probative Policy, it may be noted that this objection may or may not exist in a given instance, and that the rational and practical way of meeting it is to allow the trial Court in its discretion to exclude such evidence when it does involve a confusion of issues, but otherwise to

receive it, — a solution already considered in its general application to the present subject (*ante*, § 444).

Except in a few jurisdictions, this class of evidence is received.[2] In Massa-

[2] *Federal:* 1876, Stanton *v.* Embery, 93 U. S. 548, 557 ("price usually charged and received for similar services by other persons of the same profession [of the law] practising in the same Court", admissible); 1885, Kerr *v.* Com'rs, 117 id. 379, 385, 387, 6 Sup. 801 ("Sales of property of like character and quality, similarly situated and affected by the same causes, made under circumstances likely to produce competition among bidders, are sometimes resorted to", but the sales here offered were of land "relatively so different" as not to be evidential; this instruction and ruling were approved); 1886, Lehigh V. C. Co. *v.* Chicago, 26 Fed. 415, 419 (land; "sales of similar property in the vicinity", admitted); 1896, Schradsky *v.* Stimson, 22 C. C. A. 515, 76 Fed. 730 (rentals of other stores, not shown to have similar conditions, excluded); 1922, Jones *v.* U. S., — U. S. —, 42 Sup. 218 (timber land; other sales in adjoining townships, admissible in the trial Court's discretion);
Alabama: 1899, Ladd *v.* Ladd, 121 Ala. 583, 25 So. 627 (sales of other lands in the same locality about the same time, admissible, "at least on cross-examination"); 1904, Tennessee C. I. & R. Co. *v.* State, 141 Ala. 103, 37 So. 433 (sales of other similar coal lands, received);
Arkansas: 1887, Little Rock J. R. Co. *v.* Woodruff, 49 Ark. 381, 391, 5 S. W. 792, *semble* (sales of other lands, admissible, in trial Court's discretion);
California: 1868, Central P. R. Co. *v.* Pearson, 35 Cal. 247, 262 (sales of "adjoining lands", excluded, on the principle of confusion of issues; but cross-examination to test a value-witness may employ such material); 1899, Crusoe *v.* Clark, 127 Cal. 341, 59 Pac. 700 (value of similar services in the neighborhood, admitted);
Colorado: 1903, Loloff *v.* Sterling, 31 Colo. 102, 71 Pac. 1113 (Massachusetts doctrine approved);
Connecticut: 1904, Comstock *v.* Conn. R. & L. Co., 77 Conn. 65, 58 Atl. 465 (corporal injury to a keeper of a boarding-house: profits before and after the injury, admitted);
Georgia: 1898, Western & A. R. Co. *v.* Calhoun, 104 Ga. 384, 30 S. E. 868 (value of a mare; sales of other horses and of mules, excluded on the facts); 1913, Flemister *v.* Central Ga. P. Co., 140 Ga. 511, 79 S. E. 148 (similar sales, admissible; here excluded because of the form of the question);
Illinois: 1869, White *v.* Hermann, 51 Ill. 243, 246 (land; value of "other property of equal quality lying near to and similarly situated to this, at or near the date", admissible, or even "property of different quality in its immediate vicinity"); 1871, Cook *v.* Com'rs, 61 Ill. 115, 124 (value of adjacent lands, here excluded because too different in situation); 1876, St. Louis V. & T. H. R. Co. *v.* Haller, 82 Ill. 208, 211, *semble* (other sales allowable); 1880, Chicago & W. I. R. Co. *v.* Maroney, 95 Ill. 179, 182, *semble* (land; sale of an adjoining tract, admissible); 1883, Haish *v.* Payson, 107 Ill. 365, 371 (legal services; less beneficial results of similar services by others, in settling infringement claims under the same patent, excluded); 1884, Culbertson & B. P. & P. Co. *v.* Chicago, 111 Ill. 651, 654 (land; sales of "property in the vicinity and near the time", admitted); 1890, Sherlock *v.* R. Co., 130 Ill. 403, 22 N. E. 844 (excluding mere offers of other property); 1891, Louisville N. A. & C. R. Co. *v.* Wallace, 136 Ill. 87, 26 N. E. 493 (usual charge for similar legal services, admitted); 1891, O'Hare *v.* Chicago M. & N. R. Co., 139 Ill. 151, 157, 28 N. E. 923 ("voluntary sales of other lands, in the vicinity and similarly situated as affecting their value", are admissible; but here a mere deed reciting consideration was excluded); 1893, Peoria G. & C. Co. *v.* R. Co., 46 Ill. 372, 374, 34 N. E. 550 (sales of "other similar property, made at or about the same time", admissible); 1896, Metropolitan W. S. E. R. Co. *v.* Dickinson, 161 Ill. 22, 24, 43 N. E. 706 (effect of a similar railroad on values of other property, not admissible; except that witnesses to value may qualify by showing that they know it); 1896, Metropolitan R. Co. *v.* White, 166 Ill. 375, 46 N. E. 978 (specific nature of injury to rental values of other property, excluded, except as brought out in showing the source of the witness' qualifications); 1897, Nathan *v.* Brand, 167 Ill. 607, 47 N. E. 771 (attorney's services; others' usual charges, admitted as evidence of reasonableness); 1897, Boecker *v.* Naperville, 166 Ill. 151, 48 N. E. 1061, (sales of similar property receivable as affecting the value of the witness' testimony); 1900, Chicago Terminal T. R. Co. *v.* Bugbee, 184 Ill. 353, 56 N. E. 386 (effect of another railroad on a piece of land four miles away eight years before, excluded); 1902, Chicago *v.* Jackson, 196 Ill. 496, 63 N. E. 1013 (value of benefit to other properties by track elevations and depressions, excluded); 1902, Lanquist *v.* Chicago, 200 Ill. 69, 65 N. E. 681 (sales of similar property, admitted); 1903, Spohr *v.* Chicago, 206 Ill. 441, 69 N. E. 515 (allowable on cross-examination); 1904, Illinois, I. & M. R. Co. *v.* Humiston, 208 Ill. 100, 69 N. E. 880 (eminent domain; price paid other lands, excluded); 1904, Dady *v.* Condit, 209 Ill. 488, 70 N. E. 1088 (breach of contract to sell land; sales of similar lands in the vicinity, admitted to show "the actual cash value of the land in controversy at a certain

chusetts and in New Hampshire the principle of leaving the matter to the trial Court's discretion to determine both the substantial similarity of conditions and the confusion of issues is well carried out. In some jurisdictions its use

time"; prior rulings not noticed, except St. Louis, V. & T. H. R. Co. *v.* Haller); 1904, Springer *v.* Borden, 210 Ill. 518, 71 N. E. 345 (appraisal of valuation of lease; rental values in the vicinity, held not admissible; no authority cited); 1906, Chicago & S. L. R. Co. *v.* Kline, 220 Ill. 334, 77 N. E. 229 ("voluntary sales of other lands in the vicinity similarly situated" in locality and character, admissible); 1906, Chicago & S. L. R. Co. *v.* Mines, 221 Ill. 448, 77 N. E. 898 (sales of property not similar, excluded); 1907, Chicago & A. R. Co. *v.* Scott, 225 Ill. 352, 80 N. E. 404 (eminent domain; the amounts paid by this and other railroads for land in the vicinity, excluded); 1909, West Skokie Drainage District *v.* Dawson, 243 Ill. 175, 90 N. E. 377 (Peoria Gaslight Co. *v.* P. T. R. Co., followed); 1910, Aledo Terminal R. Co. *v.* Butler, 246 Ill. 406, 92 N. E. 909 (voluntary sales of similar lands, admitted, the trial Court to determine whether they are similar); 1913, Smith *v.* Sanitary District, 260 Ill. 453, 103 N. E. 254 (sales of similar property, admitted); 1915, Sanitary District *v.* Baumbach, 270 Ill. 128, 110 N. E. 331 (condemnation proceedings; other sales of land, excluded because dissimilar in conditions); 1915, Sanitary District *v.* Boening, 267 Ill. 118, 107 N. E. 810 (eminent domain; certain sales held improperly admitted because the lands were not similarly situated); 1920, Forest Preserve Dist. *v.* Barchard, 293 Ill. 556, 127 N. E. 878 (sales of land ten miles distant; trial Court's discretion controls); 1919, Pittsburgh C. C. & St. L. R. Co. *v.* Gage, 286 Ill. 713, 121 N. E. 582 (sales pending condemnation proceedings, not admissible); 1921, Forest Preserve Dist. *v.* Wallace, 299 Ill. 476, 132 N. E. 444 (condemnation proceedings; other recent voluntary sales of similar property, admissible); 1921, Mauvaisterre Drainage & L. Dist. *v.* Wabash R. Co., 299 Ill. 299, 132 N. E. 559 (prices paid to other persons for right of way of railroad, inadmissible);

Indiana: 1912, Cleveland C. C. & St. Louis R. Co. *v.* Smith, 177 Ind. 524, 97 N. E. 164 (eminent domain; other purchases for the same right of way, excluded, on mixed grounds, citing no Indiana cases; loosely worded);

Iowa: 1872, King *v.* R. Co., 34 Ia. 458, 461 (price of a similar right of way through an adjoining tract, excluded; such evidence "is admissible only where it appears that there is a uniformity in the character of the lands thus brought in question with those made a criterion of their value"); 1879, Cherokee *v.* Land Co., 52 Ia. 279, 3 N. W. 42 (prices of other lots in the neighborhood, admitted, although not precisely similar in all respects); 1884, Cummins *v.* R. Co., 63 Ia. 397, 404, 19 N. W. 268 (prices of other lots in the vicinity, excluded, because "it was not shown . . . that there was any similarity between the lots in question" and the others); 1901, Soper *v.* McClout, — Ia. —, 87 N. W. 724 (rental value of other similar farms, excluded); 1905, Simons *v.* Mason C. & F. D. R. Co., 128 Ia. 139, 103 N. W. 129 (eminent domain; price paid by the railway company for other rights of way, not similarly situated, excluded; but the ruling seems to apply to all prices paid under eminent domain); 1908, Watkins *v.* R. Co., 137 Ia. 441, 113 N. W. 924 (Pennsylvania and New York rule adopted); 1914, Hubbell *v.* Des Moines, 166 Ia. 481, 147 N. W. 908 (Watkins *v.* R. Co. adhered to);

Kansas: 1878, Atchison & N. R. Co. *v.* Harper, 19 Kan. 529, 534 (colts killed; value of other colts of like appearance and qualities, excluded, as affording an opening for too much uncertainty and as tending to confuse the issues); 1890, Kansas C. & T. R. Co. *v.* Splitlog, 45 Kan. 68, 25 Pac. 202 (unoccupied land; value of land in a settled neighborhood, excluded; but a general rule also intimated that, where expert testimony can be obtained, the values of other land should not be considered as evidence); 1891, Kansas C. & T. R. Co. *v.* Vickroy, 46 Kan. 248, 250, 26 Pac. 698 (the preceding case approved; but testing on cross-examination allowed, as in the following case); 1892, Chicago K. & N. R. Co. *v.* Stewart, 47 Kan. 703, 706, 28 Pac. 1017 (land; values of adjoining land allowed to be asked about to test value-witnesses on cross-examination; the present question left undecided);

Kentucky: 1901, Paducah *v.* Allen, — Ky. —, 63 S. W. 981 (sales of similar adjoining property, admissible); 1904, Chicago, St. L. & N. O. Co. *v.* Rottgering, — Ky. —, 83 S. W. 584 (similar); 1914, West Kentucky Coal Co. *v.* Dyer, 161 Ky. 407, 170 S. W. 967 (admissible);

Maine: 1842, Warren *v.* Wheeler, 21 Me. 484, 486, 491 (land; the prices of land "lying in the neighborhood" and also "more remote" in the same town, admitted); 1842, Fogg *v.* Hill, 21 Me. 529, 532 (tenancy; the rents of "similar tenements in the same neighborhood at and about the same time", admitted); 1882, Norton *v.* Willis, 73 Me. 580 (value of three horses; price paid for six horses, including these three, admitted);

Maryland: 1854, Moale *v.* Baltimore, 5 Md. 314, 324 ("the neighboring and contiguous lots may be looked to"); 1910, Baltimore, City of, *v.* Hurlock, 113 Md. 674, 78 Atl. 558 (sales etc. of property in the neighborhood, admitted, as the basis of the expert witness' testimony to value);

is limited to the testing of value-witnesses on cross-examination. Even in the jurisdictions where it is rejected, its force is so far recognized that numerous absurd quibbles become necessary in order to distinguish between that which

Massachusetts: 1847, Wyman *v.* R. Co., 13 Metc. 316, 326 ("other sales between other parties of adjacent lots", admissible; though not compulsory sales nor jury-verdict valuations nor mere opinion-valuations); 1853, Davis *v.* R. Co., 11 Cush. 506, 509 (actual sales of other land, admissible); 1861, Boston & W. R. Co. *v.* O. C. & F. R. Co., 3 All. 142, 146 (the preceding cases approved); 1862, Paine *v.* Boston, 4 All. 168 ("actual sales of lots of land on the same street", admitted; no specific distance is too remote as a matter of law; "it was the province of the judge to determine whether the lots . . . were so similar in their situation, relative position, and other circumstances bearing on their value, as to make a sale of them evidence"; leading case); 1863, Shattuck *v.* R. Co., 6 All. 115, 117 (other land sales admitted; the trial judge to have discretion as to time and place); 1868, Ham *v.* Salem, 100 Mass. 350, 352 (rejection of values of other land in trial judge's discretion, approved); 1869, Benham *v.* Dunbar, 103 Mass. 365 (other land sales, held not improperly admitted in discretion); Presbrey *v.* R. Co., 103 Mass. 1, 8 (another sale of land condemned for a railroad, held improperly admitted under the circumstances, as including extra damages in the price); 1871, Lawton *v.* Chase, 108 Mass. 238, 241 (other sales of similar fallen timber, held not improperly rejected in discretion); 1873, Green *v.* Fall River, 113 Mass. 262, 263 (other land sales, held not improperly rejected in discretion as too far anterior in time); 1877, Chandler *v.* Aqueduct, 122 Mass. 305 (another land sale in a different town and three years later, held improperly rejected in the trial Court's discretion); 1879, Gardner *v.* Brookline, 127 Mass. 358, 363 (another sale of land of a peculiar kind in an adjoining town, held not improperly admitted in discretion); 1887, Sawyer *v.* Boston, 144 Mass. 470, 11 N. E. 711 (sales of other lots, much smaller, held not improperly admitted in discretion); 1888, Patch *v.* Boston, 146 Mass. 52, 57, 14 N. E. 770, 772 (sales a few months later and of improved lots, held not improperly admitted in discretion); 1888, Lowell *v.* Com'rs, 146 Mass. 403, 16 N. E. 8 (value of mill water-power in Lawrence, admitted to show value in Lowell, the conditions being the same); 1889, Thompson *v.* Boston, 148 Mass. 387, 19 N. E. 406 (the general principle affirmed; but a mere opinion of the value of another lot, excluded, as in Shattuck *v.* R. Co.); 1895, Amory *v.* Melrose, 162 Mass. 556, 558, 39 N. E. 276 (another sale in the same street and vicinity, held not improperly admitted in discretion); Lyman *v.* Boston, 164 Mass. 99, 41 N. E. 127 (other land sales admissible in discretion); Bowditch *v.* Boston, 164 Mass. 112, 41 N. E. 131 (same); Pierce *v.* Boston, 164 Mass. 92, 41 N. E. 229 (same); Teele *v.* Boston, 165 Mass. 88, 42 N. E. 507 (same; a mere difference in size is not conclusive); 1896, Buck *v.* Boston, 165 Mass. 509, 43 N. E. 496 (the usual principle); Beale *v.* Boston, 166 Mass. 53, 43 N. E. 1029 (like Thompson *v.* Boston); 1899, Manning *v.* R. Co., 173 Mass. 100, 53 N. E. 160 (similar); 1900, Old Colony R. Co. *v.* Robinson Co., 176 Mass. 387, 57 N. E. 670 (similar; but excluding the opinion of experts as to the conditions of these other pieces of property used in comparison); 1903, Sirk *v.* Emery, 184 Mass. 22, 67 N. E. 668 (like the preceding case); 1912, Fourth National Bank *v.* Commonwealth, 212 Mass. 66, 98 N. E. 686 (dissimilarity not shown on the facts); 1914, Burley *v.* Old Colony R. Co., 219 Mass. 483, 107 N. E. 365 (sale to an interested person, not in the open market, not admitted on the facts); 1922, Johnson *v.* Lowell, — Mass. —, 134 N. E. 627 (land condemnation; other sales, not improperly admitted in the trial Court's discretion);

Michigan: 1870, Comstock *v.* Smith, 20 Mich. 338, 346 (the value of one of several wells considered); 1877, Eggleston *v.* Boardman, 37 Mich. 14, 18 (amount paid to one lawyer, not admitted to show the value of another's services to the other parties in the same case; intimating that ordinarily such evidence as to "certain commodities" is admissible);

Minnesota: 1873, Lehmicke *v.* R. Co., 19 Minn. 464, 483 (sales of adjacent land, admissible); 1880, Stinson *v.* R. Co., 27 Minn. 284, 289, 6 N. W. 784 (sales of other lands, excluded "unless perhaps in an exceptional case, in which no other evidence can be had"); 1884, Seurer *v.* Horst, 31 Minn. 479, 480, 18 N. W. 283 (services; wage-rate of another employee of the defendant, excluded);

Mississippi: 1899, Board *v.* Dillard, 76 Miss. 641, 25 So. 292 (experts to value may be cross-examined as to other sales of like land about the same time); 1903, Board *v.* Nelms, 82 Miss. 416, 34 So. 149 (admissible, "in weakening opinion values");

Missouri: 1861, Lexington *v.* Long, 31 Mo. 369, 374 (benefit by betterment to opposite owners, excluded); 1878, Springfield *v.* Schmook, 68 Mo. 394 (damages allowed for other expropriated lands, excluded, because of confusion of issues and uncertainty of the inference); 1893, St. Louis K. & N. W. R. Co. *v.* Clark, 121 Mo. 169, 185, 25 S. W. 192 (land; sales of "similar property made in the neighborhood about the same time", admitted; distinguishing the preceding case); 1895, Forsyth Boulevard *v.* Forsyth, 127 Mo. 417, 30 S. W.

is rejected and that of which common sense compels a hearing. The doctrine of admission, moreover, is sometimes recognized for evidencing the value of services or chattels, when not recognized for land-value.

188 (value of similar pieces of land in the neighborhood, received); 1898, St. Louis O. H. & C. R. Co. *v.* Fowler, 142 Mo. 670, 44 S. W. 771 (sales must be of similar property); 1902, State *v.* Meysenburg, 171 Mo. 1, 71 S. W. 229 (shares of stock; sales of similar shares, admitted); 1909, Rourke *v.* Holmes, St. R. Co., 221 Mo. 46, 119 S. W. 1094 (Jamieson *v.* R. Co., N. Y., followed; foregoing cases ignored);

Nebraska: 1894, Kirkendall *v.* Omaha, 39 Nebr. 1, 6, 57 N. W. 752 (excluding, on the facts, sales of other land); 1897, Thompson *v.* Gaffey, 52 Nebr. 317, 72 N. W. 314 (reasonable plumbing charges; charges by other plumbers in the same city, excluded); 1904, Union P. R. Co. *v.* Stanwood, 71 Nebr. 150, 91 N. W. 191, 98 id. 656 (particular sales, excluded, except on cross-examination);

New Hampshire: 1849, March *v.* P. & C. R. Co., 19 N. H. 372, 376 (not clear); 1851, Concord R. *v.* Greely, 23 N. H. 237, 242 ("sales of other lands, similarly situated, in the vicinity of that in question", and made about the same time, admissible); 1855, White *v.* Concord R., 30 N. H. 188, 191, 208 (colt killed; sale of another colt of the same age, sire, etc., admitted; the case of Whipple *v.* Walpole, 10 N. H. 131, treated as a precedent, seems hardly to be one); 1858, Ferguson *v.* Clifford, 37 N. H. 86, 105 (sales of property "in the vicinity and about the same time, similar" to that in question, admissible); 1860, Carr *v.* Moore, 41 N. H. 131, 133 (price of horses of similar age and description, a year later, admitted; "it has been the uniform practice . . . to receive evidence of the price at which other property of like character and condition was actually sold in the vicinity at or about the same time"); 1860, Swain *v.* Cheney, 41 N. H. 232, 234 (services in hauling lumber; prices paid for similar services elsewhere in the neighborhood, admissible according to circumstances); 1861, Dewey *v.* Williams, 43 N. H. 384, 387 (prices at "times more or less remote and places more or less distant according to circumstances", admissible); Cross *v.* Wilkins, 43 N. H. 332, 334 (board at a hotel; price at a similar hotel in an adjacent town, admitted; the trial judge's discretion to control); 1862, French *v.* Piper, 43 N. H. 439 (leather; value in Boston, where approximate prices ruled, admitted); 1864, Kingsbury *v.* Moses, 45 N. H. 222, 223 (services as carpenter; price paid to the employer-defendant by the customer or the plaintiff's services, admitted; whether the time of such other sales is before or after suit brought does not affect their admissibility); 1869, Kelsea *v.* Fletcher, 48 N. H. 282 (that a controversy is pending at the time of such sales does not exclude them); 1872, Haines *v.* Ins. Co., 52 N. H. 467, 468 (house and farm; value of another farm, admitted, the question of remoteness in time and place being for the discretion of the trial Judge); 1876, Hoit *v.* Russell, 56 N. H. 559, 563 (land rule affirmed); 1879, Amoskeag Co. *v.* Head, 59 N. H. 332, 337 (flowage; the sums paid to thirty-two other persons for their rights of flowage, excluded, because not important enough to justify confusing the issues and protracting the trial; see quotation *ante*, § 443);

New Jersey: 1873, Montclair R. Co. *v.* Benson, 36 N. J. L. 557 (value of adjoining lots a year later, excluded, on the ground of confusion of issues; but the trial Court's discretion is apparently allowed some influence); 1892, Laing *v.* R. & C. Co., 54 N. J. L. 576, 25 Atl. 409 (sales of other land substantially similar, admissible, the trial judge's discretion to control); 1906, Hadley *v.* Board, 73 N. J. L. 197, 62 Atl. 1132 (Laing *v.* R. Co., followed); 1908, Brown *v.* New Jersey S. L. R. Co., 76 N. J. L. 795, 71 Atl. 271 (admissible in discretion); 1912, Manda *v.* Orange, 82 N. J. L. 686, 82 Atl. 869 (like Laing *v.* R. Co.); 1916, Manda, Inc. *v.* Delaware L. & W. R. Co., 89 N. J. L. 298, 98 Atl. 476 (condemnation proceedings; amount paid for other parcels, admissible in trial Court's discretion);

New York: 1873, Gouge *v.* Roberts, 53 N. Y. 619 (the cost of another ice-house, excluded, "as it raised a collateral issue leading to a comparison between the different structures, and could not legitimately aid" upon the issue); 1874, Blanchard *v.* Steamboat Co., 59 N. Y. 292, 294, 300 (sunken vessel; value of other vessels excluded; no reason given); 1886, People *v.* McCarthy, 102 N. Y. 630, 639, 8 N. E. 85 (prices named as consideration in various deeds, not received to show value of lands); 1889, McGean *v.* R. Co., 117 N. Y. 219, 224, 22 N. E. 957 (land rentals; rental values of "similar property in the same street", allowed to be compared); 1890, Huntington *v.* Attrill, 118 N. Y. 365, 378, 23 N. E. 544 (values of other seaside property, rejected because of confusion of issues); 1891, Matter of Thompson, 127 N. Y. 463, 470, 28 N. E. 389 (water-power; amounts paid for adjacent water-powers, excluded; see quotation *supra*); 1891, Roberts *v.* R. Co., 128 N. Y. 455, 473, 28 N. E. 486 ('obiter', proof of "the rental and fee value" of "buildings somewhat similar to plaintiff's" may be used); 1892, People *v.* Myers, 133 N. Y. 627, 631, 636, 30 N. E. 1150 ("the ordinary rule" excludes "sales of other real property in the same vicinity", first, because of confusion of issues, and, secondly, because of unfair surprise; here, such sales were admitted because no other evidence was attainable, and because

2. After instances of such similar sales have been received, it is proper, on the principle of Explanation (*ante*, § 449), to diminish the force of the evi-

on the facts of the case the above objections were obviated); 1895, Jamieson *v.* R. Co., 147 N. Y. 322, 325, 41 N. E. 693 (rental value "in the vicinity", excluded); 1896, Witmark *v.* R. Co., 149 N. Y. 393, 44 N. E. 78 (affirming the preceding case; "There is no general or well-defined principle of the law of evidence that enables a party to establish the value of some particular or specific thing by proof of the value of another thing of the same class or general character. . . . Cases may doubtless be found where, in other jurisdictions, and in special statutory proceedings for determining the value of real property, more or less support is given to the contention of the plaintiffs' counsel. But in most, if not all, of them, it will be found that the inquiry was not governed by the rules of evidence that prevail at common law. . . . It will be found, we think, upon careful examination, that in most of these [older] cases the Court simply recognized a situation which the parties themselves had created by the general course of the trial, or by consent or acquiescence, and hence they are in no way in conflict with the decision" in the Jamieson case; this suggestion, that the rule in other jurisdictions has anything to do with a statute, and is not based on a common-law principle, is without foundation); 1901, Levin *v.* El. R. Co., 165 N. Y. 572, 59 N. E. 261 (cross-examination of the value of similar premises, allowed; direct examination to "the general course of values" in the vicinity, allowed); 1901, Shepard *v.* R. Co., 169 N. Y. 160, 62 N. E. 151 (Jamieson *v.* R. Co. followed); 1903, Robinson *v.* N. Y. El. R. Co., 175 N. Y. 219, 67 N. E. 431 (Jamieson's case approved; but, cross-examination to specific instances of sales being allowed, the re-direct examination may take up the instances thus brought out); 1906, Hindley *v.* Manhattan R. Co., 185 N. Y. 335, 78 N. E. 276 (damage by eminent domain, the defendant pleading prescription; the defendant's settlements with two hundred other abutters, excluded; following Jamieson *v.* R. Co.); 1907, Shaw *v.* N. Y. Elev. R. Co., 187 N. Y. 186, 79 N. E. 984 (value of adjacent premises, admitted on the facts; three judges diss.);

North Dakota: 1906, Vidger Co. *v.* Great Northern R. Co., 15 N. D. 501, 107 N. W. 1083 (apples; not decided);

Pennsylvania: 1859, Searle *v.* R. Co., 33 Pa. 57, 63 ("the market value is measured by the price usually given for such land in that neighborhood, making due allowance for differences of position, soil, and improvement; . . . [the French law] directs the market value to be ascertained by reference to recent actual sales in the neighborhood"); 1861, East Pa. R. Co. *v.* Hiester, 40 Pa. 53, 55 (the Searle case approved as allowing reference to "the selling price of land in the neighborhood"; "there certainly can be no objection to this test"; but it is then said to be available only as forming the basis of the witness' knowledge, and not admissible as an independent fact; see quotation *supra;* but it may be used on cross-examination to test a witness' qualifications); 1873, Pittsburg V. & C. R. Co. *v.* Rose, 74 Pa. 362, 369 (land; particular sales inadmissible, *semble*); 1873, Hays *v.* Briggs, 74 Pa. 373, 386 (the Hiester case approved); 1883, Vanderslice *v.* Philadelphia, 103 Pa. 102, 109 (value of another lot excluded); 1884, Pittsburg & W. R. Co. *v.* Patterson, 107 Pa. 461, 464 ("particular sales of alleged similar property under special circumstances", inadmissible; the reasoning of the Hiester case adopted); 1886, Pittsburg R. Co. *v.* Vance, 115, Pa. 325, 331, 8 Atl. 764 (same); 1890, Curtin *v.* R. Co., 135 Pa. 20, 30, 19 Atl. 740 (same); 1896, Becker *v.* R. Co., 177 Pa. 252, 35 Atl. 617 (same); 1906, Gorgas *v.* Philadelphia H. & P. R. Co., 215 Pa. 501, 64 Atl. 680 (eminent domain; "a witness may qualify himself . . . by showing that he has a knowledge of sales in the community, . . . but he cannot be interrogated in chief as to the money values of similar properties"; on cross-examination he may be asked "his knowledge of particular sales and the prices asked"); 1906, Davis *v.* Pennsylvania R. Co., 215 Pa. 581, 64 Atl. 774 (a witness to land-value may be cross-examined on 'voir dire' to test his qualifications, by asking him as to values; compare § 654, *post*); 1907, Schonhardt *v.* Pennsylvania R. Co., 216 Pa. 224, 65 Atl. 543 (cross-examination to other sales, not allowed where its object was "to have his testimony go to the jury on the question of value"); 1908, Neely *v.* Western Allegheny R. Co., 219 Pa. 349, 68 Atl. 829 (cross-examination allowed to particular sales, but not to particular values; the rule of this State, being unsound to start with, is now leading to tweedle-dum and tweedle-dee distinctions); 1910, Rea *v.* Pittsburg & C. R. Co., 229 Pa. 106, 78 Atl. 73 (cross-examination to a former sale of the same property, allowed); 1917, Llewellyn *v.* Sunnyside Coal Co., 255 Pa. 291, 99 Atl. 869 (rule of the Hiester case, applied); 1917, Stone *v.* Delaware L. & W. R. Co., 257 Pa. 456, 101 Atl. 813 (prior rulings sought to be reconciled); 1922, Wissinger *v.* Valley Smokeless Coal Co., 271 Pa. 566, 115 Atl. 880 (usual rule applied);

Rhode Island: 1893, Daigneault *v.* Woonsocket, 18 R. I. 378, 28 Atl. 346 (value of other remote and dissimilar land, excluded);

South Carolina: 1905, Kean *v.* Landrum, 72 S. C. 556, 52 S. E. 421 (value of timber on adjoining land, admitted);

Tennessee: 1901, Whorley *v.* Tennessee C. Expos. Co., — Tenn. —, 62 S. W. 346 (sales

dence by showing the conditions to have been dissimilar in some important points.[3]

§ 464. **Same: Other Principles discriminated.** (1) For the purpose of *testing the opinion of a value-witness*, by bringing out facts contradictory of his conclusion, it may be proper for the opponent to ask him on *cross-examination* about the sale-price of adjacent pieces of property; thus, one who places the value of the lot in question at $5000 may admit that a similar lot adjoining was sold for $3000 or for $7000. The effect of this is to exhibit an apparent error of judgment, for if the lots are really similar, their value should be about the same. This mode of impeachment rests on another principle (*post*, § 1004). It is conceded in some jurisdictions where the independent use of such similar instances to show value is forbidden.[1] It is occasionally forbidden, apparently on the theory that it involves a contradiction on a collateral point (*post*, § 1004); but that principle does not properly apply to any inquiry confining itself to cross-examination.[2]

(2) In order that a value-witness may qualify as to *knowledge*, he must appear to know the value of the article in question (*post*, § 713); he may

of similar articles at other places, admitted to show the amount of loss of business); 1905, Union R. Co. *v.* Hunton, 114 Tenn. 609, 88 S. W. 182 (eminent domain; sales in the neighborhood, admitted);
Utah: 1912, Telluride Power Co. *v.* Burneau, 41 Utah 4, 125 Pac. 399 (not decided);
Vermont: 1849, Vilas *v.* Downer, 21 Vt. 419, 424 ("usual prices charged and received for similar services . . . by other men of the same profession with the plaintiff in the same vicinity and in the same Courts", admissible); 1897, Davis *v.* Cotey, 70 Vt. 120, 39 Atl. 628 (price paid for timber in the vicinity, receivable);
Washington: 1892, Seattle & M. R. Co. *v.* Gilchrist, 4 Wash. 509, 30 Pac. 738 (price of similar land about same time, admissible);
Wisconsin: 1882, West *v.* R. Co., 56 Wis. 318, 321, 14 N. W. 292 (sale of adjoining land, admitted); 1883, Watson *v.* R. Co., 57 Wis. 332, 349, 15 N. W. 468 (sales of lots "in the vicinity", some of them several years before, admitted, the trial judge's discretion controlling; but the use to test on cross-examination was the one here concerned); 1884, Washburn *v.* R. Co., 59 Wis. 364, 377, 18 N. W. 328 (same; such evidence admitted generally, "to test the accuracy of estimates thereof made by the witnesses"; but the other lands must be "similar in character, location, and value [?]", and the sales "not too remote in time"); 1896, Atkinson *v.* R. Co., 93 Wis. 362, 67 N. W. 703 (preceding case approved; but mere offers excluded); 1898, Stolze *v.* Term. Co., 100 Wis. 208, 75 N. W. 987 (other sales admissible, in the trial Court's discretion, if similar); 1909, American States S. Co. *v.* Milwaukee N. R. Co., 139 Wis. 99, 120 N. W. 844 (sales of similar land, admissible).

[3] 1847, Wyman *v.* R. Co., 13 Metc. 316, 326 ("open of course to any evidence explanatory of the circumstances attending such sale", and indicating the price as an unfair basis); 1896, Buck *v.* Boston, 165 Mass. 512, 43 N. E. 496 (witness to the value of land who had spoken to the value of adjacent farms; questions bringing out undesirable elements in the location, admitted).

§ 464. [1] As in Cal., Kan., *supra;* so also the following: 1896, Silverstein *v.* O'Brien, 165 Mass. 512, 43 N. E. 497 (a witness who has valued stock as worthless; question as to his having heard of orders for goods which would make it valuable, admitted).

[2] 1839, Tennant *v.* Hamilton, 5 Cl. & F. 122 (a witness for defendant, in an action for nuisance by smoke, had testified that adjacent premises A, B, etc., were not injured; on cross-examination he was asked whether G, a place, was injured; having answered "No", he was then asked if he knew that defendant had paid anything to the owner of G as compensation for alleged damage; held, that (1) the answer could not serve to test the correctness of his direct testimony, because he had not testified as to G, and (2) it could not be used to test his credit generally, because the inquiry was "perfectly collateral", and involved "a matter which was not relevant to the subject matter in dispute"; hence, even the question was rejected, because (it would seem) its purpose was to lay the foundation for a contradiction); 1889, Thompson *v.* Boston, 148 Mass. 387, 389, 19 N. E. 406 (a question as to his former estimate of adjacent land, held not improperly excluded in discretion).

therefore be asked on *direct examination* whether he knows the value of adjacent lands, without naming specific instances;[3] in such a case the present principle is not involved.

(3) Whether an *opinion* as to value is obnoxious to the Opinion rule involves the general principle elsewhere treated (*post*, §§ 1940–1944).

(4) The effect of a *railroad* in injuring the material condition of land, as evidenced by the material condition of adjacent land, depends upon the principle already dealt with (*ante*, § 451).

§ 465. **Measure of Literary or Intellectual Propriety (Other Persons' Utterances in Libel or Sedition).** On the same principle as the foregoing, the propriety of an alleged *seditious* or *libellous utterance*, with reference to its keeping within the bounds of fair criticism or moderate statement, as demanded by the exigency, is evidenced by a comparison with *other persons' utterances* whose propriety is conceded.[1]

Distinguish, however, the use of the *defendant's own other utterances*, to evidence his own normal state of mind (*ante*, § 367).

[3] *E.g.* as in Ill. and Pa., *supra*.

Compare the cases cited *post*, §§ 562, 655.

§ 465. [1] With the following cases compare those cited *ante*, § 367, concerning sedition and libel: *England:* 1817, Hone's Trial (Pamph.) (the defendant, charged with seditious libel, read various publications by eminent men, including the father of Lord Chief Justice Ellenborough himself, the presiding judge at the trial, to show that utterances of a similar sort were compatible with unquestioned loyalty and propriety of conduct; the defendant's acquittal on three successive trials was the immediate occasion of Lord Ellenborough's retirement from the Bench; how the case of R. *v.* Hone influenced this result is interestingly told in J. Routledge's "Chapters in the History of Popular Progress, chiefly in Relation to the Freedom of the Press and Trial by Jury", (1876), p. 433, and, most vividly, in Harriet Martineau's account of the trial in her "History of the Peace, being a History of England from 1816 to 1854", vol. II, pp. 138–143); 1843, R. *v.* O'Connell, 5 State Tr. N. S. 1, 533 (sedition by bringing Courts into contempt by encouraging resort to arbitration; rules of the Society of Friends, requiring resort to arbitration, admitted to show "that a vast number of the respectable portion of the community have done the same thing and have universally been considered as acting legally"); 1848, R. *v.* O'Brien, 7 St. Tr. N. S. 1, 275 (seditious utterances; former similar utterances of persons of high station and unquestioned loyalty, offered as "acts done by public men on particular subjects"; rejected); 1848, R. *v.* Duffy, 7 St. Tr. N. S. 795, 915 (seditious utterances; other speeches, by persons since in high office, offered to show that defendant "did not go beyond the latitude allowed to political writers"; received on account of the former practice, but not approved on principle). *United States:* 1819, Jacob Graber's Trial, Md., 1 Amer. St. Tr. 69, 97 (preaching rebellion to slaves; Mr. Martin for the defence quoted similar passages from Thomas Jefferson, to show that "men high in office, eminent in science, fair in character, and exalted in the confidence of their fellow-citizens . . . have condemned a system they conceived unwise and unnatural"); 1859, John Cook's Trial, Jefferson Co. Circuit Court, Va., quoted in Sellers' Classics of the Bar, IV, 138 (the accused was one of the Northerners who took part in the raid upon Harper's Ferry under John Brown; Daniel W. Voorhees, for the accused, argued that he was merely a humble and insignificant follower, misled by the violent utterances of influential Northern statesmen, viz. Seward, Giddings, et al., whom nobody thought of bringing to book criminally).

For examples of the comparison of other utterances by distinguished men, as showing that the defendant's utterance could not be a *libel* if the others were unaccused, see striking instances in Brougham's Speeches, Works, vol. IX, p. 18 (trial of Hunt), p. 230 (trial of Williams).

Compare also the admission of *literary usage*, to show a standard of meaning, *post*, § 1699.

The following ruling belongs here: 1901, State *v.* Ulsemer, 24 Wash. 657, 64 Pac. 800 (circulating obscene pictures; "use of similar pictures in commerce", excluded).

TITLE II: TESTIMONIAL EVIDENCE

INTRODUCTORY: GENERAL THEORY OF TESTIMONIAL EVIDENCE

CHAPTER XVII.

§ 475. **In Theory a question of Relevancy is involved.** The necessity for a distinction between Testimonial or Direct and Circumstantial or Indirect evidence has already been considered (*ante*, § 25). It was there noticed that a large class of evidence is differentiated from all others as governed by a set of rules of admission peculiar to itself, — a class including human assertions taken as the basis of an inference to the truth of the fact asserted. The process of all evidence is an inference from one fact to the existence of another, — from Evidence to Proposition (*ante*, § 2); and in the present class of evidence the uniform feature is that the inference is to be drawn from the fact of an assertion having been made to the truth of the matter asserted. How this inference is in practice constantly combined with the inference from circumstantial evidence, and how nevertheless the detailed principles applicable to each remain distinct and independent in application, has been already suggested (*ante*, § 25).

The rules governing the use of this sort of evidence — Testimonial Evidence — include mainly the rules prescribing the qualifications of witnesses, together with sundry rules for evidence used to explain away and diminish or to strengthen and restore the effect of testimonial evidence. Is it proper to regard such topics as topics of Relevancy? On principle, it is. The question whether A's assertion (or testimony) that B forged a note can be received to show that B forged is as much a question of relevancy as the question whether the discovery of forger's tools in B's room, or the flight of B from the city, can be received for the same purpose. Suppose a person to come upon the stand and, without a preliminary question, to assert that B forged the note. The mere fact that some casual person opens his mouth and utters these words has in itself little or no weight whatever; for there is as yet no substantial reason why one should pay any attention to his statements. But the fact that a witness A, being of sound mind and sufficient experience, having had opportunity to see what B did, and well recollecting the circumstances, is willing

to assert that B forged the note, is a fact which we shall readily listen to as evidence. Some unknown person's assertion may be worthless; but a specific person's assertion, under certain conditions, acquires sufficient probative value to be at least considered. Any one of several circumstances being definitely lacking, it may have no probative value. If A is insane, for example, his assertion is mere chatter; if A is too young to understand what he is speaking of, his assertion is only an infantile repetition of what his elders have said in his hearing; if A cannot write, he cannot form any opinion as to what B wrote; if A was in St. Louis when B is said to have forged the note in New York, his assertion is idle gossip. In short, it is not every human assertion, as such, that is worth considering as the basis of an inference to the truth of the thing asserted; but only assertions made under certain conditions, — these usually consisting in the presence of certain personal qualities or circumstances in A, — *i.e.* his testimonial qualifications. Now these conditions and the mental process which induces us to recognize them are the same in essence as in the case of Circumstantial Evidence. A fact must rise to a certain degree of probative value before it can be considered at all (*ante*, §§ 32, 38), — that is the root notion of relevancy, as thus far examined; and the same notion is here involved. If it is desired to express the doctrine of testimonial qualifications in terms of Relevancy, it may be thus stated: The fact that an assertion is made by a person who is sane, of age, experienced in the subject-matter, acquainted with the circumstances, and so forth, is relevant to show the truth of the fact asserted.

The rules of Relevancy here, as with circumstantial evidence, will consist in a statement of these conditions under which the fact of the assertion will be received as having probative value. It is true, however, that in stating these conditions the phraseology of relevancy is not commonly employed; nor is it needed. It is sufficient to deal with the general question in its common forensic form, Under what conditions may Testimonial Evidence be received? — or, as covering most of the same scope, What are the qualifications of witnesses? It is only necessary to appreciate that scientifically the present subject is equally a part of the general topic of Relevancy.

§ 476. **Method of Argument; Inductive or Deductive.** What has already been noted as to the form of the inference (*ante*, § 30) applies equally to the present class of evidence. The rules which prescribe the relevancy of a class of evidence are here, as with Circumstantial Evidence, always in inductive form. It is only in the use of these rules that we find employed chiefly the deductive form. When the Court is asked to agree that testimony of a certain sort is relevant and admissible, it is asked to lay down the rule of law as a proposition reached inductively on the basis of experience. But when the Court has sanctioned this proposition, the counsel's argument then takes the deductive form; *i.e.* "Testimony of a specific class is by a certain rule admissible; the present testimony offered is of that class; therefore it is admissible."

§ 477. **Three General Groups of Rules; Testimonial Qualifications, Impeachment, and Rehabilitation.** It follows that the ordinary processes of inductive argument are here appropriate. Practically those which call for use are reduced to three:

First, in offering testimonial assertions and asking the Court to agree that assertions of that class are *admissible*, the simple question is whether other hypotheses affecting the credibility of the assertion are sufficiently negatived (*ante*, § 32). When the Court declares that the statement is under the conditions named admissible, it declares by implication that the sanity, the experience, the knowledge, and so forth, of the witness are such that the hypotheses of the assertion being idle chatter, ignorant gossip, or otherwise untrustworthy, are sufficiently negatived 'prima facie', and that the assertion is 'prima facie' worth listening to. Thus the other forms or requirements — substantial similarity of conditions, sufficient number of instances, and the like (*ante*, § 31) — do not arise for application at all, as they do in using circumstantial evidence; the simple reason being that the basis of inference here is a single homogeneous variety of evidence (human assertions), and not the myriad varied sorts of facts roughly grouped together under the term "circumstantial evidence." In offering testimonial evidence, then, the judge merely inquires whether experience and precedent have sanctioned certain conditions which must accompany the statements.

Secondly, just as in the use of circumstantial evidence it was observed that there are for the opponent certain ways of *diminishing the force* of the evidence after it was admitted (*ante*, § 34), namely, by showing that other hypotheses exist which are equally or more probable, or by adducing contrary instances of the same sort, — so here there is found a group of rules pointing to the analogous ways by which an opponent may diminish the force of testimonial evidence; and here, as there, these ways consist mainly either in explaining away the testimonial statement (as, by showing the witness' bad character for veracity, his inadequate experience or knowledge, his poor recollection, and so on), or in adducing contrary instances of the same sort (in the shape of previous contradictory statements, and the like).

Thirdly, since the new facts offered by way of discrediting the witness may themselves in turn be open to explanation taking away their apparent force of inference, so once more the original proponent of the witness may offer evidence, this time for such explanatory or *rehabilitating* purpose. In practice the process usually ends here; although in theory it might continue longer.

There are thus three general groups of rules to be considered, which correspond to these three general processes of argument:

I. Admissibility of Testimonial Assertions, *i.e.* Witness-Qualifications;

II. Impeachment of Testimonial Assertions;

III. Rehabilitation of Testimonial Assertions.

It might be objected (on the reasons given *post*, § 875) that this division of the field is artificial and unscientific, because the probative value of a testi-

monial assertion is one indivisible thing, and because scientifically all the data affecting that probative value (whether termed "qualifications", "impeachment", or "corroboration") involve this indivisible process of weighing the value of the assertion. The division is indeed artificial, but not unscientific. It is due simply to the fact that in forensic practice the bi-partisan nature of the proceedings allots to each party in turn the right and duty of adducing the evidential considerations that suit his side of the case. Hence, the adducing of the whole mass of considerations falls naturally into three stages, viz. *first*, the proponent, qualifying the witness, *secondly*, the opponent, impeaching him, and *thirdly*, the proponent again, corroborating him; this is the time-honored order of evidence peculiar to the Anglo-American system (*post*, § 1866).

This division of the field is not one which an ordinary scientist would follow in analyzing his evidence. But it is not unscientific; it is merely a provisional allotment due to the partisan and controversial nature of the proceedings and the necessity for some orderly rule.

§ 478. **Analysis of Elements of a Testimonial Assertion: Observation, Recollection, Narration.** Before proceeding to the consideration of these rules, an analysis is desirable of the elements of a piece of testimonial evidence; for upon this analysis will depend the grouping of topics, and from it may be surmised something of the necessary requirements of such evidence.

1. When a witness' statement is offered as the basis of an evidential inference to the truth of his statement — for example, the statement of A that B struck X —, it is plain that at least three distinct elements are present; or, put in another way, that there are three processes, in the absence of any one of which we cannot conceive of testimony. *First*, the witness must know something, *i.e.* must have *observed* the affray and received some impressions on the question whether B struck X; to this element may be given the generic term Observation. *Secondly*, the witness must have a *recollection* of these impressions, the result of his Observation; this may be termed Recollection. *Thirdly*, he must *communicate* this recollection to the tribunal; that is, there must be Communication, or Narration, or Relation (for there is no single term entirely appropriate).

Now the very notion of taking a human utterance as the basis of belief in the truth of the fact asserted impliedly attributes these three processes to the witness, — Observation, Recollection, Communication.[1] Whatever rules,

§ 478. [1] 1806, Evans, Notes to Pothier, II, 202: "All regard to testimony supposes the general proposition that witnesses, not having any motives for asserting what is false or suppressing what is true, having had an adequate opportunity of observing the subject to which they depose, having actually observed it with adequate attention, and having a distinct and perfect memory with respect to it, relate what they have seen or heard with accuracy and fidelity." 1906, Train, The Prisoner at the Bar, 224 ("The probative value of all honestly given testimony depends, naturally, first, upon the witness' original capacity to observe; second, upon the extent to which his memory may have played him false; and third, upon how far he really means exactly what he says. . . . The authoritativeness of everything these witnesses have to say must lie in their ability to see, remember, and describe accurately what they have seen").

therefore, limit the acceptance of testimonial assertions must have reference to some one or more of these elements.

Moreover, in the function fulfilled by each of the three elements or processes are to be found in general form the fundamental canons of which the various detailed rules will be the applications and from which they are sometimes direct deductions. Thus, the notion of Observation is that the external event has in some way or other impressed itself on the witness' senses, to be now reproduced to us in court. This impression of the witness, then (knowledge, observation, or whatever it be called), should adequately represent or correspond to the fact itself as it really existed or exists; and the practical rules under this head will be found to have, for their common purpose, the object of ensuring the probability of a fairly accurate knowledge on the part of the witness. Again, the function of Recollection is to recall or reproduce the original impressions of observation; and such rules as the law has laid down under this head are usually therefore merely applications of this fundamental notion that Recollection must fairly correspond with or reproduce the original Knowledge or Observation. Finally, the function of Narration or Communication is to reproduce for the apprehension of the tribunal the Recollected results — themselves already reproduced from Observation; and the common purpose of the varied rules under this head is to ensure that the story as told shall represent with fair accuracy what the witness once observed and now recollects.

2. The rules, thus analyzed, would however deal with the simple question, Does this witness *actually* know, recollect, communicate with sufficient accuracy? — a question requiring in each instance anew an investigation, and a decision based on the facts discovered. But experience has carved out certain rough rules of convenience which, if applied at the outset, may save the necessity of a detailed investigation as to the sufficiency of *actual* knowledge, recollection, and communication; for it is obvious that if we find the witness *incapable* — *i.e.* lacking in the very power — *of acquiring* adequate knowledge or of sufficiently recollecting or of properly telling, then further inquiry, whether he did in fact know or does in fact recollect or well relate, is useless and may be omitted. For instance, if A is put on the stand to testify to the color of a horse, it will be unnecessary to inquire whether and where and when he saw the horse, if it appears at the outset that he has been blind from birth. So, too, it would be unnecessary to ask B, who is put forward to testify to the results of a post-mortem examination, whether he was present and took part, if it appears at the outset that he knows nothing of medicine or of surgery. When the witness is found to lack the proper capacity or power, it becomes not only unnecessary but improper to consider whether he actually knows, for it is impossible for him to know; we do not trust his statement that he does know. Thus, in addition to the rules defining the requirements as to actual Knowledge, Recollection, and Communication, there arise other rules defining the kinds of Incapacity (to know,

recollect, and communicate) which exclude the witness at the outset without further inquiry.

Of this incapacity there are three distinct sorts; *First,* there is an organic incapacity, affecting the *inherent* mental or moral *powers,* — of which insanity, infancy, dumbness, and the like, are instances. This sort of incapacity may affect the witness' power of knowing or of recollecting or of communicating or of doing all three, and must be examined with reference to each. *Secondly,* there is an incapacity involving a lack of power to judge rightly on particular subjects, and arising from lack of *experience* or training. This incapacity extends to particular topics only, not necessarily to the whole subject of litigation. *Thirdly,* there is an incapacity arising from an *emotional relation* to the controversy, *e.g.* from marital relationship or from pecuniary interest in the subject of the suit. This incapacity — nowadays recognized to a limited extent only — is supposed to involve an inability to give any credible testimony on the subject of the particular cause, and, when it exists, affects all three elements alike.

As for the names to be applied to these three sorts of incapacity, there are none of general acceptance. The first may be termed Organic, as affecting mental and moral functions or powers; the second Experiential, as involving a lack of sufficient experience or training; the third Emotional, as involving the dominance of untrustworthy motives.

§ 479. **Any Assertion, whether in court or not, may be Testimonial Evidence.** The use of the phrase "testimonial" evidence must not be understood as applicable exclusively to assertions made on the witness-stand. Any assertion, taken as the basis of an inference to the existence of the matter asserted, is testimony, whether made in court or not (*ante,* § 25). Thus, all the statements received under the exceptions to the hearsay rule are genuinely testimony (*post,* § 1361). Assertions made on the witness-stand are merely the commonest class of testimonial evidence. It follows that the qualifications of a witness are equally applicable in the use of extra-judicial assertions. In practice the Court does not always insist on proof of these qualifications beforehand; but many of the rules established for the hearsay exceptions (*post,* § 1424) are nothing more than applications of the rules of testimonial qualifications to extra-judicial assertions.

§ 480. **Order of Topics.** In accordance with the preceding analysis, the order of topics under the general title of Testimonial Evidence becomes:

Sub-title I: Qualifications of Witnesses.

Topic I: Organic Capacity; including

Sub-topic A: Mental Derangement (Insanity, Disease, Idiocy);

Sub-topic B: Mental Immaturity (Infancy);

Sub-topic C: Moral Depravity (Sex, Religion, Race, Infamy).

Topic II: Experiential Capacity.

Topic III: Emotional Capacity:

Sub-topic A: Pecuniary Interest;

Sub-topic B; Domestic Relationship.
Topic IV: Observation, or Knowledge.
Topic V: Recollection.
Topic VI: Narration, or Communication.
Sub-title II: Impeachment of Witnesses; with further subdivisions (noted *post*, § 881).
Sub-title III: Rehabilitation of Witnesses; with further subdivisions (noted *post*, § 1101).

SUB-TITLE I: TESTIMONIAL QUALIFICATIONS

INTRODUCTORY: GENERAL RULES AFFECTING TESTIMONIAL QUALIFICATIONS

CHAPTER XVIII.

§ 483. **Time of Qualifications.** The time of *utterance of the testimony* is the time when the qualifications must exist, because it is at that time that they are needed. Certain consequences follow from this axiom:

(1) In the case of *insanity*, an insanity prior to the time of trial is immaterial, unless it affected the person's power of correct observation at the time of the fact testified to (*post*, §§ 493, 497). On the other hand, prior insanity may suffice as evidence of the continuing existence of it at the time of observation or of delivering testimony (*ante*, § 233).

(2) In the case of *infamy*, the disqualifying conviction has of course occurred before the trial; but it is supposed to demonstrate a moral depravity continuing up to the trial. A pardon operates to remove the disqualification (*post*, § 523); but this, though justifiable only on the ground that the depravity had ceased, is a conclusion that does violence to the general principle. In such an irrational doctrine, however, as that of disqualification by infamy (now almost obsolete) it is needless to look for consistency.

(3) In the case of a *deposition*, the qualifications are required at the time of its taking; hence, the condition of the deponent at the time of its offering in court is immaterial; his intervening death or disqualification could not affect the trustworthiness of his statement when made. On this point, however, the judicial rulings sometimes have ignored sound principle (*post*, §§ 1408, 1409).

§ 484. **Burden of Proof of Qualifications.** The preëxistence, in the witness, of the requisite elements of capacity already enumerated (*ante*, § 478) is in theory required. In the practical enforcement of these requirements, however, it would be pedantic to require that their existence be expressly shown in every respect before the witness is permitted to testify. Experience has led to an arrangement by which the existence of the proper qualifications may in some classes of cases be assumed, until the opposing party proves or the witness reveals their absence; while in certain other classes of cases the qualifications are not assumed to exist, but must first be proved to exist by the party offering the witness.

Under the former head fall, in general, the elements affecting Organic and Emotional Capacity; under the latter head, those affecting Experiential Capacity, as well as the qualification of Observation (or Knowledge); for the elements of Recollection and Narration, there is no uniform doctrine. The detailed rules carrying out this general principle can better be examined under the respective qualifications. It is enough to note here that the lack of capacity by *insanity* or idiocy must be shown as a disqualification by the opposing party (*post*, § 497); that lack of capacity by *infancy* must in theory also be shown by him, though the witness' age and appearance usually serve to change the burden (*post*, § 508); and that *interest* and relationship must be shown, as disqualifications, by the opposing party (*post*, § 584); while the witness' *experience* (*post*, § 572) and *observation*, or knowledge (*post*, § 654) must be shown, as qualifications, by the offering party.

§ 485. **Mode of Proof of Qualifications.** Four ways are distinguishable for ascertaining the qualifications or lack of qualifications of a witness.

(1) The *behavior* of a witness, in court during trial, or after being called to the stand but before being sworn or formally questioned, may reveal his incapacity. This, however, would in practice be an available source for the cases only of idiocy, insanity, intoxication, or extreme infancy (*post*, §§ 497, 508).

(2) Before the witness is sworn as such, but after he is called and presented, a *preliminary questioning* of himself may be had, in order to ascertain by his own answers his condition as to qualifications. This questioning (known as ' voir dire ', when applied to ascertain disqualification by interest) formed originally a distinct stage of the proceeding; and it was perhaps properly so, because the answers of a (supposedly) unqualified person could not form testimony, and because it is convenient to mark definitely the time when the stage of testimony proper begins. But in modern practice (especially under the custom of administering the oath beforehand to the witnesses in mass) the separation of the two stages is usually ignored. Moreover, in proving the qualifications of experience (*post*, § 560) and knowledge (*post*, § 654), it was never practiced.

The detailed rules in regard to the mode of conducting this provisional examination are noticed later under the respective heads of insanity (*post*, § 497), infancy (*post*, § 508), infamy (*post*, § 523), and interest (*post*, § 583).

(3) Before the witness is sworn as such, but after he is called and presented, *other witnesses* may be used to evidence the facts of his incapacity. This, the commonest mode of proof, is ordinarily available as complementary to the foregoing two (*post*, §§ 497, 508, 562); but, for incapacity by interest, it was allowed (*post*, § 585, only on condition of not using the 'voir dire', — the exception being due merely to the disfavor which the Courts finally came to show towards that ground of disqualification.

(4) After the witness has been sworn, the *progress of his direct examination* or *cross-examination* may disclose his incapacity, and then he may be

stopped and his preceding testimony ordered expunged; or, if merely grounds of doubt are disclosed, a questioning on 'voir dire', or other persons' testimony, may be resorted to. But at this stage, after the oath's administration, his incapacity will not be examined into in case the opponent has by the delay lost the right to make objection (*post*, §§ 486, 586); and this loss of the right might occur at different times for different incapacities.

The rules for ascertaining *capacity to take the oath* rest on special grounds (*post*, §§ 1816, 1823).

§ 486. **Time of Objecting to Qualifications.** Wherever a plain separation is preserved between the preliminary examination of 'voir dire' and the testimony proper, the rule can be strictly enforced that capacity is not to be questioned *after the person is once sworn* as a witness, except where the opposing party had *no prior notice* of the disqualifying fact, or where, having notice, he has made due objection but has been unable to prove the fact (*post*, § 586). But in a court where the witnesses are customarily sworn as such before any opportunity for questioning is given, this rule cannot be applied. Yet its principle may be carried out by requiring the opponent to make objection and offer proof before the testimony of the witness is begun, — so far at least as the opponent then is aware of any specific ground of objection (*post*, §§ 497, 586).

When the testimony is offered in the form of a *deposition*, the same general principle is applied, *i.e.* the objection, if the facts were known, must have been made at the time of the taking of the deposition, if it could then have been of any avail. Nevertheless, since the officer taking it has usually no authority to exclude testimony, in some classes of evidence the objection would be at that time without practical consequences, and hence there is no harm in permitting certain questions to be raised at the trial for the first time, provided the party offering the deposition has not been put in an inconvenient position for lack of the prior objection. The specific rules on this point have already been considered (*ante*, § 18).

§ 487. **Judge, not Jury, to determine Qualifications.** The orthodox division of function between judge and jury allots, without question, to the *judge* the determination of all matters of fact on which the *admissibility of evidence* depends (*post*, § 2550), and therefore of the facts of a witness' capacity to testify.

In this inquiry, on the one hand, the judge is not bound by the ordinary rules of evidence applicable to evidence offered to the jury (*post*, §§ 587, 2550); and, in particular, he need not permit cross-examination of witnesses called to prove or disprove another's qualifications (*post*, § 1385).

On the other hand, when the judge has once determined the admissibility of a witness, by applying the rules of law to the facts found by himself, the witness stands before the jury for them to judge of his credit as they see fit, untrammelled by the rules of law as to his qualifications (*post*, §§ 861, 1451, 2550); it would follow that if they rejected his testimony, it should be merely

because, all things considered, they do not believe him, and not because they find him lacking by force of some legal definition of competency; with such definitions the jury have nothing to do.

It seems hardly worth while here to take note of the various fallacious principles or phrases which one time or another have been offered for acceptance at this point. For example, it has been more or less argued whether there is "a presumption that a witness speaks the truth." Now of course there is no presumption, in the correct sense of that term (*post*, § 2409). Not since the earlier days of superstitious ignorance have we been credulous and foolish enough to recognize legally (*post*, § 2032) that a human being's utterance of words in court was 'per se' operative to produce credence. But, on the other hand, equally of course, a witness' qualifications, shown preliminarily, give *some* probative value to his testimony as he begins to open his mouth. In short, the law and the tribunal start with assuming that every witness is at least worth listening to. Hence the question whether the trial judge is entitled or bound, in point of law, to tell the jury that "there is no presumption that a witness tells the truth" is a barren one. Most of the judicial discussion of this subject [1] is so crude as not to advance sound theory and practice in the least.

§ 488. **Statutes affecting Qualifications.** The rules of the common law respecting the qualifications of witnesses were highly restrictive. In the progress of thought, these restrictions came in many instances to be recognized as illiberal and unnecessary; and legislation has in several important respects abolished them either wholly or in part. The statutes affecting these changes have often embodied in the same enactment the change of diverse rules. In order to have before us in practicable form all the statutory data affecting a given rule, it is necessary to set out in one place the series of enactments or statutory sections dealing with the general subject, and then from time to time in the course of discussion refer to this single collection of statutory texts. Accordingly, it is most convenient to set out here in mass, for subsequent reference in detail, the statutes affecting organic and emotional capacity, *i.e. insanity*, *infancy*, *infamy*, *interest*, and *marital relationship*, reserving for other places the statutes, easily separable, which affect other rules of testimonial evidence.[2]

§ 487. [1] *E.g.* Burton *v.* Burton (1920), 113 S. C. 227, 102 S. E. 282.

§ 488. [2] The editions of collected statutes here referred to will be found enumerated in the List of Statutes, prefixed to this volume.

I. England: 1814, St. 54 Geo. III, c. 170 (rated inhabitants of parish, etc., to be competant in certain cases); 1833, St. 3 & 4 Wm. IV, c. 42 (removes disqualification by reason of verdict being usable for or against the witness); 1840, St. 3 & 4 Vict. c. 26 (similar to St. 1814); 1843, St. 6 & 7 Vict. c. 85, Lord Denman's Act ("Whereas the inquiry after truth in courts of justice is often obstructed by incapacities created by the present law, and it is desirable that full information as to the facts in issue, both in criminal and in civil cases, should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced and on the truth of their testimony. Now therefore be it enacted, That no person offered as a witness shall hereafter be excluded by reason of incapacity from crime or interest from giving evidence", provided that this shall not render competent "any party to any suit", "or the husband or wife of such persons"); 1846, St. 9 & 10 Vict.

c. 95 (in suits in the county courts, "the parties thereto, their wives and all other persons" may be examined); 1851, St. 14 & 15 Vict. c. 99, § 1 (St. 6 & 7 Vict. repealed as to the proviso about parties); § 2 (parties, and persons on whose behalf a suit is brought or defended, are to be competent and compellable); § 3 (person charged with offence indictable or punishable with summary conviction, not to be affected by statute; neither husband nor wife to be "competent or compellable to give evidence for or against" the other in criminal proceedings); § 4 (action for breach of promise of marriage or in consequence of adultery, not to be affected); 1853, St. 16 & 17 Vict. c. 83, § 1 ("husbands and wives of the parties" shall be competent and compellable to testify "on behalf of either or any of the parties"); § 2 (but nothing shall render husband or wife competent or compellable to testify for or against the other "in any criminal proceeding or in any proceeding instituted in consequence of adultery"); § 3 ("no husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage"); 1859, St. 22 & 23 Vict. c. 61, § 6 (on wife's petition for divorce founded on adultery, coupled with cruelty or desertion, both husband and wife are competent and compellable as to the cruelty or desertion); 1869, St. 32 & 33 Vict. c. 68 ("Whereas the discovery of truth in courts of justice has been signally promoted by the removal of the restrictions on the admissibility of witnesses and it is expedient to amend the law of evidence with the object of still further promoting such discovery"); § 2 (parties to an action for breach of marriage promise, competent); § 3 (parties to any proceeding in consequence of adultery, and their husbands and wives, to be competent; but no answer as to a witness' own adultery to be compellable, unless the witness has already testified in disproof thereof); 1877, St. 40 & 41 Vict. c. 14 (on indictment or proceeding to try or enforce a civil right only, the defendant, and the defendant's wife or husband, to be competent and compellable); 1885, St. 48 & 49 Vict. c. 69, § 4 (in prosecutions for rape under age, where the girl in question "or any other child of tender years" does not in the Court's opinion understand the nature of an oath, the child's evidence may be given, without oath, if in the Court's opinion the child "is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth"; with a proviso requiring corroboration, for which see *post*, § 2061); 1889, St. 52 & 53 Vict. c. 44, § 8 (similar); 1898, St. 61 & 62 Vict. c. 36, Criminal Evidence Act:

§ 1 ("Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person. Provided as follows: — (*a*) A person so charged shall not be called as a witness in pursuance of this Act except upon his own application; (*b*) The failure of any person charged with an offence, or of the wife or husband, as the case may be, of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution; (*c*) The wife or husband of the person so charged shall not, save as in this Act mentioned, be called as a witness in pursuance of this Act except upon the application of the person so charged; (*d*) Nothing in this Act shall make a husband compellable to disclose any communication made by him to his wife during the marriage, or a wife compellable to disclose any communication made to her by her husband during the marriage; (*e*) A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged; (*f*) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless — (i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or (ii) he has personally or by his advocate asked questions of the witnesses or the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or (iii) he has given evidence against any other person charged with the same offence; (*g*) Every person called as a witness in pursuance of this Act shall, unless otherwise ordered by the Court, give his evidence from the witness box or other place from which the other witnesses give their evidence; (*h*) Nothing in this Act shall affect the provisions of section eighteen of the Indictable Offences Act, 1848, or any right of the person charged to make a statement without being sworn");

§ 2 ("Where the only witness to the facts of the case called by the defence is the person charged, he shall be called as a witness immediately after the close of the evidence for the prosecution");

§ 3 ("In cases where the right of reply depends upon the question whether evidence has been called for the defence, the fact that the person charged has been called as a witness shall not of itself confer on the prosecution the right of reply");

§ 4 "(1) The wife or husband of a person

charged with an offence under any indictment mentioned in the schedule of this Act may be called as a witness either for the prosecution or defence and without the consent of the person charged. (2) Nothing in this Act shall affect a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person"); 1904, St. 4 Edw. VII, c. 15, § 12 (Prevention of Cruelty to Children Act; in trials of any person for offences under this act, "such persons shall be competent but not compellable to give evidence, and the wife or husband of such person may be required to attend to give evidence as an ordinary witness in the case and shall be competent but not compellable to give evidence"); 1908, St. 8 Edw. VII, c. 67, § 27 (Children Act; the provisions of the Criminal Evidence Act to apply); 1912, St. 2–3 Geo. V, c. 20, § 7 (vagrancy offences; wife or husband "may be called as a witness either for the prosecution or for the defence and without the consent of the person charged," saving cases where at common law the same might be done); 1914, St. 4 & 5 Geo. V, c. 58, Criminal Justice Administration, § 28 (husband or wife of a person charged with bigamy may be called for prosecution or defence, without consent of the person charged).

II. CANADA: DOMINION OF CANADA: *Revised Statutes* 1906, c. 152, § 142 (in trials under the Temperance Act, the respondent or the wife or husband of the respondent is compellable and competent); Crim. Code 1892, § 685, R. S. c. 146, § 1003 (rape under age, and indecent assault; like Eng. St. 1885, c. 69, § 4); R. S. c. 145, Evidence Act, § 3 ("A person shall not be incompetent to give evidence by reason of interest or crime"); Evid. Act § 4, as amended by St. 1917, 7–8 Geo. V, c. 14 (1. "Every person charged with an offence, and, except as in this section otherwise provided, the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence, whether the person so charged is charged solely or jointly with any other person. 2. The wife or husband of a person charged with an offence against any of the sections 202 to 206 inclusive, 211 to 219 inclusive, 238, 239, 242 A, 244, 245, 298 to 302 inclusive, 307 to 311 inclusive, 313 to 316 inclusive of the Criminal Code, shall be a competent and compellable witness for the prosecution without the consent of the person charged. 3. No husband shall be compellable to disclose any communication made to him by his wife during their marriage, and no wife shall be compellable to disclose any communication made to her by her husband during their marriage. 4. Nothing in this section shall affect a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person. 5. The failure of the person charged, or of the wife or husband of such person, to testify, shall not be made the subject of comment by the judge, or by counsel for the prosecution"; [par. 2 of this statute seems to have been enacted in consequence of the divided opinions in Gosselin *v.* King, 1903, 33 Can. Sup. 255, cited *post*, § 2245]); Evid. Act, § 6 ("A witness who is unable to speak, may give his evidence in any other manner in which he can make it intelligible"); § 16 ("in any legal proceeding" the rule of Eng. St. 1885, c. 69, § 4, is adopted); St. 1920, 10–11 Geo. V, c. 46, § 92 (Dominion election offences; in any civil action for penalties, "the parties thereto, and the husbands or wives of such parties respectively, shall be competent and compellable" as in other civil actions; But such evidence shall not be used in any criminal proceeding under this Act against the person giving it).

ALBERTA: St. 1910, 2d sess., c. 3, Evidence Act, § 4 (no witness to be excluded for "any alleged incapacity from crime or interest"); § 5 ("every person offered as a witness shall be admitted to give evidence notwithstanding" interest or conviction of crime); § 6 ("the parties to an action", etc., shall be "competent and compellable to give evidence on behalf of themselves or of any of the parties"; "husbands and wives of such parties and persons shall, except as hereinafter otherwise provided, be competent and compellable to give evidence on behalf of any of the parties"); § 8 (like Eng. St. 1869, St. 32–33 Vict. c. 68, § 3); § 9 (like Eng. St. 1853, 16–17 Vict. c. 83, § 3).

BRITISH COLUMBIA: *Revised Statutes* 1911, c. 78, § 4 (like Dom. Evidence Act, § 4); § 6 (child; quoted *post*, § 1828); § 7 (like Dom. Evid. Act, § 4, par. 1, without the exception); §§ 12–15 (testimony of certain natives not understanding an oath may be received); § 22 (like Dom. Evid. Act, § 6); § 8 "[In civil proceedings, the parties] and their wives and husbands shall, except as hereinafter excepted, be competent as witnesses and compellable" as if not parties, etc.; provided that the plaintiff's testimony, in breach of promise of marriage, must be corroborated); § 9 ("No husband shall be compellable to disclose any communication made to him by his wife during the marriage", and no wife similarly); c. 67, § 27 (in divorce, the Court may order the examination or cross-examination of the petitioner, who shall however not be bound to answer any question tending to show him guilty of adultery); c. 81, § 75 (on trial of offences under the Factories Act, the defendant is "competent and compellable to give evidence"); c. 107, § 100 (contributing to a child's delinquency; like c. 78, § 6, *supra*).

MANITOBA: *Revised Statutes* 1913, c. 65, §§ 3, 4, 6 (like Dom. Evidence Act, §§ 3, 4, 6, except that § 4 stands as before the 1917 Amendment of the Dominion Act, *i.e.* it omits par. 2 and 4, and also in par. 1 the words "for

the defence"); § 39 (like ib., § 16); c. 70, § 73 (in offences under the Factory Act, the accused shall be competent and compellable); St. 1912, R. S. 1913, c. 206, § 4 (family desertion; "the wife shall be a competent and compellable witness against the husband").

NEW BRUNSWICK: *Consolidated Statutes* 1903, c. 127, § 3 ("No person shall be incompetent to give evidence by reason of interest or crime"); § 4 ("(1) . . . the parties to the proceeding and the persons in whose behalf the action or other proceeding is brought or instituted, or opposed, or defended, and the husbands and wives of such parties shall, except as hereinafter excepted, be competent and compellable to give evidence. . . . (2) Nothing in this section shall apply to any suit, action or proceeding in any Court instituted in consequence of adultery"); § 5 ("On the trial of any issue joined, or of any matter or question, or on any enquiry arising in any suit, action or other proceeding in the Court of Divorce and Matrimonial Causes, or in any other Court, any husband shall be competent to give evidence for or against his wife, and any wife shall be competent to give evidence for or against her husband, whether such proceedings were instituted in consequence of adultery or otherwise"); § 6 ("Upon the trial of any person in any Court for any violation of any Statute of this Province, or upon the prosecution of any person for any penalty under any law of this Province, the person charged, and the wife or husband, as the case may be, of such person, shall be a competent witness, whether the person so charged is charged solely or jointly with any other person; provided, however, that neither such person, nor the wife or husband of such person, shall be compellable to testify, and that upon such trial no husband shall be competent to disclose any communication made by his wife to him during their marriage, and no wife shall be competent to disclose any communication made to her by her husband during their marriage"); § 9 ("Nothing herein shall render any party to a proceeding in any Court, instituted in consequence of adultery, or the husband or wife of such party, liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless he or she shall have already given evidence in the same proceeding in disproof of his or her alleged adultery"); § 10 ("Nothing herein contained shall render any person charged with any offence against any law of this Province compellable to give evidence for or against himself, or the wife or husband of such person, as the case may be, compellable to give evidence for or against such person"); § 11 ("Nothing herein contained shall render any husband compellable to disclose any communication made to him by his wife during the marriage, nor any wife compellable to disclose any communication made to her by her husband during the marriage"); § 12 ("Nothing herein contained shall extend or apply to any prosecution instituted under and by virtue of the criminal laws of Canada for any breach of a Provincial Statute"); St. 1905, c. 7, § 41 (offences under the Factory Act; the person charged shall be "competent and compellable to give evidence in or with respect to such complaint, proceeding, matter, or question").

NEWFOUNDLAND: *Consolidated Statutes* 1916, c. 91, Evidence Act, § 1 (the parties and their beneficiaries, "and the husbands and wives of the parties" and of the beneficiaries, shall be "competent and compellable", except as otherwise declared; provided that "the party so called to testify may be cross-examined by the opposite party under the rules applicable to the cross-examination of witnesses"); § 2 (no person "charged with the commission of any indictable offence" shall be "competent and compellable to give evidence for or against himself or herself", nor shall any person be "compellable to answer any question tending to criminate himself or herself", nor shall any husband "in any such criminal proceeding" be "competent or compellable to give evidence for or against his wife", nor any wife similarly; but nothing here "shall preclude a defendant or the husband or wife of the defendant from becoming a witness, should he or she think fit, in any summary proceeding of a criminal or other nature" and "no witness in any proceeding instituted in consequence of adultery, whether a party to the suit or not, or the husband or wife of such party, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery"); § 3 (marital communications; like Eng. St. 1853, c. 83, § 3); § 4 (breach of promise; like Ont. Rev. St. 1914, c. 76, § 11); § 6 ("no person offered as a witness shall be excluded by reason of incapacity from crime");

NORTHWEST TERRITORIES: St. 1901, c. 10, § 1 (rules of the Canada Evidence Act 1893, as now or hereafter amended, made applicable in this jurisdiction; compare *ante*, § 6 *b*); Can. Rev. St. 1886, c. 50, § 31 (interest as executor or as legatee of a will is not to disqualify a person as witness in proving the will).

NOVA SCOTIA: *Revised Statutes* 1900, c. 163, § 34 (no person shall be incompetent "by reason of incapacity from crime or from interest"); § 35 (the parties and beneficiaries and their husbands and wives shall be competent and compellable; provided that no "opposite or interested party" shall obtain a judgment, in any action against "the heirs, executors, administrators, or assigns of a deceased person", "on his own testimony, or that of his wife, or both of them, in respect to any dealing, transaction, or agreement with the deceased, or in respect to any act, state-

ment, acknowledgment, or admission of the deceased, unless such testimony is corroborated by other material evidence"; compare the statutes *post*, § 2065); § 36 (the preceding shall not apply to any proceeding "instituted by the husband or wife in consequence of adultery"); § 37 (nothing herein shall render any person compellable "to answer any question tending to subject him to criminal proceedings or to prosecution for any penalty"; nor render any person charged in any criminal proceeding with "any offence under the statutes of the province, or the wife or husband of the person so charged, compellable to give evidence against the person so charged"); § 38 (marital communications; like Eng. St. 1853, c. 83, § 3); c. 100, § 164 (in offences concerning the sale of intoxicating liquors, "the person charged or the husband of such person shall be competent and compellable", saving the privilege against self-crimination); St. 1866, c. 13, § 11, in Rev. St. 1900, vol. II, p. 864 (in proceedings for divorce by the wife for adultery coupled with cruelty, husband and wife are "competent and compellable to give evidence of or relating to such cruelty").

Ontario: *Revised Statutes* 1914, c. 76, Evidence Act, §§ 4, 5 (neither interest nor conviction of crime is to disqualify, and every person shall be admitted notwithstanding interest or conviction); § 6 (parties and beneficiaries shall be competent and compellable, and also their husbands and wives, except as otherwise declared); § 8 (proceedings in consequence of adultery; parties and their husbands and wives shall be competent; but "the husband or wife, if competent only under this Act, shall not be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless he or she shall have already given evidence in the same proceeding in disproof of his or her alleged adultery"); § 9 (marital communications; like Eng. St. 1853, c. 83, § 3).

Prince Edward Island: St. 1889, c. 9, §§ 3, 4 (incapacity by crime or interest; like Eng. St. 1843, c. 85, without the provisos); § 5 (parties and beneficiaries, and their husbands and wives, are "competent and compellable", except as otherwise declared); § 6 (privilege against self-crimination reserved for all persons); § 7 (breach of promise; like Eng. St. 1869, c. 68, § 2); § 8 (adultery; like ib. § 3, except that the proviso is made applicable only to "the husband or wife if competent only under and by virtue of this Act"); § 9 (marital communications; like Eng. St. 1853, c. 83, § 3); § 10 (the "party opposing or defending, or the wife or husband of such party, shall be competent and compellable" in any proceeding under an act of this Legislature or before a justice of the peace or stipendiary magistrate when the matter is not a crime); St. 1906, 6 Edw. VII, c. 12 (St. 1889, c. 9, § 10, amended by striking out the words "not being a crime").

Saskatchewan: *Revised Statutes* 1920, c. 44, § 28 (like Ont. R. S. c. 76, § 4); § 29 (like ib. § 6); § 30 (like ib. § 9), § 36 (children; like Can. Evid. Act, § 16); St. 1920, c. 28, § 1 (amending Evid. Act, R. S. c. 44, § 29, by adding sub-sect. (2) that when "the evidence of any party defendant, or the husband or wife of such party, is taken at the instance of the adverse party," no sentence of imprisonment should be imposed).

Yukon: *Consolidated Ordinances* 1914, c. 30, § 34 (like N. Sc. Rev. St. 1900, c. 163, § 34); ib. § 35 (like N. Sc. Rev. St. 1900, c. 163, § 35); ib. § 36 (like N. Sc. Rev. St. 1900, c. 163, § 36); ib. § 37 (like N. Sc. Rev. St. 1900, c. 163, § 37); ib. § 38 (like N. Sc. Rev. St. 1900, c. 163, § 38).

III. United States: Federal: *Revised Statutes* 1878, and *Code* 1919; R. S. § 858 ("In the courts of the United States, no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried; provided, that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the Court. In all other respects, the laws of the State in which the Court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law and in equity and admiralty"; repealed by St. 1906, *infra*); R. S. § 1977, Code § 3541 ("All persons within the jurisdiction of the United States shall have the same right in every State and Territory to . . . give evidence . . . as is enjoyed by white citizens"); R. S. § 2140, Code § 4390 ("Indians shall be competent witnesses" in all cases concerning illegal sale of liquor to Indians); St. 1874, June 22, c. 391, § 8, Code § 10107 ("No officer, or other person entitled to or claiming compensation under any provision of this act [against evading customs laws] shall be thereby disqualified from becoming a witness in any action, suit, or proceeding for the recovery, mitigation, or remission thereof", and the defendant may testify); St. 1878, March 16, c. 37, Code § 1357 ("In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offences, and misdemeanors, in the United States courts, territorial courts, and courts martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him"); St. 1887, March 3, c. 397, § 1, Code § 1358 ("In any proceeding or examination

before a grand jury, a judge, justice, or a United States commissioner, or a Court, in any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, the lawful husband or wife of the accused shall be a competent witness, and may be called, but shall not be compelled to testify in such proceeding, examination, or prosecution, without the consent of the husband or wife, as the case may be; and such witness shall not be permitted to testify as to any statement or communication made by either husband or wife to each other, during the existence of the marriage relation, deemed confidential at common law"); St. 1892, Code § 3658 (for this and other statutes affecting the Chinese, see *post*, § 516, incapacity by race); St. 1903, Code § 8804 (bankruptcy; the Court may "require any designated person, including the bankrupt and his wife", to appear for examination "concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this Act; provided that the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt"); St. 1906, June 29, Code § 1356 ("The competency of a witness to testify in any civil action, suit, or proceeding in the courts of the United States shall be determined by the laws of the State or Territory in which the court is held"); St. 1910, Mar. 26, No. 107, Code § 3572 (amending St. 1907, Feb. 20, § 3; importation of aliens for prostitution; in such prosecutions husband or wife shall be admissible against each other); St. 1911, Mar. 3, Code § 1155 ("No person shall be excluded as a witness in the Court of Claims on account of color or because he or she is a party to or interested in the cause or proceeding; and any plaintiff or party in interest may be examined as a witness on the part of the government"); 1904, Fajardo *v.* Costa, 1 P. R. Fed. 119, 123 (survivor of a transaction with a deceased agent, held competent under U. S. Rev. St. § 858); for the applicability of the Federal Statutes, see *ante*, § 6.

ALABAMA: *Constitution* 1901, Art. I., § 6 ("In all criminal prosecutions the accused has a right . . . to testify in all cases in his own behalf, if he elects so to do"); *Code* 1907, § 4007 ("In civil suits and proceedings, there must be no exclusion of any witness because he is a party, or interested in the issue tried, except that no person having a pecuniary interest in the result of the suit or the proceeding shall be allowed to testify against the party to whom his interest is opposed, as to any transaction with or statement by the deceased person whose estate is interested in the result of the suit or proceeding, or when such deceased person, at the time of such transaction or statement, acted in any representative or fiduciary relation whatsoever to the party against whom such testimony is sought to be introduced, unless called to testify thereto by the party to whom such interest is opposed, or unless the testimony of such deceased person in relation to such transaction or statement is introduced in evidence by the party whose interest is opposed to that of the witness, or has been taken and is on file in the cause. No person who is an incompetent witness under this section shall make himself competent by transferring his interest to another"); § 4008 ("No objection must be allowed to the competency of a witness because of his conviction for any crime, except perjury or subornation of perjury; but if he has been convicted of a crime involving moral turpitude, the objection goes to his credibility"; before 1907, the credibility clause read "infamous crime"); § 4013 ("Persons who have not the use of reason, as idiots, lunatics during lunacy, and children who do not understand the nature of an oath, are incompetent witnesses"); § 4014 ("The court must, by examination, decide upon the capacity of one alleged to be incompetent from idiocy, lunacy, or insanity, or drunkenness, or childhood"); § 4015 ("When the borrower is dead, and the usury is relied on as a defense, the representative of the borrower, having given ten days' notice to the plaintiff, or his attorney, of his intention so to do, is a competent witness to prove the usury, by swearing that he believes the contract to be usurious, if the plaintiff was the lender, unless the plaintiff denies on oath, in open court, the truth of the facts proposed to be sworn to by the defendant"); § 7894 ("On the trial of all indictments, complaints, or other criminal proceedings, the person on trial shall, at his own request, but not otherwise, be a competent witness; and his failure to make such request shall not create any presumption against him, nor be the subject of comment by counsel"); § 7895 ("There shall be no exclusion of a witness in a criminal case, because, on conviction of the defendant, he may be entitled to a reward, or to a restoration of property, or to the whole or any part of the fine or penalty inflicted; such objection is addressed to the credibility, not to the competency, of the witness"); § 7898 ("When two or more defendants are jointly indicted, the Court may, at any time before the evidence for the defence has commenced, order any defendant to be discharged from the indictment, in order that he may be a witness for the prosecution; and such order operates as an acquittal of such defendant, provided he does testify"); § 7899 ("When two or more defendants are jointly indicted, the Court may direct a verdict of acquittal to be entered in favor of any one of them, against whom there is not, in the opinion of the Court, evidence sufficient to put him on his defence; and being acquitted, he may be a witness"); St.

1903, Code 1907, § 7900 ("in all cases where a husband is charged with abandoning his family and leaving them in danger of becoming a burden to the public, the wife shall be a competent witness against her husband"); St. 1915, No. 826, p. 942 ("the husband and wife may testify either for or against each other in criminal cases, but shall not be compelled to do so").

ALASKA: *Compiled Laws* 1913, §§ 2254, 2255 (like Or. Laws 1920, §§ 1530, 1531); § 2258 (like ib. § 1534, omitting the last words, following "a right to cross-examination"); § 2259 (like ib. § 1535); § 1865 (like Or. Laws 1920, § 731, omitting the first sentence); § 1866 (like ib. § 732, par. 1 and 2, inserting in par. 1 after "time" the words "of the transaction and"); § 1867 (like ib. § 733, par. 1); St. 1913, Apr. 28, c. 75 (pandering; "a husband or wife shall be a competent witness against the other, and the wife may be compelled to testify" where the husband is defendant); St. 1915, Apr. 21, c. 12, § 3 (family-desertion; like the Washington law); St. 1915, April 23, c. 19 ("the fact that two or more persons are jointly indicted shall not render any one so indicted incompetent as a witness for or against his co-defendant, whether said co-defendants are tried jointly or severally"); St. 1919, c. 49, § 5 (family-desertion; like Wash. R. & B. Codes 1909, § 5935).

ARIZONA: *Revised Statutes* 1913, *Civil Code*, § 1674 ("Every person, including the party, may testify in any action or proceeding, civil or criminal, in court, or before any person who has authority to receive evidence, except as otherwise expressly provided by law"); § 1675 ("No person shall be incompetent to testify because he is a party to a suit or proceeding or interested in the issue tried, nor because he has been indicted, accused or convicted of a crime"); § 1676 ("No person shall be incompetent to testify on account of his religious opinions, or for want of any religious belief"); § 1677 ("The following persons cannot be witnesses in a civil action: 1. Those who are of unsound mind at the time of their production for examination; 2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly; 3. A husband cannot be examined for or against his wife, without her consent, nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to an action for divorce or a civil action by one against the other, nor to a criminal action or proceeding as provided in the Penal Code; or in an action brought by husband or wife against another person for the alienation of the affections of either husband or wife; or in an action for damages against another person for adultery committed by either husband or wife"); § 1678 ("In an action by or against executors, administrators, or guardians, in which judgment may be rendered, for or against them as such, neither party shall be allowed to testify against the others as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party or required to testify thereto by the Court; and the provisions of this section shall extend to and include all actions by or against the heirs or legal representatives of a decedent arising out of any transaction with such decedent"); § 3861 ("either party may be a witness" in divorce proceedings); *Penal Code*, § 1225 (rules for witnesses in criminal cases are the same as in civil cases, except as otherwise provided); § 1226 ("All persons, without exception, otherwise than is specified in the next two sections, who, having organs of sense, can perceive, and, perceiving, can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding, are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although in every case the credibility of the witness may be drawn in question"); § 1227 ("The following persons cannot be witnesses in a criminal action: 1. Those who are of unsound mind at the time of their production for examination; 2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly"); § 1228 ("There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases: 1. A husband cannot be examined for or against his wife, without her consent, nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply in the following cases, and in such cases the husband or wife may be examined for or against each other as in case of other witnesses: (a) In a criminal action or proceeding for a crime committed by the husband against the wife, or by the wife against the husband. (b) In a criminal action or proceeding against the husband for the abandonment, failure to support or provide for, or failure or neglect to furnish the necessities of life to the wife or the minor children, the wife shall be a competent witness against the husband. — The wife may, at her own request, but not otherwise, be examined as a witness for or against her husband, and the husband may, at his own request, but not otherwise, be examined as a witness

for or against his wife in the following cases (1) Upon a prosecution for bigamy or adultery, committed by either husband or wife, or for rape, seduction, or the crime against nature, or any similar offense, committed by the husband"); § 1229 ("A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but if he offer himself as a witness, he may be cross-examined by the counsel for the Territory as to all matters about which he was examined in chief. His neglect or refusal to be a witness cannot in any manner prejudice him, nor be used against him on the trial or proceeding"); §§ 1039, 1040 (on joint indictment, the Court may, on prosecuting attorney's application, at any time before defendant has gone into his defence, discharge defendant to testify for prosecution; and when the Court believes that there is not sufficient evidence as to one to put him on his defence, it shall order his discharge, before evidence closed, to be witness for co-defendant); § 248 (pandering, etc.; the female is a competent witness to "any and all matters, including conversation with the accused, or by him, with or by third persons in her presence", notwithstanding marriage with the accused before or after the offence); St. 1921, c. 114, § 2 (filiation proceedings; "the mother of said child shall not be considered a competent witness in any case where the alleged natural father of said child shall be dead at the time of the trial").

ARKANSAS: *Digest* 1919, § 3121 ("No person shall be rendered incompetent to testify in criminal cases by reason of being the person injured or defrauded, or intended to be injured or defrauded, or because he would be entitled to satisfaction for the injury, or may be liable to pay the costs of prosecution"); § 3122 ("In all cases where two or more persons are jointly or otherwise concerned in the commission of any crime or misdemeanor, either of such persons may be sworn as a witness in relation to such crime or misdemeanor; but the testimony given by such witness shall in no instance be used against him in any criminal prosecution for the same offence"); § 3123 ("On the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offences, and misdemeanors, the person so charged shall, at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create any presumption against him"); § 3124 ("When two or more persons are indicted in the same indictment, either may testify in behalf of or against the other defendant or defendants"); § 4144 ("In civil actions, no witness shall be excluded because he is a party to a suit or interested in the issue to be tried; Provided, in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statements of the testator, intestate, or ward, unless called to testify thereto by the opposite party; Provided further, this section may be amended or repealed by the General Assembly"); § 4146 ("All persons except those enumerated herein shall be competent to testify in a civil action. The following persons shall be incompetent to testify: First: Infants under the age of ten years, and over that age if incapable of understanding the obligation of an oath; Second: Persons who are of unsound mind at the time of being produced as witnesses; Third: Husband and wife, for or against each other, or concerning any communication made by one to the other during the marriage, whether called as a witness while that relation subsists or afterward, but either shall be allowed to testify for the other in regard to any business transacted by the one for the other in the capacity of agent"); § 4147 ("All other objections to witnesses shall go to their credit alone, and be weighed by the jury or tribunal to which their evidence is offered"); § 3125 ("In any criminal prosecution a husband and wife may testify against each other in all cases in which an injury has been done by either against the person or property of the other"); § 4145 ("No person shall be disqualified to testify in any action, civil or criminal, pending in any of the courts of this State, by reason of having been convicted of any felony or other crime whatsoever; but evidence of his former conviction of any crime by a court of this or any other State or Territory of the United States shall be admissible" to affect his credibility); § 2416 (seduction; though marriage with accused has ensued, "such female shall be a competent witness against such accused", etc.); § 2709 (pandering; like W. Va. Code 1914, § 5171).

CALIFORNIA: *Codes* 1872, as amended to 1921 inclusive: *Code of Civil Procedure*, § 1879 ("All persons, without exception, otherwise than is specified in the next two sections, who, having organs of sense, can perceive, and, perceiving, can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although in every case the credibility of the witness may be drawn in question, as provided in section 1847"); § 1880 ("The following persons cannot be witnesses: 1. Those who are of unsound mind at the time of their production for examination. 2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly. 3. Parties or assignors of parties to an action or proceeding, or persons on behalf of whom an action or proceeding is prosecuted, against an executor or adminis-

trator upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person"); § 1881 ("There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases: 1. A husband cannot be examined for or against his wife, without her consent, nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, or in an action brought by husband or wife against another person for the alienation of affections of either husband or wife; or in an action for damages against another person for adultery committed by husband or wife"); *Penal Code*, § 675 (imprisonment affecting civil rights does not create incompetency as witness in a criminal case); § 1099 ("When two or more persons are included in the same charge the Court may, at any time before the defendants have gone into their defence, on the application of the district attorney, direct any defendant to be discharged, that he may be a witness for the People"); § 1100 ("When two or more persons are included in the same indictment or information, and the Court is of opinion that in regard to a particular defendant there is not sufficient evidence to put him on his defence, it must order him to be discharged before the evidence is closed, that he may be a witness for his co-defendant"); § 1102 ("The rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this code"); § 1322 ("Neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties, except with the consent of both, or in case of criminal actions or proceedings for a crime committed by one against the person or property of the other, or in cases of criminal violence upon one by the other, or in cases of criminal actions or proceedings for bigamy, or adultery, or in cases of criminal actions or proceedings brought under the provisions of sections 270 and 270a of this code"); § 1323 (if the accused "offer himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief"; "his neglect or refusal to be a witness cannot in any manner prejudice him nor be used against him on the trial or proceeding"); § 266g (husband placing wife in house of prostitution; wife is "competent witness against her husband"); St. 1911, Feb. 8, p. 9, No. 865, § 2 (pandering; any female sought for prostitution is competent "for or against the accused as to any transaction or as to any conversation with the accused or by him with another person or persons in her presence, notwithstanding her having married the accused before or after" the offence, "whether called as a witness during the existence of the marriage or after its dissolution"); St. 1911, Feb. 8, p. 10, No. 866, § 2 (pimping; like the foregoing Act).

COLORADO: *Compiled Laws* 1921, § 5570 (in prosecution for failure to support, the wife is competent against the husband with or without his consent); § 5831 (on a trial in which a county is interested, the inhabitants are competent witnesses, if otherwise qualified); § 6555 ("All persons, without exception, other than those specified in the next three sections, and in the second, third, fourth, seventh, and eighth sections of chapter one hundred and four of the general laws may be witnesses. Neither parties nor other persons who have an interest in the event or proceeding shall be excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although in every case the credibility of the witness may be drawn in question, as now provided by law; but the conviction of any person for any crime may be shown for the purpose of affecting the credibility of such witness; and the fact of such conviction may be proved like any other fact not of record, either by the witness himself (who shall be compelled to testify thereto), or by any other person cognizant of such conviction, as impeaching testimony or by any other competent testimony"); § 6556 ("That no party to any civil action, suit, or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, by virtue of the foregoing section [now § 6555] when any adverse party sues or defends as the trustee or conservator of an idiot, lunatic, or distracted person, or as the executor or administrator, heir, legatee, or devisee of any deceased person, or as guardian or trustee of any such heir, legatee, or devisee, unless when called as a witness by such adverse party so suing or defending; and also, except in the following cases, namely: First: In any such action, suit, or proceeding, a party or interested person may testify to facts occurring after the death of such deceased person. Second: When in such action, suit, or proceeding, any agent of any deceased person shall, in behalf of any person or persons suing or being sued, in either of the capacities above named, testify to any conversation or transaction between the agent and the opposite party or parties in interest, such party or parties in interest may testify concerning the same conversation or transaction. Third: When in any such action, suit, or proceeding, any such party suing or defending as aforesaid, or any person having a direct interest in the event of such action, suit, or proceeding,

shall testify in behalf of such party so suing or defending, to any conversation or transaction with the opposite party or parties in interest, then such opposite party in interest shall also be permitted to testify as to the same conversation or transaction. Fourth: When in any such action, suit, or proceeding, any witness not a party to the record, or not a party in interest, or not an agent of such deceased person, shall in behalf of any party to such action, suit, or proceeding, testify to any conversation or admission by any adverse party or parties in interest, occurring before the death and in the absence of such deceased person, such adverse party or parties in interest may also testify to the same admission or conversation. Fifth: When in any such action, suit, or proceeding, the deposition of such deceased person shall be read in evidence at the trial, any adverse party or parties in interest may testify as to all matters and things testified to in such deposition by such deceased person and not excluded for irrelevancy or incompetency. Sixth: In any such action, suit or proceeding, any adverse party or parties in interest may testify as to any conversation or admission, or as to all matters and things connected with the subject matter of said action, suit or proceeding, and which conversation and admission and matters and things aforesaid, occurred before the death and in the presence of such deceased and also in the presence of any member of the family of such deceased person over the age of sixteen years, or in the presence of any heir, legatee or devisee of such deceased person over the age of sixteen years; Provided, however, That such member of the family, heir, legatee or devisee as the case may be, is present at the hearing of said action, suit or proceeding, or whose testimony is or may be procurable at such trial. Seventh: When the defendant in any such suit has previously been required to testify under the provisions of section 7080 or section 7253 of the Revised Statutes of Colorado, 1908, the testimony so given if reduced to writing, or the stenographic minutes thereof, so far as the same relates to the estate concerning which or for the benefit of which suit is brought and is relevant to the issue in such suit and competent under the general rules of evidence, may be read in behalf of such defendant"); § 6558 ("That in any action, suit, or proceeding, by or against any surviving partner or partners, joint contractor or contractors, no adverse party or person adversely interested in the event thereof, shall, by virtue of section one of this act, be rendered a competent witness to testify to any admission or conversation by any deceased partner or joint contractor, unless some one or more of the surviving partners or joint contractors were also present at the time of such admission or conversation"); § 6559 (an assignment or release "made for the purpose of allowing such person to testify" does not make him competent); § 6560 (statute is not to affect the law in regard to the settlement of estates of deceased persons, etc., or to the acknowledgment or proof of deeds, or to the attestation of instruments required to be attested); § 6562 ("The following persons shall not be witnesses: 1. Those who are of unsound mind at the time of their production for examination. 2. Children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined or of relating them truly"); § 6563 ("There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore a person shall not be examined as a witness in the following cases: 1. A husband shall not be examined for or against his wife without her consent, nor a wife for or against her husband without his consent; nor shall either during the marriage or afterward be, without the consent of the other, examined as to any communication made by one to the other during marriage: but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other"); § 6564 ("If a person offer himself as a witness, that is to be deemed a consent to the examination; also the offer of a wife, husband, attorney, clergyman, physician, or surgeon, as a witness, shall be deemed a consent to the examination within the meaning of the first four subdivisions of the last section"); § 7100 ("The party or parties injured shall in all cases be competent witnesses, unless he, she, or they shall be rendered incompetent by reason of his, her, or their infamy or other legal incompetency other than that of interest. The credibility of all such witnesses shall be left to the jury as in other cases"); § 7101 ("Hereafter in all criminal cases tried in any court of this State, the accused, if he so desire, shall be sworn as a witness in the case, and the jury shall give his testimony such weight as they think it deserves; but in no case shall a neglect or refusal of the accused to testify be taken or considered any evidence of his guilt or innocence"); § 7102 ("The solemn affirmation of witnesses shall be deemed sufficient"); § 2451 (married woman becoming special partner in limited firm "shall be a competent witness for or against her husband, the same as though a femme sole" in all proceedings arising out of partnership); § 5342 ("no person making a claim against the estate of any testator, intestate, or mental incompetent shall be permitted to prove the same by his or her own oath"); § 6846 (pimping; any offender is competent against any other offender, and "a husband or wife shall be a competent witness against the other, with or without consent").

COLUMBIA (DISTRICT): *Code of Law* 1919, § 921 (joint indictees; like Arizona P. C. §§ 1039,

1040); § 1063 ("Except as herein elsewhere provided, no person shall be incompetent to testify in any civil action or proceeding by reason of his being a party thereto or interested in the result thereof; but if otherwise competent to testify, he shall be competent to give evidence in his own behalf and competent and compellable to give evidence on behalf of any other party to such action or proceeding"); § 1064 ("If one of the original parties to a transaction or contract has since the date thereof died or become insane or otherwise incapable of testifying in relation thereto, the other party thereto shall not be allowed to testify as to any transaction or declaration or admission of the said deceased or otherwise incapable party in any action between said other party, or any person claiming under him, and the executors, administrators, trustees, heirs, devisees, assignees, committee, or other person legally representing the deceased or otherwise incapable party, unless he be first called upon to testify in relation to said transaction or declaration or admission by the other party, or the opposite party first testify in relation to the same, or unless the transaction or contract was made or had with an agent of the said deceased or otherwise incapable party, and the said agent testifies in relation thereto, or unless called to testify thereto by the Court"); § 1065 (if the former testimony of a party deceased or insane be used, "the opposite party may testify in opposition thereto"); § 1066 ("Where any of the original parties to a transaction or contract which is the subject of investigation are partners or other joint contractors, or jointly entitled or liable, and some of them have died, or otherwise become incapable of testifying, any others with whom the contract or transaction was personally made or had, or in whose presence or with whose privity it was made or had, or admissions in relation to the same were made, shall not, nor shall the adverse party, be incompetent to testify because some of the parties or joint contractors, or those jointly entitled or liable, have died or otherwise become incapable of testifying"); § 1067 ("No person shall be incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime other than perjury, but such fact may be given in evidence to affect his credit as a witness, either upon the cross-examination of the witness or by evidence 'aliunde'; and the party cross-examining him shall not be concluded by his answers as to such matters. In order to prove such conviction of crime it shall not be necessary to produce the whole record of the proceedings containing such conviction, but the certificate, under seal, of the clerk of the court wherein such proceedings were had, stating the fact of the conviction and for what cause, shall be sufficient"); § 1068 ("In both civil and criminal proceedings, husband and wife shall be competent but not compellable to testify for or against each other"); § 1069 ("In neither civil nor criminal proceedings shall a husband or wife be competent to testify as to any confidential communications made by one to the other during the marriage"); St. 1906, Mar. 23, § 2, U. S. Stat. L. vol. 34, p. 87 (offence of failing to support one's family; "in all prosecutions under this act any existing provisions of law prohibiting the disclosure of confidential communications between husband and wife shall not apply, and both husband and wife shall be competent and compellable witnesses to testify to any and all relevant matters, including the fact of such marriage and the parentage of such child or children").

The following provisions of the Federal laws apply expressly to the District: U. S. St. 1878, March 16, Code 1919, § 1357 (accused in criminal cases).

Connecticut: *General Statutes* 1918, § 5735 ("In actions by or against the representatives of deceased persons, the entries, memoranda, and declarations of the deceased, relevant to the matter in issue, may be received as evidence; and in actions by or against the representatives of deceased persons, in which any trustee or receiver is an adverse party, the testimony of the deceased, relevant to the matter in issue, given at his examination, upon the application of said trustee or receiver, shall be received in evidence"); § 5706 ("A wife may be compelled to testify in any action brought against her husband for necessaries furnished her while living apart from him"); § 5705 ("No person shall be disqualified as a witness in any action by reason of his interest in the event of the same as a party or otherwise, or of his disbelief in the existence of a Supreme Being, or of his conviction of crime; but such interest or conviction may be shown for the purpose of affecting his credit"); § 5741 (Any party to a civil action may compel any adverse party or "any person for whose immediate and adverse benefit" the action was begun, etc., to testify); § 6634 ("Any person on trial for crime shall be a competent witness, and at his or her option may testify or refuse to testify, upon such trial, and if such person has a husband or wife, he or she shall be a competent witness, but may elect or refuse to testify for or against the accused, except that a wife when she has received personal violence from her husband, or is a woman described in §§ 6379 or 6391 of the General Statutes may, upon his trial for offenses arising out of such personal violence or from violation of the provisions of said sections, be compelled to testify in the same manner as any other witness. The neglect, or refusal, of an accused party to testify shall not be commented upon to the Court or jury").

Delaware: *Revised Statutes* 1915, § 3041 (family-desertion; no rule "prohibiting the disclosure of confidential communications between husband and wife shall apply, and both husband and wife shall be competent

and compellable witnesses to testify against each other as to any and all relevant matters", including marriage and parentage; but with privilege against self-incrimination); §§ 3076, 3085 (in bastardy cases, the putative father may testify in his own behalf; the mother is a "competent witness, unless otherwise legally incompetent"); § 4212 ("No person shall be incompetent to testify in any civil action or proceeding whether at law or in equity, because he is a party to the record or interested in the event of the suit or matter to be determined; provided that in actions or proceedings by or against executors, administrators, or guardians, in which judgment or decree may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party"); § 4213 ("A party to the record in any action or judicial proceeding, or a person for whose immediate benefit such proceeding is prosecuted or defended, may be examined as if under cross-examination, at the instance of the adverse party, or any of them, and for that purpose may be compelled in the same manner, and subject to the same rules of examination as any other witness to testify; but the party calling for such examination shall not be concluded thereby, but may rebut his testimony by other evidence. A party proposing to examine a party adverse in interest may have the same process and means of compelling attendance and response as the law provides in the case of ordinary witnesses"); § 4214 ("No person shall be excluded from testifying as a witness by reason of his having been convicted of a felony, but evidence of the fact may be given to affect his credibility"); § 4215 ("Each and every person accused, or who shall be accused, of any felony, misdemeanor, or offence whatsoever, punishable by the laws of this State, now or hereafter in force, shall, upon his or her trial before any tribunal established by the Constitution or laws of this State, have the right to testify in his or her own behalf, and shall also have the right to testify for or against any other person or persons jointly tried with him or her; provided, however, that a refusal to testify shall not be construed or commented upon as an indication of guilt"); § 4216 ("It shall be lawful for a wife or a husband to testify for or against each other in both civil and criminal causes"); St. 1921, c. 184, § 5, substituting in Rev. Code a new § 3085, par. 25 ("In illegitimacy cases, the mother shall be a competent witness, unless otherwise legally incompetent").

FLORIDA: *Revised General Statutes* 1919, § 2705 ("No person, in any Court or before any officer acting judicially, shall be excluded from testifying as a witness, by reason of his interest in the event of the action or proceeding, or because he is a party thereto; provided, however, that no party to such action or proceeding, nor any person interested in the event thereof, nor any person from, through, or under whom, any such party or interested person derives any interest or title by assignment or otherwise, shall be examined as a witness in regard to any transaction or communication between such witness and a person at the time of such examination deceased, insane, or lunatic, against the executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, or survivor of such deceased person, or the assignee or committee of such insane person or lunatic; but this prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, survivor, or committeeman shall be examined on his own behalf, or as to which the testimony of such deceased person or lunatic shall be given in evidence"); § 3608 (executor's oath not admitted to prove will, if he is "interested in the estate therein bequeathed, or any part thereof"); §§ 4859–4860 (disputed ownership of live stock in certain cases, must be proved "by disinterested testimony"); § 6018 ("The provisions of law relative to the competency of witnesses and evidence in civil cases shall obtain also in criminal cases" except as otherwise provided); § 6076 ("Approvers shall not be admitted in any case whatever"); § 2702 ("In the trial of civil actions in this State, neither the husband nor the wife shall be excluded as witnesses, where either the said husband or wife is an interested party to the suit pending"); § 6080 ("In all criminal prosecutions the accused may at his option be sworn as a witness in his own behalf, and shall in such case be subject to examination as other witnesses"); § 2706 ("No person shall be disqualified to testify . . . by reason of conviction of any crime except perjury"); § 2704 ("A conviction of perjury shall make incompetent any person to testify in any court in this State, even if such person has been pardoned").

GEORGIA: *Revised Code* 1910, § 5785 ("Communications between husband and wife", excluded); § 5857 ("Religious belief goes only to the credit"); § 5858 ("No person offered as a witness shall be excluded, by reason of incapacity, for crime or interest, or from being a party, from giving evidence, either in person or by deposition [in any court or proceeding] . . . ; but every person so offered shall be competent and compellable to give evidence on behalf of either or any of the parties to the said suit, action, or other proceeding, except as follows: 1. Where any suit is instituted or defended by a person insane at the time of trial, or by an indorsee, assignee, transferee, or by the personal representative of a deceased person, the opposite party shall not be admitted to testify in his own favor against the insane or deceased per-

son, as to transactions or communications with such insane or deceased person. 2. Where any suit is instituted or defended by partners, persons jointly liable, or interested, the opposite party shall not be admitted to testify in his own favor as to transactions or communications solely with an insane or deceased partner, or person jointly liable or interested. 3. Where any suit is instituted or defended by a corporation, the opposite party shall not be admitted to testify in his own behalf to transactions or communications solely with a deceased or insane officer or agent of the corporation. 4. Where a person not a party, but a person interested in the result of the suit, is offered as a witness, he shall not be competent to testify, if, as a party to the cause, he would for any cause be incompetent. 5. No agent or attorney-at-law of the surviving or sane party, at the time of the transaction testified about, shall be allowed to testify in favor of a surviving or sane party, under circumstances where the principal, a party to the cause, could not testify; nor can a surviving party or agent testify in his own favor, or in favor of a surviving or sane party, as to transactions or communications with a deceased or insane agent, under circumstances where such witness would be incompetent if deceased agent had been principal. 6. In all cases where the personal representative of the deceased or insane party has introduced a witness interested in the event of a suit, who has testified as to transactions or communications on the part of the surviving agent or party with a deceased or insane party or agent, the surviving party or his agent may be examined in reference to such facts testified to by said witness"); § 5859 ("There shall be no other exceptions allowed under the foregoing paragraphs"); § 5861 ("Nothing contained in section 5858 shall apply to any action, suit, or proceeding in any Court, instituted in consequence of adultery, or to any action for breach of promise of marriage"); § 5862, P. C. 1910, § 1038 ("Persons who have not the use of reason, as idiots, lunatics during lunacy, and children who do not understand the nature of an oath, are incompetent witnesses"); § 5863, P. C. 1910, § 1039 ("Drunkenness, which dethrones reason and memory, incapacitates during its continuance"); § 5864, P. C. 1910, § 1040 ("No physical defects in any of the senses incapacitates a witness. An interpreter may explain his evidence"); § 5865 ("The Court must, by examination, decide upon the capacity of one alleged to be incompetent from idiocy, lunacy, or insanity, or drunkenness, or childhood"); P. C. §§ 1036, 1037, par. 12 ("In all criminal trials the prisoner shall have the right to make to the Court and jury such statement in the case as he may deem proper in his defence. It shall not be under oath, and shall have such force only as the jury may think right to give it. They may believe it in preference to the sworn testimony in the cause"; but in so making a statement, he is not compellable "to answer any questions on cross-examination, should he think proper to decline to answer"; "no person, who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, is competent or compellable to give evidence for or against himself"); § 1037, par. 4 ("Husband and wife shall not be competent or compellable to give evidence in any criminal proceeding for or against each other, except that the wife shall be competent, but not compellable, to testify against her husband, upon his trial for any criminal offence committed, or attempted to have been committed, upon her person. She is also a competent witness to testify for or against her husband, in cases of abandonment of his child, as provided for in § 116 of this Code"); § 116 (as above); § 104 (wife to be a "competent witness", when husband is tried for maltreatment of wife); § 935 (accused's statement before a magistrate, regulated); § 379 (seduction; prosecution may be stopped by marriage; but if defendant does not comply with the conditions, "the wife shall be a competent witness to testify against the husband, except in cases pending on Dec. 20, 1899"); § 995 ("When defendants are separately tried, they shall be competent to testify for or against each other"); § 5041 (witness before arbitrators); St. 1911, No. 207, p. 68, Aug. 25 (amending Pen. Code, 1910, § 379, prosecutions for seduction, by omitting the last part after "husband", and substituting, "in all such cases, whether the marriage to suspend said prosecution was before or after indictment of said defendant").

HAWAII: *Revised Laws* 1915, § 2609 ("No person offered as a witness shall hereafter be excluded by reason of incapacity from crime (perjury or subornation of perjury only excepted) or interest, from giving evidence. . . . But every person so offered may and shall be admitted to give evidence, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question or inquiry, or of the suit, action or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence except as aforesaid"); § 2611 (". . . It shall be lawful for such Court or person to receive the evidence of any minor, notwithstanding he may be destitute of the knowledge of God and of any belief in religion or in a future state of rewards and punishments. Provided always, that the evidence of such minor shall be given upon his affirmation or declaration to tell the truth, the whole truth, and nothing but the truth, or in such other form as may be approved of and allowed by such Court or person as first aforesaid, and after he shall have been

cautioned by such Court or person that he will incur and be liable to punishment if he do not tell the truth. Provided also, that no such evidence shall in any case be received unless it shall be proved to the satisfaction of such Court or such person, that such minor perfectly understands the nature and object of such declaration or affirmation as aforesaid, and the purpose for which his testimony is required"); § 2612 (" . . . Parties thereto, and the party on whose behalf any such action, suit, or proceeding may be brought or defended, and the husbands and wives of such parties and persons respectively shall (except as provided in §§ 2613, 2614) be competent and compellable to give evidence, either in person or by deposition, according to the practice of the Court, on behalf of either or any of the parties to the said suit, action or proceeding"); § 2610 ("The defendant in any criminal proceeding may give evidence on his own behalf, and thereupon be subject to cross-examination in like manner as any other witness, but in case any such person shall neglect or decline to offer himself as a witness, no inference shall be drawn prejudicial to such accused by reason of such neglect or refusal, nor shall any argument be permitted tending to injure the defence of such accused person on account of such failure to offer himself as witness"); § 2613 ("Nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, compellable to give evidence for or against himself; or (except as hereinafter mentioned) shall render any person compellable to answer any question tending to criminate himself, or shall in any criminal proceeding render any husband competent or compellable to give evidence against his wife, or any wife competent or compellable to give evidence against her husband, except in such cases where such evidence may now be given; provided also that in all criminal proceedings the husband or wife of the party accused shall be a competent witness for the defence"); § 2614 ("No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage"); § 2949 (in divorce, the Court may in discretion "examine either or both of the parties upon oath, in order to prevent collusion"); § 2975 (in prosecutions for family-desertion, etc., no rule "prohibiting the disclosure of confidential communications between husband and wife shall apply"; "both husband and wife shall be competent and compellable witnesses" as to any relevant fact); § 3010 (in bastardy complaint, mother is admissible).

IDAHO: *Compiled Statutes* 1919, § 7935 ("All persons without exception, otherwise than is specified in the next two sections, who, having organs of sense, can perceive, and, perceiving, can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although in every case the credibility of the witness may be drawn in question, by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility"); § 7936 ("The following persons cannot be witnesses: 1. Those who are of unsound mind at the time of their production for examination. 2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly. 3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or an administrator, upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person"); § 7958 ("There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore a person cannot be examined as a witness in the following cases: 1. A husband cannot be examined for or against his wife, without her consent, nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by violence of one against the person of the other"); §§ 8947–8948 (like Cal. P. C. §§ 1099, 1100); § 9129 ("The rules for determining the competency of witnesses in civil actions are applicable also to criminal actions and proceedings, except as otherwise provided in this Code"); § 9130 ("Neither husband nor wife are competent witnesses for or against each other in a criminal action or proceeding to which one or both are parties"); ("Except 1. with the consent of both, or 2. in cases of criminal violence upon one by the other, or, 3. in cases of desertion or non-support of wife or child by the husband"); § 9131 ("A defendant in a criminal action or proceeding to which he is a party, is not, without his consent, a competent witness for or against himself. His neglect or refusal to give such consent shall not in any manner prejudice him nor be used against him on the trial or proceeding"); § 8613 (civil death as a penalty does not render the persons "incompetent as witnesses" in criminal cases); § 8950 ("The rules of evidence in civil actions are applicable also

to criminal actions, except as otherwise provided in this Code").

ILLINOIS: *Revised Statutes* 1874, c. 17, § 6, as amended (in bastardy trials, "the mother and defendant" are competent); c. 38, § 35 (when a witness is released by Court order from liability to prosecution, and compelled to testify, "the defendant shall also at his own request be deemed a competent witness"; but no inference shall be drawn, as in ib. § 426); c. 38, § 426 ("No person shall be disqualified as a witness in any criminal case or proceeding by reason of his interest in the event of the same, as a party or otherwise, or by reason of his having been convicted of any crime, but such interest or conviction may be shown for the purpose of affecting his credibility; provided, however, that a defendant in any criminal case or proceeding shall only at his own request be deemed a competent witness, and his neglect to testify shall not create any presumption against him, nor shall the Court permit any reference or comment to be made to or upon such neglect"); c. 38, § 491, St. 1893, June 17 (the wife to be competent in any case against the husband under the statute punishing abandonment of family, "as to any and all matters relevant thereto, including the fact of such marriage and the parentage of such children"); St. 1901, May 11, § 3 (in prosecutions for abandonment of wife or child, "such husband or wife shall be a competent witness to testify in any case brought against the one or the other under this act, and to any and all matters relevant thereto, including the facts of such marriage and the parentage of such child or children"); St. 1915, June 24, p. 470, § 7 (family-desertion; no existing rule "prohibiting the disclosure of confidential communications between husband and wife" shall apply; "both husband and wife shall be competent witnesses to any and all relevant matters"; including marriage and parentage); Rev. St. c. 51, § 1 ("No person shall be disqualified as a witness in any civil action, suit, or proceeding, except as hereinafter stated, by reason of his or her interest in the event thereof, as a party or otherwise, or by reason of his or her conviction of any crime; but such interest or conviction may be shown for the purpose of affecting the credibility of such witness; and the fact of such conviction may be proven like any fact not of record, either by the witness himself (who shall be compelled to testify thereto) or by any other witness cognizant of such conviction, as impeaching testimony, or by any other competent evidence"); § 2 ("No party to any civil action, suit, or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, by virtue of the foregoing section, when any adverse party sues or defends as the trustee or conservator of any idiot, habitual drunkard, lunatic, or distracted person, or as the executor, administrator, heir, legatee, or devisee of any deceased person, or as guardian or trustee of any such heir, legatee, or devisee, unless when called as a witness by such adverse party so suing or defending, and also except in the following cases, namely: — First. In any such action, suit, or proceeding, a party or interested person may testify to facts occurring after the death of such deceased person, or after the ward, heir, legatee, or devisee shall have attained his or her majority. Second. When, in such action, suit, or proceeding, any agent of any deceased person shall, in behalf of any person or persons suing or being sued, in either of the capacities above named, testify to any conversation or transaction between such agent and the opposite party or party in interest, such opposite party or party in interest may testify concerning the same conversation or transaction. Third. Where, in any such action, suit, or proceeding, any such party suing or defending, as aforesaid, or any person having a direct interest in the event of such action, suit, or proceeding, shall testify in behalf of such party so suing or defending, to any conversation or transaction with the opposite party or party in interest, then such opposite party or party in interest shall also be permitted to testify as to the same conversation or transaction. Fourth. Where, in any such action, suit, or proceeding, any witness, not a party to the record, or not a party in interest, or not an agent of such deceased person, shall, in behalf of any party to such action, suit, or proceeding, testify to any conversation or admission by any adverse party or party in interest, occurring before the death and in the absence of such deceased person, such adverse party or party in interest may also testify as to the same admission or conversation. Fifth. Where, in any such action, suit, or proceeding, the deposition of such deceased person shall be read in evidence at the trial, any adverse party or party in interest may testify as to all matters and things testified to in such deposition by such deceased person, and not excluded for irrelevancy or incompetency"); § 4 ("In any action, suit, or proceeding, by or against any surviving partner or partners, joint contractor or contractors, no adverse party, or party adversely interested in the event thereof, shall, by virtue of section 1 of this Act, be rendered a competent witness, to testify to any admission or conversation, by any deceased partner or joint contractor, unless some one or more of the surviving partners or joint contractors were also present at the time of such admission or conversation; and in every action, suit, or proceeding, a party to the same, who has contracted with an agent of the adverse party, the agent having since died, shall not be a competent witness, as to any conversation or transaction between himself and such agent, except where the conditions are such, that under the provisions of sections 2 and 3 of this Act, he would have been permitted to testify, if the deceased person had been a principal and not an agent"; amended by St. 1899, April 24, by inserting after "such

agent", the words, "unless such admission or conversation with the said deceased agent was had or made in the presence of a surviving agent or agents of such adverse party, and then only"); § 5 ("No husband or wife shall, by virtue of section 1 of this Act, be rendered competent to testify for or against each other as to any transaction or conversation, occurring during the marriage, whether called as a witness during the existence of the marriage, or after its dissolution, except in cases where the wife would, if unmarried, be plaintiff or defendant, or where the cause of action grows out of a personal wrong or injury done by one to the other or grows out of the neglect of the husband to furnish the wife with a suitable support; and except in cases where the litigation shall be concerning the separate property of the wife, and suits for divorce; and except also in actions upon policies of insurance of property, so far as relates to the amount and value of the property alleged to be injured or destroyed, or in actions against carriers, so far as relates to the loss of property and the amount and value thereof, or in all matters of business transactions where the transaction was had and conducted by such married woman as the agent of her husband, in all of which cases the husband and wife may testify for or against each other, in the same manner as other parties may, under the provisions of this act. Provided, that nothing in this section contained shall be construed to authorize or permit any such husband or wife to testify to any admissions or conversations of the other, whether made by him to her or by her to him, or by either to third persons, except in suits or causes between such husband and wife"); § 6 ("Any party to any civil action, suit, or proceeding, may compel any adverse party or person for whose benefit such action, suit, or proceeding is brought, instituted, prosecuted, or defended, to testify as a witness at the trial, or by deposition, taken as other depositions are by law required, in the same manner, and subject to the same rules, as other witnesses"); § 7 ("In any civil action, suit, or proceeding, no person who would, if a party thereto, be incompetent to testify therein, under the provisions of sections 2 or 3, shall become competent by reason of any assignment or release of his claim, made for the purpose of allowing such person to testify"); § 8 (nothing in this act is to affect the law as to the settlement of the estates of deceased persons, incapables, etc., or the proof of conveyances for record, or the attestation of instruments required to be attested).

INDIANA: *Burns' Annotated Statutes* 1914, § 519 ("All persons, whether parties to or interested in the suit, shall be competent witnesses in a civil action or proceeding, except as herein otherwise provided"); § 520 ("The following persons shall not be competent witnesses: First: Persons insane at the time they are offered as witnesses, whether they have been so adjudged or not; Second: Children under ten years of age, unless it appears that they understand the nature and obligation of an oath; . . . Sixth: Husband and wife, as to communications made to each other"); § 521 ("In suits or proceedings in which an executor or administrator is a party, involving matters which occurred during the lifetime of the decedent, where a judgment or allowance may be made or rendered for or against the estate represented by such executor or administrator, any person who is a necessary party to the issue or record, whose interest is adverse to such estate, shall not be a competent witness as to such matters against such estate: Provided, however, that in cases where a deposition of such decedent has been taken, or he has previously testified as to the matter, and his testimony or deposition can be used as evidence for such executor or administrator, such adverse party shall be a competent witness for himself, but only as to any matters embraced in such deposition or testimony"); § 522 ("In all suits by or against heirs or devisees, founded on a contract with or demand against the ancestor, to obtain title to or obtain possession of property, real or personal, of, or in right of, such ancestor, or to affect the same in any manner, neither party to such suit shall be a competent witness as to any matter which occurred prior to the death of the ancestor"); § 523 ("When in any case an agent of a decedent shall testify on behalf of an executor, administrator, or heirs, concerning any transaction, as having been had by him, as such agent, with a party to the suit, his assignor or grantor, and in the absence of the decedent; or if any witness shall, on behalf of the executor, administrator, or heirs, testify to any conversation or admission of a party to the suit, his assignor or grantor, as having been had or made in the absence of the deceased; then the party against whom such evidence is adduced, his assignor or grantor, shall be competent to testify concerning the same matter. No person who shall have acted as an agent in the making or continuing of a contract with any person who may have died, shall be a competent witness in any suit upon or involving such contract, as to matters occurring prior to the death of such decedent, on behalf of the principal to such contract, against the legal representatives or heirs of the decedent, unless he shall be called by such heirs or legal representatives. And in such case he shall be a competent witness only as to matters concerning which he is interrogated by such heirs or representatives. When, in any case, a person shall be charged with unlawfully taking or detaining personal property, or having done damage thereto, and such person by his pleading shall defend on the ground that he is executor, administrator, guardian, or heir, and as such has taken or detains the property, or has done the acts charged, then no person shall be competent to testify who would not be competent if the person so defending were the complainant; but

when the person complaining cannot testify, then the party so defending shall also be excluded"); St. § 524 ("in all suits by or against any person adjudged to be a person of unsound mind and under guardianship, or against his guardian, founded upon any contract with or demand against said ward, or in any suit to obtain possession of the real or personal property of said ward, or to affect the same in any manner, neither party to said transaction shall be a competent witness to any matter which occurred prior to the appointment of said guardian; provided however that if the party to said transaction under guardianship should be adjudged by the Court competent to testify, then the other party to said suit shall not be excluded; provided further that the provisions of this act shall not apply to any case where a person has been adjudged to be of unsound mind before the taking effect of this act, nor to any contract made or transaction had before the taking effect of this act; also provided that in all cases contemplated by this act either party to such suit shall have the right to call and examine any party adverse to him as a witness, or the Court may in its discretion require any party to such suit or other person to testify, and any abuse of such discretion shall be reviewable on appeal"); § 525 ("When the husband or wife is a party, and not a competent witness in his or her own behalf, the other shall also be excluded; except that the husband shall be a competent witness in a suit for the seduction of the wife, but she shall not be competent"); § 526 ("In all cases in which executors, administrators, heirs, or devisees are parties, and one of the parties to the suit shall be incompetent, as hereinbefore provided, to testify against them, then the assignor or grantor of a party making such assignment or grant voluntarily shall be deemed a party adverse to the executor or administrator, heir, or devisee, as the case may be; Provided, however, that in all cases referred to in sections 276, 277, 278, and 279 of said act — said sections being numbered in the Revised Statutes of 1881, 498, 499, 500, and 501 — any party to such suit shall have the right to call and examine any party adverse to him as a witness, or the Court may, in its discretion, require any party to a suit, or other person, to testify, and any abuse of such discretion shall be renewable [reviewable?] on appeal"); § 527 ("In all actions by an executor or administrator on contracts assigned to the decedent, when the assignor is alive and a competent witness in the cause, the executor or administrator and the defendant or defendants shall be competent witnesses as to all matters which occurred between the assignor and the defendant or defendants, prior to notice of such assignment"); §§ 1015, 1019 (in a bastardy charge, "the mother of the child, if of sound mind, shall be a competent witness", and her written examination on making complaint before the justice may be used "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"); § 2109 ("The rules of evidence prescribed in civil cases and concerning the competency of witnesses shall govern in criminal cases, except as otherwise provided in this act"); [Criminal cases:] § 2111 ("The following persons are competent witnesses: First. All persons who are competent to testify in civil actions. Second. The party injured by the offence committed. Third. Accomplices, when they consent to testify. Fourth. The defendant, to testify in his own behalf. But if the defendant do not testify, his failure to do so shall not be commented upon or referred to in the argument of the cause, nor commented upon, referred to, or in any manner considered by the jury trying the same; and it shall be the duty of the Court, in such case, in its charge, to instruct the jury as to their duty under the provisions of this section"); § 2117 ("When two or more persons are included in one prosecution, the Court may, at any time before the defendant has gone into his defence, direct any defendant to be discharged, that he may be a witness for the State. A defendant may also, when there is not sufficient evidence to put him on his defence, at any time before the evidence is closed, be discharged by the Court for the purpose of giving testimony for a co-defendant"); § 2356 (pandering; female who marries accused before or after the offence's date shall be competent for or against him whether called during marriage or after dissolution); § 3000 (illegitimate child of deceased intestate who has acknowledged parentage shall inherit; but "the testimony of the mother of such child or children shall in no case be received to establish the fact of such acknowledgment"); St. 1915, April 26, p. 139, § 3 (family-desertion; no rule "prohibiting disclosure of confidential communications between husband and wife shall apply", and both husband and wife shall be "competent and compellable witnesses to testify against each other").

Iowa: *Constitution* 1857, Art. 1, § 9 ("Any party to any judicial proceeding shall have the right to use as a witness, or take the testimony of, any other person, not disqualified on account of interest, who may be cognizant of any fact material to the case; and parties to suits may be witnesses, as provided by law"); *Compiled Code* 1919, § 7308 ("Every human being of sufficient capacity to understand the obligation of an oath is a competent witness in all cases, except as otherwise declared"); § 7309 ("Facts which have heretofore caused the exclusion of testimony may still be shown for the purpose of lessening its credibility"); § 7310 ("No person offered as a witness in any action or proceeding in any Court, or before any officer acting judicially, shall be excluded by reason of his interest in the event

of the action or proceeding, or because he is a party thereto, except as provided in this chapter"); § 7311 ("No party to any action or proceeding, nor any person interested in the event thereof, nor any person from, through, or under whom any such party or interested person derives any interest or title by assignment or otherwise, and no husband or wife of any said party or person, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the commencement of such examination, deceased, insane, or lunatic, against the executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, or survivor of such deceased person, or the assignee or guardian of such insane person or lunatic. But this prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir-at-law, next of kin, assignee legatee, devisee, survivor, or guardian shall be examined in his own behalf, or as to which the testimony of such deceased or insane person or lunatic shall be given in evidence"); § 7312 (a person who would be incompetent under the preceding section may have his deposition taken during the lifetime or sanity of the other party, to be used in case of death or insanity); § 7313 ("Neither the husband nor wife shall in any case be a witness against the other, except in a criminal prosecution for a crime committed by one against the other, or in a civil action or proceeding one against the other, or in a civil action by one against a third party for alienating the affections of the other, or in any civil action brought by a judgment creditor against either the husband or the wife, to set aside a conveyance of property from one to the other on the ground of want of consideration or fraud, and to subject the same to the payment of his judgment; but in all civil and criminal cases they may be witnesses for each other"); § 7314 ("Neither husband nor wife can be examined in any case as to any communication made by the one to the other while married, nor shall they, after the marriage relation ceases, be permitted to reveal in testimony any such communication made while the marriage subsisted"); § 9464 ("Defendants in all criminal proceedings shall be competent witnesses in their own behalf, but cannot be called as witnesses by the State; and should a defendant not elect to become a witness, this fact shall not have any weight against him on the trial, nor shall the attorney or attorneys for the State, during the trial, refer to the fact that the defendant did not testify in his own behalf; and should they do so, such attorney or attorneys will be guilty of a misdemeanor, and defendant shall for that cause alone be entitled to a new trial"); § 9465 (defendant taking the stand "shall be subject to cross-examination as an ordinary witness, but the State shall be strictly confined therein to the matters testified to in the examination in chief"); § 9470 (rules of evidence in civil cases to apply in criminal cases, so far as applicable and except as otherwise provided); St. 1907, c. 170, § 2, Code § 8846 (desertion of family; husband or wife to be competent for the State, "and may testify to any relevant acts or communications between them", but neither is "compelled to testify against the other under this Act", except by consent).

KANSAS: *General Statutes* 1915, § 7219 ("No person shall be disqualified as a witness in any civil action or proceeding by reason of his interest in the event of the same, as a party or otherwise, or by reason of his conviction of a crime; but such interest or conviction may be shown for the purpose of affecting his credibility"); § 7220 ("Nothing in the preceding section contained shall in any manner affect the laws now existing relating to the settlement of estates of deceased persons, infants, idiots, or lunatics, or the attestation of the execution of last wills and testaments, or of conveyances of real estate, or of any other instrument required by law to be attested"); § 7222 ("No party shall be allowed to testify in his own behalf in respect to any transaction or communication had personally by such party with a deceased person, where either party to the action claims to have acquired title directly or indirectly from such deceased person, or when the adverse party is the executor, administrator, heir-at-law, next of kin, surviving partner, or assignee of such deceased person, nor shall the assignor of a thing in action be allowed to testify in behalf of such party concerning any transaction or communication had personally by such assignor with a deceased person in any such case; nor shall such party or assignor be competent to testify to any transaction had personally by such party or assignor with a deceased partner or joint contractor in the absence of his surviving partner or joint contractor, when such surviving partner or joint contractor is an adverse party. If the testimony of a party to the action or proceeding has been taken, and he afterward die, and the testimony so taken shall be used after his death in behalf of his executors, administrators, heirs-at-law, next of kin, assignee, surviving partner, or joint contractor, the other party or the assignor shall be competent to testify as to any and all matters to which the testimony so taken relates"); § 7223 ("The following persons shall be incompetent to testify: First, persons who are of unsound mind at the time of their production for examination; second, children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly; third, husband and wife, for or against each other, concerning any communication made by one to the other during the marriage, whether called while that relation subsisted or afterward"); § 8130 ("No person shall be rendered incompetent to testify in criminal causes by

reason of his being the person injured or defrauded, or intended to be injured or defrauded, or that would be entitled to satisfaction for the injury or is liable to pay the costs of the prosecution; or by reason of his being the person on trial or examination; or by reason of being the husband or wife of the accused; but any such facts may be shown for the purpose of affecting his or her credibility; provided, that no person on trial or examination, nor wife or husband of such person, shall be required to testify except as a witness on behalf of the person on trial or examination"); § 8130 ("The neglect or refusal of the person on trial to testify, or of a wife to testify on behalf of her husband, shall not raise any presumption of guilt, nor shall that circumstance be referred to by any attorney prosecuting in the case, nor shall the same be considered by the Court or jury before whom the trial takes place"); § 8150 (prosecution of two or more; Court may order any defendant discharged to be a witness for the State, at any time before "the defendant" has gone into his defence; when there is not sufficient evidence to put him on his defence, he may be discharged to testify for co-defendant, at any time before close of evidence); § 7579 (in divorce and alimony, "the parties thereto, or either of them, shall be competent to testify upon all material matters involved in the controversy to the same extent as other witnesses might do"); § 3415, St. 1911, c. 163 (family-desertion, etc.; the privilege for marital communications shall not apply; "both husband and wife shall be competent witnesses to testify against each other to any and all relevant matters"); § 5159, G. S. 1868, c. 50 (furnishing liquor to Indians; "Indians shall be deemed competent witnesses"); § 5511, St. 1885, c. 149 (liquor prosecutions; "members, shareholders, or associates in any club or association" etc., to be competent); § 7221 ("Any party to a civil action or proceeding may compel any adverse party or person for whose benefit such a proceeding is instituted, prosecuted, or defended, at the trial or by deposition, to testify as a witness in the same manner and subject to the same rules as other witnesses"); § 8132 (person receiving a bribe is competent against the person bribing); § 8138 (similar, for gaming offences); § 8134 ("no person shall be disqualified" in criminal cases by "conviction of a crime"); 1905, May *v.* May, 71 Kan. 317, 80 Pac. 567 (St. 1903, cc. 387, 388, applied to admit a husband's testimony to his wife's admissions).

KENTUCKY: *Statutes* 1915, § 172 (bastardy; the mother, "unless she is otherwise incompetent, may be a witness for all purposes"; and "if the party accused desire it unless he is otherwise incompetent, he shall be examined on oath"); § 1180 (conviction for false swearing or subornation of perjury, or for falsely making certain affidavits and reports, disqualifies "from giving evidence in any judicial proceeding or from being a witness in any case whatever"); § 1219*a* (abortion; the woman to be a competent witness); § 1645 ("In all criminal and penal prosecutions now pending or hereafter instituted in any of the courts of this Commonwealth, the defendant on trial, on his own request, shall be allowed to testify in his own behalf, but the failure to do so shall not be commented on or be allowed to create any presumption against him"); § 1646 ("The defendant requesting that he be allowed to testify shall not be allowed to testify in chief, after any other witness has testified for the defence"); § 1973 (the person against whom a witness testifies in gaming prosecutions is not competent to prove prior gaming against the witness); § 4838 (no executor to be as such incompetent for or against a will); *Civil Code of Practice*, 1895, as amended: § 605 ("Subject to the exceptions and modifications contained in section six hundred and six, every person is competent to testify for himself or another, unless he be found by the Court incapable of understanding the facts concerning which his testimony is offered"); § 606 ((1) "Neither a husband nor his wife shall testify, while the marriage exists or afterwards, concerning any communication between them during marriage. Nor shall either of them testify against the other. Nor shall either of them testify for the other, except in an action for lost baggage or its value against a common carrier, an innkeeper, or a wrongdoer, and in such action either or both of them may testify; and except in actions which might have been brought by or against the wife, if she had been unmarried, and in such actions either but not both of them may testify, and except that when a husband or wife is acting as agent for his or her consort either of them may testify as to any matter connected with such agency"; (2) "Subject to the provisions of sub-section seven of this section no person shall testify for himself concerning any verbal statement of, or any transaction with, or any act done or omitted to be done by, an infant under fourteen years of age, or by one who is of unsound mind or dead when the testimony is offered to be given, except for the purpose and to the extent of affecting one who is living, and who, when above fourteen years of age and of sound mind heard such statement, or was present when such transaction took place, or when such act was done or omitted, unless (*a*) the infant of his guardian shall have testified against such person with reference to such statement, transaction, or act; or (*b*) the person of unsound mind shall, when of sound mind, have testified against such person with reference thereto; or (*c*) the decedent, or a representative of or some one interested in his estate, shall have testified against such person, with reference thereto; or (*d*) an agent of the decedent or person of unsound mind, with reference to such act or transaction, shall have testified against such person with refer-

ence thereto, or be living when such person offers to testify with reference thereto." (3) "No person shall testify for himself in chief in an ordinary action, after introducing other evidence for himself in chief; nor in an equitable action after taking other testimony for himself in chief." . . (5) "If the right of a person to testify for himself be founded upon the fact that one who is dead or of unsound mind has testified against him, the testimony of such person shall be confined to the facts or transactions to which the adverse testimony related." (6) "A person may testify for himself as to the correctness of original entries made by him against persons who are under no disability — other than infancy — in an accounting according to the usual course of business, though the person against whom they were made may have died or become of unsound mind; but no person shall testify for himself concerning entries in a book, or the contents or purport of any writing, under the control of himself, or of himself and others jointly, if he refuse or fail to produce such book or writing and to make it subject to the order of the Court for the purposes of the action, if required to do so by the party against whom he offers to testify." (7) "The assignment of a claim by a person who is incompetent to testify for himself shall not make him competent to testify for another." (8) "A party may be examined as if under cross-examination at the instance of the adverse party, either orally or by deposition as any other witness; but the party calling for such examination shall not be concluded thereby, but may rebut it by counter-testimony." (9) "None of the preceding provisions of this section apply to affidavits for provisional remedies, or to affidavits of claimants against the estates of deceased or insolvent persons, or affect the competency of attesting witnesses of instruments which are required by law to be attested"); § 607 ("All other objections to witnesses shall go to their credit alone, and be weighed by the jury or tribunal to which their evidence is offered"); §§ 608, 609 (admits party's testimony in rebuttal of new testimony by opponent since deceased or become unsound in mind); *Code of Practice in Criminal Cases*, 1895: § 223 (like Stats. §§ 1645, 1646, *supra*); St. 1912, c. 103, p. 295 (add a new exception to C. C. P. § 606, par. 1, for divorce on the ground of cruelty); St. 1916, Mar. 23, p. 499 (pandering; like W. Va. St. 1911).

LOUISIANA: *Annotated Revised Statutes* 1915, § 1438 ("testimony of convicts for or against each other", admissible); *Revised Civil Code* 1920, § 2282 ("The circumstances of the witness being a relation, a party to the cause, interested in the result of the suit, or in the actual service or salary of one of the parties, is not a sufficient cause to consider the witness as incompetent"); § 2281, St. 1916, No. 157, p. 379 ("the competent witness in any proceeding, civil or criminal, in court, or before a person having authority to receive evidence, shall be a person of proper understanding, but: First. Private conversations between husband and wife shall be privileged. Second. Neither husband nor wife shall be compelled to be a witness on any trial upon an indictment, complaint or other criminal proceeding, against the other. Third. In the trial of all indictments, complaints and other proceedings against persons charged with the commission of crimes or offenses, a person so charged shall, at his own request, but not otherwise, be deemed a competent witness; and his neglect or refusal to testify shall not create any presumption against him"); St. 1910, No. 307, p. 524, § 8 (pandering, procuring, etc.; any female person involved is competent to testify "for or against the accused as to any transaction with the accused or by him with another person or persons in her presence", notwithstanding marriage with him, before or after the offense, and before or after dissolution of marriage); St. 1912, No. 105, p. 123, July 8 (family-desertion; "the wife shall be a competent witness for or against her husband").

MAINE: *Revised Statutes* 1916, c. 65, § 2 (in divorce, "either party may be a witness"); c. 87, § 112 ("No person is excused or excluded from testifying in any civil suit or proceeding at law or in equity, by reason of his interest in the event thereof as a party or otherwise, except as hereinafter provided, but such interest may be shown to affect his credibility: and the husband or wife of either party may be a witness"); § 113 ("No defendant shall be compelled to testify in any suit when the cause of action implies an offence against the criminal law on his part. If he offers himself as a witness, he waives his privilege of not criminating himself, but his testimony shall not be used against him in any criminal prosecution involving the same subject-matter"); § 117 ("The five preceding sections do not apply to cases where at the time of taking testimony or at the time of trial the party prosecuting or the party defending or any one of them is an executor or an administrator or is made a party as heir of a deceased party; except in the following cases: 1. The deposition of a party or his testimony given at a former trial may be used at any trial after his death, if the opposite party is then alive, and in that case the latter may also testify. 2. In all cases in which an executor, administrator, or other legal representative of a deceased person is a party, such party may testify to any facts admissible upon the rules of evidence, happening before the death of such person; and when such person so testifies, the adverse party is neither excluded nor excused from testifying in reference to such facts, and any such representative party or heir of a deceased party may testify to any fact admissible upon general rules of evidence, happening after the decease of the testator, intestate, or ancestor; and in reference to such matters the adverse party

may testify. 3. If the representative party is nominal only, both parties may be witnesses; if the adverse party is nominal only, and had parted with his interest, if any, during the lifetime of the representative party's testator or intestate, he is not excluded from testifying, if called by either party; and in an action against an executor or administrator, if the plaintiff is nominal only, or, having had an interest, disposed of it in the lifetime of the defendant's testator or intestate, neither party to the record is excused or excluded from testifying. 4. In an action by or against an executor, administrator, or other legal representative of a deceased person, in which his account books or other memoranda are used as evidence on either side, the other party may testify in relation thereto. 5. In actions where an executor, administrator, or other legal representative is a party, and the opposite party is an heir of the deceased, said heir may testify when any other heir of the deceased testifies at the instance of such executor, administrator, or other legal representative"); 6. In all actions brought by the executor, administrator, or other legal representative of a deceased person, such representative shall not be excused from testifying to any facts admissible upon general rules of evidence, happening before the death of such person, if so requested by the opposite party; but nothing herein shall be so construed as to enable the adverse party to testify against the objection of the plaintiff when the plaintiff does not voluntarily testify"); § 118 ("The rules of evidence which apply to actions by or against executors or administrators apply in actions where a person shown to the Court to be insane is solely interested as a party"); § 124 ("No person is incompetent to testify in any Court or legal proceeding in consequence of having been convicted of an offence; but such conviction may be shown to affect his credibility"); c. 92, § 12 (on suggestion of death of a party, in an action that survives, the survivors if any on both sides may testify); c. 136, § 19 ("In all criminal trials the accused shall, at his own request, but not otherwise, be a competent witness. He shall not be compelled to testify on cross-examination to facts that would convict or furnish evidence to convict him of any other crime than that for which he is on trial; and the fact that he does not testify in his own behalf shall not be taken as evidence of his guilt. The husband or wife of the accused is a competent witness"); c. 102, § 6 (bastardy; mother "may be a witness"); c. 126, § 20 (pandering and pimping; the female may be a witness for or against the accused, or to conversations with him, "notwithstanding her having married the accused" before or after the offence, and whether called during marriage or after dissolution).

MARYLAND: *Annotated Code* 1914, Art. 35, § 1 ("No person offered as a witness shall hereafter be excluded, by reason of incapacity from crime or interest, from giving evidence, either in person or by deposition, according to the practice of the Courts, in the trial of any issue joined or hereafter to be joined, or of any matter or question, or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any Court, or before any judge, jury, justice of the peace, or other person having, by law or by consent of the parties, authority to hear, receive, and examine evidence; but every person so offered may and shall be admitted to give evidence, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or inquiry, or of the suit, action, or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence; but no person who has been convicted of the crime of perjury shall be admitted to testify in any case or proceeding whatever; and the parties litigant, and all persons in whose behalf any suit, action, or other proceeding may be brought or defended, themselves, and their wives and husbands, shall be competent and compellable to give evidence in the same manner as other witnesses, except as hereinafter excepted"); . . . § 3 ("In acts or proceedings by or against executors, administrators, heirs, devisees, legatees or distributees of a decedent as such, in which judgments or decrees may be rendered for or against them, and in proceedings by or against persons incompetent to testify by reason of mental disability, no party to the cause shall be allowed to testify as to any transaction had with, or statement made by the testator, intestate, ancestor, or party so incompetent to testify, either personally or through an agent since dead, lunatic, or insane, unless called to testify by the opposite party, or unless the testimony of such testator, intestate, ancestor, or party incompetent to testify shall have [been?] already given in evidence, concerning the same transaction or statement, in the same cause, on his or her own behalf or on behalf of his or her representative in interest; nor shall it be competent for any party to the cause, who has been examined therein as a witness, to corroborate his testimony when impeached by proof of his own declaration or statement made to third persons out of the presence and hearing of the adverse party"); § 4 ("In the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes and offences, and in all proceedings in the nature of criminal proceedings in any court of this State, and before a justice of the peace or other person acting judicially, the person so charged shall at his own request, but not otherwise, be deemed a competent witness; but the neglect or refusal of any such person to testify shall not create any presumption against him. In all criminal proceedings the husband or wife of the accused party shall be competent to testify; but in no case, civil or criminal, shall

any husband or wife be competent to disclose any confidential communication made by the one to the other during the marriage; and in suits, actions, bills, or other proceedings instituted in consequence of adultery, or for the purpose of obtaining a divorce, or for damages for breach of promise of marriage, no verdict shall be permitted to be recovered, nor shall any judgment or decree be rendered, upon the testimony of the plaintiff alone; but in all such cases testimony in corroboration of that of the plaintiff shall be necessary").

Compare the decisions cited *post*, § 2065, n. 5, applying Art. 35, § 3, *supra*.

MASSACHUSETTS: *General Laws* 1920: c. 233, § 20 ("Any person of sufficient understanding although a party, may testify in any proceeding, civil or criminal, in Court or before a person who has authority to receive evidence except as follows: First, except in a prosecution begun under §§ 1–10 inclusive of c. 273 [family-desertion, etc.] neither husband nor wife shall testify to private conversations with the other; Second, except as otherwise provided in § 7 of c. 273, neither husband nor wife shall be compelled to testify in the trial of an indictment, complaint, or other criminal proceeding against the other; Third, the defendant in the trial of an indictment, complaint or other criminal proceeding, shall at his own request, but not otherwise, be allowed to testify; but his neglect or refusal to testify shall not create any presumption against him"); c. 273, § 7 (family-desertion; like Wash. St. R. & B. Code 1909, § 5435; omitting "for or" before "against").

MICHIGAN: *Compiled Laws* 1915, § 12551 ("No person shall be excluded from giving evidence in any matter, civil or criminal, by reason of crime, or for any interest of such person in the matter, suit, or proceeding in which such testimony may be offered, or by reason of marital or other relationship to any party thereto; but such interest, relationship, or conviction of crime may be shown for the purpose of drawing in question the credibility of such witness, except as is hereafter provided"); § 12552 ("On the trial of any issue joined, or in any matter, suit, or proceeding, in any court, or before any officer or person having, by law or by consent of parties, authority to hear, receive, and examine evidence, the parties to any such suit or proceeding named in the record, and persons for whose benefit such suit is prosecuted or defended, may be witnesses therein, in their own behalf or otherwise, in the same manner as otherwise, except as hereinafter otherwise provided; and the deposition of any such party or person may be taken and used in evidence under the rules and statutes governing depositions, and any such party or person may be proceeded against, and compelled to attend and testify, as provided by law for other witnesses. No person shall be disqualified in any criminal case or proceeding, by reason of his interest in the event of the same as a party or otherwise, or by reason of his having been convicted of any crime; but such interest or conviction may be shown for the purpose of affecting his credibility; provided, however, that a defendant in any criminal case or proceeding shall only at his own request be deemed a competent witness, and his neglect to testify shall not raise any presumption against him, nor shall the Court permit any reference or comment to be made to or upon such neglect"); § 12553 ("That when a suit or proceeding is prosecuted or defended by the heirs, assignees, devisees, legatees, or personal representatives of a deceased person, the opposite party, if examined as a witness on his own behalf, shall not be admitted to testify at all to matters which, if true, must have been equally within the knowledge of such deceased person; and when any suit or proceeding is prosecuted or defended by any surviving partner or partners, the opposite party, if examined as a witness in his own behalf, shall not be admitted to testify at all in relation to matters which, if true, must have been equally within the knowledge of the deceased partner and not within the knowledge of any one of the surviving partners. No person who shall have acted as an agent in the making or continuing of a contract with any person who may have died shall be a competent witness, in any suit involving such contract, as to matters occurring prior to the death of such decedent, on behalf of the principal to such contract against the legal representative or heirs of such decedent, unless he shall be called by such heirs or legal representatives. And when any suit or proceeding is prosecuted or defended by any corporation, the opposite party, if examined as a witness in his own behalf, shall not be admitted to testify at all to matters which, if true, must have been equally within the knowledge of a deceased officer or agent of the corporation and not within the knowledge of any surviving officer or agent of the corporation, nor when any suit or proceeding is prosecuted or defended by the heirs, assigns, devisees, legatees, or personal representatives of a deceased person against a corporation (or its assigns), shall any person who is or has been an officer or agent of any such corporation be allowed to testify at all in relation to matters which, if true, must have been equally within the knowledge of such deceased person; provided, that whenever the words 'the opposite party' occur in this section, it shall be deemed to include the assignors or assignees of the claim or any part thereof in controversy. Provided further that when the testimony of any person would be barred in case of the death of any of the persons hereinbefore mentioned it shall also be barred if such person shall have been adjudged to be and still is at the time of the trial insane or mentally incompetent as to all matters which if true must have been equally within his knowledge when he was sane and mentally competent. And provided further that whenever the deposition, affidavit,

or testimony of such deceased party taken in his lifetime shall be read in evidence in such suit or proceeding, that the affidavit or testimony of the surviving party shall be admitted in his own behalf on all matters mentioned or covered in such deposition, affidavit, or testimony; and provided further that when the testimony or deposition of any witness has once been taken and used (or shall have heretofore been taken and used) upon the trial of any cause, and the same was, when so taken and used, competent and admissible under this act, the subsequent death of such witness or of any other person, shall not render such testimony incompetent under this act, but such testimony shall be received upon any subsequent trial of such cause"); § 11367 (in prosecutions for illegal marriage of persons sexually diseased, "a husband shall be examined as a witness against his wife and a wife shall be examined as a witness against her husband whether such husband or wife consent or not"); § 7791 (family-desertion; wife may testify against husband-defendant, "in all complaints under this Act"); § 12555 ("A husband shall not be examined as a witness, for or against his wife, without her consent; nor a wife, for or against her husband, without his consent, except in suits for divorce and in cases of prosecution for bigamy, and where the cause of action grows out of a personal wrong or injury done by one to the other, or grows out of the refusal or neglect to furnish the wife or children with suitable support and except in cases of desertion or abandonment, and cases arising under Act 136 of the Public Acts of 1905, relating to marriage, and except in cases where the husband or wife shall be a party to the record in a suit, action, or proceeding where the title to the separate property of the husband or wife so called or offered as a witness, or where the title to property derived from, through, or under the husband or wife so called or offered as a witness, shall be the subject-matter in controversy or litigation in such suit, action, or proceeding, in opposition to the claim or interest of the other of said married persons who is a party to the record in such suit, action, or proceeding; and in all such cases, such husband or wife who makes such claim of title, or under or from whom such title is derived, shall be as competent to testify in relation to said separate property and the title thereto, without the consent of said husband or wife, who is a party to the record in such suit, action, or proceeding, as though such marriage relation did not exist; nor shall either, during the marriage or afterwards, without the consent of both, be examined as to any communication made by one to the other during the marriage; but in any action or proceeding instituted by the husband or wife in consequence of adultery the husband and wife shall not be competent to testify"); § 12556 ("Whenever a child under the age of ten years is produced as a witness the Court shall by an examination, made by itself, publicly, or separate and apart, ascertain to its own satisfaction whether such child has sufficient intelligence and sense of obligation to tell the truth to be safely admitted to testify; and in such case such testimony may be given on a promise to tell the truth instead of upon oath or statutory affirmation, and shall be given such credit as to the Court or jury, if there be a jury, it may appear to deserve"); § 15500 (pandering, etc.; the female is competent to testify for or against the accused as to any transaction with him, etc., notwithstanding her marriage to him before or after the offence, whether called during marriage or after its dissolution); § 11428 (in divorce, "either party may, if he or she elect", testify); § 7756 (in bastardy proceedings, the woman shall be admitted as a witness, unless incompetent by reason of conviction of crime); § 7794 (desertion of wife married by seducer, etc.; wife may testify against husband without his consent).

MINNESOTA: *General Statutes* 1913, § 8375 ("Every person of sufficient understanding, including a party, may testify in any action or proceeding, civil or criminal, in court or before any person who has authority to receive evidence, except as follows: 1. A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent, nor can either, during the marriage or afterward without the consent of the other, be examined as to any communication made by one to the other during the marriage. But this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, nor to an action or proceeding for abandonment and neglect of the wife or children by the husband." . . . 6. "Persons of unsound mind; persons intoxicated at the time of their production for examination, and children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly, are not competent witnesses"); § 8376 ("The defendant in the trial of an indictment, complaint, or other criminal proceeding shall, at his own request and not otherwise, be allowed to testify; but his failure to testify shall not create any presumption against him, nor shall it be alluded to by the prosecuting attorney or by the court"); § 8377 ("A party to the record of any civil action or proceeding, or a person for whose immediate benefit such action or proceeding is prosecuted or defended, or the directors, officers, superintendent, or managing agents of any corporation which is a party to the record, 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 the matters testified to on such examination"); § 8378 ("It shall not be competent for any party to an action, or any person interested in the event thereof, to give evidence therein or concerning any conversation with, or admission of, a deceased or insane party or person relative to any matter at issue between the parties, unless the testimony of such deceased or insane person concerning such conversation or admission, given before his death or insanity, has been preserved, and can be produced in evidence by the opposite party, and then only in respect to the conversation or admission to which such testimony relates"); § 8504 ("Every person convicted of crime shall be a competent witness in any civil or criminal proceeding, but his conviction may be proved for the purpose of affecting the weight of his testimony, either by the record or by his cross-examination, upon which he shall answer any proper question relevant to that inquiry; and the party cross-examining shall not be concluded by his answer thereto").

MISSISSIPPI: *Code* 1906, § 1318, Hem. § 1051 (person convicted of perjury "shall not thereafter be received as a witness", until judgment reversed); § 1320, Hem. § 1053 (similar, for subornation of perjury); § 1679, Hem. § 1421 (in divorce suits, "the parties shall be competent witnesses for or against each other"); § 1915, Hem. § 1575 ("Every person, whether a party to the suit or not, shall be competent to give evidence in any suit at law or in equity, and shall not be incompetent by reason of any interest in the result thereof, or in the record as an instrument of evidence in other suits; and such weight shall be given to the evidence of parties and interested witnesses as, in view of the situation of the witnesses and other circumstances, it may fairly be entitled to. Any party may, by subpœna, as in other cases, compel any other party to the suit to appear and give evidence"); § 1916, Hem. § 1576 ("Husband and wife may be introduced by each other as witnesses in all cases, civil or criminal, and shall be competent witnesses in their own behalf, as against each other, in all controversies between them"); § 1917, Hem. § 1577 ("A person shall not testify as a witness to establish his own claim or defence against the estate of a deceased person which originated during the lifetime of such deceased person, or any claim he has transferred since the death of such decedent. But such person shall be permitted to give evidence in support of his claim or defence against the estate of a deceased person which originated after the death of such deceased person in the course of administering his estate; nor shall a person testify as a witness to establish his own or assigned claim or defence against the estate of a person of unsound mind, which originated before the ward became a 'non compos mentis'; but this shall not apply to claims or defences which arose in the course of the administration of the estate of such person"); § 1918, Hem. § 1578 ("The accused shall be a competent witness for himself in any prosecution for crime against him; but the failure of the accused in any case to testify shall not operate to his prejudice or be commented on by counsel"); § 1920, Hem. § 1580 ("A conviction of a person for any offence except perjury and subornation of perjury, shall not disqualify such person as a witness, but such conviction may be given in evidence to impeach his credibility. A person convicted of perjury or subornation of perjury shall not afterwards be a competent witness in any case, although pardoned or punished for the same"); St. 1920, Mar. 72, c. 212, § 6 (family-desertion; like Wash. R. & B. Code § 5435).

MISSOURI: *Revised Statutes* 1919, § 4033 ("No person shall be rendered incompetent to testify in criminal causes by reason of his being the person injured or defrauded or intended to be injured or defrauded, or that would be entitled to satisfaction for the injury, or is liable to pay the costs of the prosecution"); § 4035 ("When two or more persons shall be jointly indicted or prosecuted, the Court may, at any time before the defendants have gone into their defence, direct any defendant to be discharged, that he may be a witness for the State. A defendant shall also, when there is not sufficient evidence to put him on his defence, at any time before the evidence is closed, be discharged by the Court for the purpose of giving his testimony for a co-defendant"); § 4036 ("No person shall be incompetent to testify as a witness in any criminal cause or prosecution by reason of being the person on trial or examination, or by reason of being the husband or wife of the accused; but any such facts may be shown for the purpose of affecting the credibility of such witness; provided that no person on trial or examination, nor wife or husband of such person, shall be required to testify, but any such person may, at the option of the defendant, testify in his behalf, or on behalf of a co-defendant, and shall be liable to cross-examination, as to any matter referred to in his examination in chief, and may be contradicted and impeached as any other witness in the case; provided that in no case shall husband or wife, when testifying under the provisions of this section for a defendant, be permitted to disclose confidential communications had or made between them in the relation of such husband and wife"); § 4037 (the accused's failure to testify "shall not be construed to affect the innocence or guilt of the accused, nor shall the same raise any presumption of guilt, nor be referred to by any attorney in the case, nor be considered by the Court or jury before whom the trial takes place");

§ 5410 ("No person shall be disqualified as a witness in any civil suit or proceeding at law or in equity, by reason of his interest in the event of the same as a party or otherwise, but such interest may be shown for the purpose of affecting his credibility; provided that in actions where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the Court to be insane, the other party to such contract or cause of action shall not be admitted to testify either in his own favor or in favor of any party to the action claiming under him, and no party to such suit or proceeding whose right of action or defence is derived to him from one who is, or if living would be, subject to the foregoing disqualification, shall be admitted to testify in his own favor, except as in this section is provided; and where an executor or administrator is a party, the other party shall not be admitted to testify in his own favor, unless the contract in issue was originally made with a person who is living and competent to testify, except as to such acts and contracts as have been done or made since the probate of the will or the appointment of the administrator; provided, further, that in actions for the recovery of any sum or balance due on account, and when the matter at issue and on trial is proper matter of book account, the party living may be a witness in his own favor, so far as to prove in whose handwriting his charges are, and when made, and no farther"); § 5412 ("Any party to any civil action or proceeding may compel any adverse party, or any person for whose immediate and adverse benefit such action or proceeding is instituted, prosecuted, or defended, to testify as a witness in his behalf, in the same manner and subject to the same rules as other witnesses; provided that the party so called may be examined by the opposite party, under the rules applicable to the cross-examination of witnesses"); § 5413 (foregoing sections not to affect the law of attestation of instruments required to be attested); § 5415 ("No married woman shall be disqualified as a witness in any civil suit or proceeding prosecuted in the name of or against her husband, whether joined or not with her husband as a party, in the following cases, to wit: First, in actions upon policies of insurance of property, so far as relates to the amount and value of the property alleged to be injured or destroyed; second, in actions against carriers, so far as relates to the loss of the property and the amount and value thereof; third, in all matters of business transactions when the transaction was had and conducted by such married woman as the agent of her husband; and no married man shall be disqualified in any such civil suit or proceeding prosecuted in the name of or against his wife, whether he be joined with her or not as a party, when such suit or proceeding is based upon, grows out of, or is connected with any matter of business or business transaction where the transaction or business was had with or was conducted by such married man as the agent of his wife: provided that nothing in this section shall be construed to authorize or permit any married woman, while the relation exists or subsequently to testify to any admission or conversation of her husband, whether made to herself or to third parties"); § 5418 ("The following persons shall be incompetent to testify: First, a person of unsound mind at the time of his production for examination; second, a child under ten years of age, who appears incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly"); § 5439, Laws 1895, p. 284 ("Any person who has been convicted of a crime is notwithstanding a competent witness; but the conviction may be proved to affect his credibility, either by the record or by his own cross-examination, upon which he must answer any question relevant to that inquiry, and the party cross-examining shall not be concluded by his answer"); § 265 (where the presumption of death applies, in applications for administration of estates, "no person shall be disqualified by reason of his or her relationship as husband or wife to the supposed deceased, or by reason of his or her interest in the estate of the person supposed to be dead").

MONTANA: *Revised Codes* 1921, § 10533 ("A witness is a person whose declaration under oath is received as evidence for any purpose, whether such declaration be made on oral examination or by deposition or affidavit"); § 10534 ("All persons, without exception, otherwise than is specified in the next two sections, who, having organs of sense, can perceive, and perceiving can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although, in every case, the credibility of the witness may be drawn in question, as provided in § 10508"); § 10535 ("The following persons cannot be witnesses: 1. Those who are of unsound mind at the time of their production for examination. 2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly. 3. Parties or assignees of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator, upon a claim or demand against the estate of a deceased person, as to the facts of direct transactions or oral communications between the proposed witness and the deceased, excepting where the executor or administrator first introduces evidence thereof, or where it appears to the Court that without the testimony of the witness injustice will be done.

4. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against any person or corporation, as to the facts of direct transaction or oral communication between the proposed witness and the deceased, agent of such person or corporation, and between the proposed witness and any deceased officer of such corporation, except when it appears", etc. as in par. 3); § 10536 ("There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases: 1. A husband cannot be examined for or against his wife, without her consent; nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other"); § 11603 (a person "convicted of any offence" is competent); §§ 11974, 11975 (like Cal. P. C. §§ 1099, 1100); § 12175 ("The rules for determining the competency of witnesses in civil actions are applicable also to criminal actions and proceedings, except as otherwise provided in this Code"); § 12176 ("Except with the consent of both, or in cases of criminal violence upon one by the other, neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties"); § 12177 ("A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but he may be sworn, and may testify in his own behalf, and the jury, in judging of his credibility and the weight to be given to his testimony, may take into consideration the fact that he is the defendant, and the nature and enormity of the crime of which he is accused. If the defendant does not claim the right to be sworn, or does not testify, it must not be used to his prejudice, and the attorney prosecuting must not comment to the Court or jury on the same"); § 12178 ("When two or more persons are jointly or otherwise concerned in the commission of an offence, any one of such persons may testify for or against the other in relation to the offence committed, but the testimony of such witness must not be used against him in any criminal action or proceeding").

NEBRASKA: *Revised Statutes* 1922, § 1521 ("either party [to a divorce suit] may be a witness as in other civil cases"); § 278 (bastardy; the mother is competent, except when convicted of a crime that would otherwise disqualify her); § 8835 ("Every human being of sufficient capacity to understand the obligation of an oath, is a competent witness in all cases, civil and criminal, except as otherwise herein declared. The following persons shall be incompetent to testify: First, persons of unsound mind at the time of their production; second, Indians and negroes who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them intelligently and truly; third, husband and wife, concerning any communication made by one to the other during the marriage, whether called as a witness while that relation subsists or afterward"); § 8836 ("No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness, unless the evidence of the deceased person shall have been taken and read in evidence by the adverse party in regard to such transaction or conversation, or unless such representative shall have introduced a witness who shall have testified in regard to such transaction or conversation, in which case the person having such direct legal interest may be examined in regard to the facts testified to by such deceased person or such witness, but shall not be permitted to further testify in regard to such transaction or conversation"); § 8837 ("The husband can in no case be a witness against the wife, nor the wife against the husband, except in a criminal proceeding for a crime committed by the one against the other, but they may in all criminal prosecutions be witnesses for each other; provided, however, that a wife shall be a competent witness against the husband in all prosecutions arising under § 39 of the Criminal Code [C. S. § 9584]"); § 8838 ("Neither husband nor wife can be examined in any case as to any communication made by the one to the other while married, nor shall they, after the marriage relation ceases, be permitted to reveal, in testimony, any such communication made while the marriage subsisted"); § 8841 ("The prohibitions in the preceding sections do not apply to cases where the party in whose favor the respective provisions are enacted waives the rights thereby conferred"); § 10139 ("No person shall be disqualified as a witness in any criminal prosecution by reason of his interest in the event of the same, as a party or otherwise, or by reason of his conviction of any crime, but such interest or conviction may be shown for the purpose of affecting his credibility. In the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offences, the person so charged shall, at his own request, but not otherwise, be deemed a competent witness; nor shall the neglect or refusal to testify create any presumption against him, nor shall any reference be made to, nor any comment upon, such neglect or refusal"); § 10140 ("When two or more persons shall be indicted together, the Court may,

at any time before the defendant has gone into his defence, direct any one of the defendants to be discharged, that he may be a witness for the State"; the accused "may also, when there is not sufficient evidence to put him upon his defence, be discharged by the Court", or may demand a verdict, to give evidence "for others accused with him"); § 9765 (pandering; any female enticed, etc., shall be competent, "including conversation with the accused or by him with third persons in her presence, notwithstanding her having married the accused either before or after" the offence).

NEVADA: *Revised Laws* 1912, § 5419 ("All persons, without exception, otherwise than as specified in this chapter, who, having organs of sense, can perceive, and perceiving can make known their perceptions to others, may be witnesses in any action or proceeding in any Court of the State. Facts which by the common law would cause the exclusion of witnesses may still be shown for the purpose of affecting their credibility. No person shall be allowed to testify:

"1. When the other party to the transaction is dead.

"2. When the opposite party to the action, or the person for whose immediate benefit the action or proceeding is prosecuted or defended, is the representative of a deceased person, when the facts to be proved transpired before the death of such deceased person; provided that when such deceased person was represented in the transaction in question by any agent who is living, and who testifies as a witness in favor of the representative of such deceased person, or, when persons other than the parties to the transaction, and claiming to have been present when the transaction took place, testify as witnesses in favor of the representative of such deceased person, in such case the other party may also testify in relation to such transaction.

"Nothing contained in this section shall affect the laws in relation to the attestation of any instrument required to be attested"); § 5420 ("No person shall be disqualified as a witness in any action or proceeding on account of his opinions on matters of religious belief, or by reason of his conviction of felony, but such conviction may be shown for the purpose of affecting his credibility, and the jury is to be the exclusive judges of his credibility, or by reason of his interest in the event of the action or proceeding as a party thereto or otherwise, but the party or parties thereto, and the person in whose behalf such action or proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and be compellable to give evidence, either 'viva voce' or by deposition or upon a commission, in the same manner and be subject to the same rules of examination as other witnesses on behalf of himself, or either or any of the parties to the action or proceeding"); § 5422 ("When husband or wife is insane and has been so declared by a commission of lunacy, or in due form of law, the other shall be a competent witness to testify as to any fact which transpired before or during such insanity, but the privilege of so testifying shall cease on the restoration to soundness of the insane husband or wife, unless upon the consent of both, in which case they shall be competent witnesses"); § 5423 ("The following persons cannot be witnesses: 1. those who are of unsound mind at the time of their production for examination: 2. children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly; 3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person"); § 5424 ("A husband cannot be examined as a witness for or against his wife without her consent, nor a wife for or against her husband without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage. But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other"); § 7160 ("In the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offences, the person so charged shall, at his own request but not otherwise, be deemed a competent witness; the credit to be given to his testimony being left solely to the jury, under the instructions of the Court, provided that no special instruction shall be given relating exclusively to the testimony of the defendant, or particularly directing the attention of the jury to the defendant's testimony"); § 7161 ("Nothing herein contained shall be construed as compelling any such person to testify. No instruction shall be given relative to the failure of the person charged with the commission of the crime or offense to testify, except, upon request of the person so charged, the Court shall instruct the jury that, in accordance with a right guaranteed by the constitution, no person can be compelled in a criminal action to be a witness against himself"); §§ 7168, 7169 (joint indictees; like Cal. P. C. §§ 1099, 1100); § 7451 ("The rules for determining the competency of witnesses in civil actions are applicable also to criminal actions and proceedings, except as otherwise provided for in this Act. The party or parties injured shall in all cases be competent witnesses; the credibility of such witnesses shall be left to the jury, as in other cases. In all cases when two or more persons are jointly or otherwise concerned in the commission of any

crime or misdemeanor, either of such persons may be sworn as a witness against another, in relation to such crime or misdemeanor; but the testimony given by such witnesses shall in no instance be used against himself in any criminal prosecution, and any person may be compelled to testify as provided in this section"); § 7452 ("Except with the consent of both, or in cases of criminal violence upon one by the other, neither husband nor wife is a competent witness for or against the other in a criminal action or proceeding to which one or both are parties"); § 6483 (family desertion; wife to be competent "against her husband with or without his consent"); § 7530 (selling liquor to Indians; "Indians shall be competent witnesses"); St. 1913, Mar. 26, p. 445 (family desertion; wife a competent witness to all relevant matters, including marriage and parentage); St. 1921, c. 64, Mar. 8 (repeals Rev. St. 1912, § 7452).

NEW HAMPSHIRE: *Public Statutes* 1891, c. 224, § 13 ("No person shall be excused or excluded from testifying or giving his deposition in any civil cause by reason of his interest therein, as a party or otherwise"); § 16 ("When one party to a cause is an executor, administrator, or the guardian of an insane person, neither party shall testify in respect to facts which occurred in the lifetime of the deceased or prior to the ward's insanity, unless the executor, administrator, or guardian elects so to testify, except as provided in the following section"); § 17 ("When it clearly appears to the Court that injustice may be done without the testimony of the party in such case, he may be allowed to testify; and the ruling of the Court, admitting or rejecting his testimony, may be excepted to and revised"); § 18 ("When either party of record is not the party in interest, and the party whose interest is represented by the party of record is an executor, administrator, or insane, the adverse party shall not testify, unless the executor, administrator, or guardian of the insane person elects to testify himself, or to offer the testimony of such party of record"); § 19 ("In an action brought by an indorsee or assignee of a bill of exchange, promissory note; or mortgage against an original party thereto, the defendant shall not testify in his own behalf if either of the original parties to the bill, note, or mortgage is dead or insane, unless the plaintiff elects to testify himself or to offer the testimony of an original party thereto"); § 20 ("Husband and wife are competent witnesses for or against each other in all cases civil and criminal, except that neither shall be allowed to testify against each other as to any statement, conversation, letter, or other communication made to the other or to another person, nor shall either be allowed in any case to testify as to any matter which in the opinion of the Court would lead to a violation of marital confidence"); § 24 ("In the trial of indictments, complaints, and other proceedings against persons charged with the commission of crimes and offences, the person so charged shall, at his own request, but not otherwise, be a competent witness"); § 25 ("Nothing herein contained shall be construed as compelling any such person to testify, nor shall any inference of his guilt result if he does not testify, nor shall the counsel for the prosecution comment thereon in case the respondent does not testify"); § 26 ("No person shall be competent to testify on account of his having been convicted of an infamous crime, but the record of such conviction may be used to affect his credit as a witness").

NEW JERSEY: *Compiled Statutes* 1910, Disorderly Persons, § 23 (wife or husband may be witness in trial of husband deserting family); Evidence, § 1 ("No person offered as a witness in any action or proceeding of a civil or criminal nature shall be excluded by reason of his having been convicted of crime, but such conviction may be shown on cross-examination of the witness, or, by the production of the record thereof, for the purpose of affecting his credit"); § 2 ("In all civil actions in any Court of record in this State the parties thereto shall be admitted to be sworn and give evidence therein, when called as witnesses by the adverse party in such action; and when any party is called as a witness by the opposite party, he shall be subject to the same rules as to examination and cross-examination as other witnesses; provided, that no party to a suit shall be compelled to be sworn or give evidence in any action brought to recover a penalty or to enforce a forfeiture; and provided, also, that this section shall not apply to suits for divorce"); § 3 ("No person shall be disqualified as a witness in any suit or proceedings at law or in equity by reason of his interest in the event of the same as a party or otherwise, but such interest may be shown for the purpose of affecting his or her credit; provided, no party shall be sworn in any case when the opposite party is prohibited by any legal disability from being sworn as a witness"); § 4 ("In all civil actions any party thereto may be sworn and examined as a witness, notwithstanding any party thereto may sue or be sued in a representative capacity; provided, this section shall not extend to permit testimony to be given by any party to the action as to any transaction with or statement by any testator or intestate represented in said action, unless the representative offers himself as a witness on his own behalf and testifies to any transaction with or statements by his testator or intestate, in which event the other party may be a witness on his own behalf as to all transactions with or statements by such testator or intestate which are pertinent to the issue"); § 5 ("In any trial or inquiry in any suit, action, or proceeding in any Court, or before any person having by law or consent of parties authority to examine witnesses or hear evidence, the husband or wife of any person interested therein as a party or otherwise, shall

be competent and compellable to give evidence the same as other witnesses, on behalf of any party to such suit, action or proceeding; provided, that nothing herein shall render any husband or wife competent or compellable to give evidence for or against the other in any action for criminal conversation, except to prove the fact of marriage, or to render any husband or wife competent or compellable to give evidence against the other in any criminal action or proceeding, except to prove the fact of marriage, and except as now otherwise provided by statute, or compellable in any action or proceeding for divorce on account of adultery to give evidence for the other, except to prove the fact of marriage; nor shall any husband or wife be compellable to disclose any confidential communication made by one to the other during the marriage"); § 6 ("The complainant or petitioner in any action or proceeding of an equitable nature in any Court, shall be a competent witness to disprove so much of the defendant's answer as may be responsive to the allegations contained in the bill of complaint or petition, and any defendant in any such action or proceeding shall be a competent witness for or against any other defendant not jointly interested with him in the matter in controversy"); § 12 (surviving party deceased party's representative is competent in new trial of action revived after other party's death); Criminal Procedure, § 57 ("Upon the trial of any indictment, the defendant shall be admitted to testify, if he shall offer himself as a witness; and upon any such trial, the wife or the husband of the defendant, as the case may be, shall be admitted to testify on behalf of the defendant, if he or she shall offer himself or herself as a witness; and upon any such trial, a married woman shall be admitted to testify against her husband when she is the complainant against him, if she shall offer herself as a witness. . . . Upon the trial of any indictment for falsely making, altering, forging, or counterfeiting, or for uttering or publishing as true, any record, deed, or other instrument or writing, no person named in such record, deed, or other instrument or writing, or whose name or any part of whose name is or purports to be written or signed therein or thereto, shall on that account be deemed and taken to be an incompetent witness"); Practice, § 140 (any party may cause an adverse party to be examined); St. 1917, Mar. 19, c. 61, § 5 (family-desertion; rule "prohibiting disclosure of confidential communications between husband and wife" shall not apply; both husband and wife "shall be competent and compellable witnesses to testify against each other to any and all relevant matters", including marriage and parentage); 1903, State *v.* Zdanowicz, — N. J. L. —, 55 Atl. 743 (the accused is competent for himself under the Crim. Proced. St. 1898, June 14, c. 237, § 57, though the Evidence Revision Statute of 1900, March 23, c. 150, repeals the former § 8, and contains no clause of like effect); St. 1913, Mar. 12, c. 69 (a party to a civil suit may at his own option give his testimony by deposition, and if "any other party to such suit" die, the deposition is admissible "notwithstanding it shall relate to transactions with or statements by such decedent").

NEW MEXICO: *Annotated Statutes* 1915, § 2163 ("No person offered as a witness shall hereinafter be excluded by reason of any alleged incapacity from interest, from giving evidence, either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter in question or on any inquiry arising in any civil suit, action, or proceeding in any court, or before any judge, coroner, justice of the peace, officer, or person having, by law or by consent of parties, authority to hear, receive, and examine evidence in this State"); § 2164 ("Every person so offered shall be admitted to give evidence on oath or solemn affirmation in those cases wherein affirmation is by law receivable; notwithstanding that such person has an interest in the matter in question, or in the event of the trial of any issue, matter, question, or inquiry, or of the suit, action, or proceeding in which he is offered as a witness"); § 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"); § 2169 ("On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any civil suit, action, or other proceeding in any court of law or equity in this State, or before any person having, by law or by consent of parties, authority to hear, receive, and examine evidence, the parties to such proceedings, and the persons in whose behalf any such suit, action, or other proceeding is brought or instituted, or opposed or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either 'viva voce' or by deposition, according to the practice of the court, on behalf of themselves or of either of the parties to the suit, action, or proceeding, and the husbands and wives of such parties and persons shall, except as hereinafter excepted, be competent to give evidence, either 'viva voce' or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or proceeding"); § 2173 ("Nothing contained in this article shall apply to the trial, in any civil proceeding, of the question of the adultery of any party, or the husband or wife of any party to such action, suit, or proceeding"); § 2174

("No husband shall be compelled to disclose any communication made by his wife during the marriage, and no wife shall be compelled to disclose any communication made to her by her husband during the marriage"); § 2175 ("In a suit by or against the heirs, executors, administrators, or assigns of a deceased person, an opposite or interested party to the suit shall not obtain a verdict, judgment, or decision therein, on his own evidence, in respect to any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence"); § 2166 ("In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offences, and misdemeanors in the courts of this State, the person so charged shall, at his own request, but not otherwise, be a competent witness; and his failure to make such request shall not create any presumption against him"); § 2167 ("Hereafter the husband or wife of any defendant in any trial on a prosecution for crime before any Court or officer authorized to hear or try said prosecution shall be a competent witness to testify in favor [of,] but not against, such defendant; provided, that such husband or wife shall be a competent witness to testify against any such defendant where the prosecution is for any unlawful assault or violence forcibly committed by the defendant on the person of such witness"); § 2168 (in any prosecution for "incest, bigamy, polygamy, unlawful cohabitation, or adultery", the accused's husband or wife is competent, "and may be called, but shall not be required to testify without the consent of such husband or wife so called as a witness"); § 2171 (interrogatories to adverse party shall be annexed to pleading).

NEW YORK: *Constitution* 1895, Art. XIII, § 4 ("Any person charged with receiving a bribe, or with offering or promising a bribe, shall be permitted to testify in his own behalf in any civil or criminal prosecution therefor"); *Civil Practice Act* 1920, § 346 ("Except all otherwise specially prescribed, a person shall not be excluded or excused from being a witness, by reason of his or her interest in the event of an action or special proceeding; or because he or she is a party thereto; or the husband or wife of a party thereto, or of a person in whose behalf an action or special proceeding is brought, opposed, prosecuted, or defended"); § 347 ("Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through, or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator, or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through, or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic, except where the executor, administrator, survivor, committee, or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence, concerning the same transaction or communication. A person shall not be deemed interested for the purposes of this section by reason of being a stockholder or officer of any banking corporation which is a party to the proceeding or interested in the result thereof"); § 349 ("A husband or wife is not competent to testify against the other, upon the trial of an action, or the hearing upon the merits of a special proceeding, founded upon an allegation of adultery, except to prove the marriage or disprove the allegation of adultery. However, if upon such trial or such hearing the party against whom the allegation of adultery is made produces evidence tending to prove any of the defenses thereto mentioned in § 1153 of this Act, the other party is competent to testify in disproof of any such defense. A husband or wife shall not be compelled, or, without the consent of the other if living, allowed to disclose a confidential communication made by one to the other during marriage. In an action for criminal conversation, the plaintiff's wife is not a competent witness for the plaintiff, but she is a competent witness for the defendant, as to any matter in controversy; except that she cannot, without the plaintiff's consent, disclose any confidential communication had or made between herself and the plaintiff"); § 350 ("A person who has been convicted of a crime is, notwithstanding, a competent witness in an action of special proceeding; but the conviction may be proved for the purpose of affecting the weight of his testimony, either by the record or by his cross-examination, upon which he must answer any question relevant to that inquiry; and the party cross-examining him is not concluded by that inquiry"); § 365 ("The Court or officer may examine an infant, or a person apparently of weak intellect, produced before it or him as a witness, to ascertain his capacity and the extent of his knowledge"); *Penal Code* 1909, § 2444 (substantially like C. P. A. § 350); § 2445 ("The husband or wife of a person indicted or accused of a crime is in all cases a competent witness, on the examination or trial of such person; but neither husband nor wife can be compelled to disclose a confidential communication, made by one to the other during marriage"); *Code of Criminal Procedure*, 1881, § 10 ("No person can be compelled in a criminal action to be a witness against himself"); § 392 (in criminal cases, the testimony of a child apparently under 12 not understanding an oath may be received if it is "of sufficient intelligence"; quoted more fully *post*, § 1828); § 393 ("The defendant in all [criminal] cases may testify as a witness in his own behalf, but

his neglect or refusal to testify does not create any presumption against him") ; § 393*a* ("All persons jointly indicted shall, upon the trial of either, be competent witnesses for each other the same as if not included in the indictment"); *Consol. L.* 1909, Banking, § 145 (wife may testify in action by husband against savings bank to recover money deposited by wife as hers); St. 1912, c. 420, p. 816 (amending Greater New York Charter, § 685; desertion of family; in all complaints hereunder, wife is to be competent "against her husband as to all matters embraced in said complaint"); *Justice Court Act* 1920, § 248 (children; like C. P. A. § 305).

North Carolina: *Consolidated Statutes* 1919, § 1662 (in divorce cases, neither party is competent to prove adultery of the other, nor shall either's admissions be received for that purpose); §§ 905–907 (these sections, removing in part only the disqualification of parties, are presumably superseded by §§ 1792, 1793, *infra*); § 1801 ("In any trial or inquiry in any suit, action, or proceeding in any court or before any person having by law or by consent of parties authority to examine witnesses or to hear evidence, the husband or wife of any party thereto, or any person in whose behalf any such suit, action, or proceeding is brought, prosecuted, opposed, or defended, shall, except as hereinafter stated, be competent and compellable to give evidence as any other witness on behalf of any party to such suit, action, or proceeding. Nothing herein contained shall render any husband or wife competent or compellable to give evidence for or against the other in any action or proceeding in consequence of adultery, or in any action or proceeding for divorce on account of adultery (except to prove the fact of marriage), or in any action or proceeding for or on account of criminal conversation, except that in actions of criminal conversation brought by the husband in which the character of the wife is assailed she shall be a competent witness to testify in refutation of such charges. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage"); § 1802 ("The husband or wife of the defendant" to be competent in all criminal cases, "for the defendant, but the failure of such witness to be examined shall not be used to the prejudice of the defense. Every such person examined as a witness shall be subject to cross-examination as are other witnesses"; confidential communications not disclosable, as in § 1801; no husband or wife compellable to give evidence against each other in criminal cases, "except to prove the fact of marriage in case of bigamy", and except in prosecutions for "assault and battery upon his wife, or for abandoning his wife or for neglecting to provide for her support"); § 1795 ("Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through, or under whom such a party or interested person derives his title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator, or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through, or under a deceased person or lunatic by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic, except where the executor, administrator, survivor, committee, or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication"); § 1792, ("No person offered as a witness shall be excluded by reason of incapacity from interest or crime, from giving evidence either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit or proceeding, civil or criminal, in any court, or before any judge, justice, jury, or other person having, by law, authority to hear, receive, and examine evidence; and every person so offered shall be admitted to give evidence, notwithstanding such person may or shall have an interest in the matter in question, or in the event of the trial of the issue, or of the suit or other proceeding in which he is offered as a witness. This section shall not be construed to apply to attesting witnesses to wills"); § 1793 ("On the trial of any issue, or of any matter or question, or on any inquiry arising in any action, suit, or other proceeding in court, or before any judge, justice, jury, or other person having, by law, authority to hear and examine evidence, the parties themselves and the person in whose behalf any suit or other proceeding may be brought or defended, shall, except as otherwise provided, be competent and compellable to give evidence, either 'viva voce' or by deposition, according to the practice of the Court, in behalf of either or any of the parties to said action, suit, or other proceeding. Nothing in this section shall be construed to apply to any action or other proceeding in any court instituted in consequence of adultery, or to any action for criminal conversation"); § 1799 ("In the trial of all indictments, complaints, or other proceedings against persons charged with the commission of crimes, offences, and misdemeanors, the person so charged is at his own request, but not otherwise, a competent witness, and his failure to make such request shall not create any presumption against him. But every such person examined as a witness shall be subject to cross-examination as are other witnesses. Except as above provided, nothing in this section shall render any person, who in any

criminal proceeding is charged with the commission of a criminal offence, competent or compellable to give evidence against himself, nor render any person compellable to answer any question tending to criminate himself"); §§ 1794, 1796 (preserves certain disqualifications for parties to actions on judgments rendered prior to Aug. 1, 1868).

NORTH DAKOTA: *Compiled Laws* 1913, § 7862 ("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"); § 7863 ("A party to an action, or in case a corporation is a party, the president, secretary or other principal officer or general managing agent of such corporation, may be examined as a witness at the instance of an adverse party or any of several adverse parties and for that purpose may be compelled in the same manner and subject to the same rules of examination as any other witness to testify either at the trial, or conditionally, or upon commission"); § 7868 ("A party examined by an adverse party as in this chapter provided may be examined on his own behalf, subject to the same rules of examination as other witnesses"); § 7869 ("A person for whose immediate benefit the action is prosecuted or defended, though not a party to the action, may be examined as a witness in the same manner and subject to the same rules of examination as if he was named as a party"); § 7870 ("A party to the record of any civil action or proceeding, or a person for whose immediate benefit such action or proceeding is prosecuted or defended, or the directors, officers, superintendent or managing agents of any corporation which is a party to the record in such action or proceeding, may be examined upon the trial thereof as if under cross-examination at the instance of the adverse party or parties or any of them, and for that purpose may be compelled in the same manner and subject to the same rules for examination as any other witness to testify, but the party calling for such examination shall not be concluded thereby, but may rebut it by counter testimony"); § 7871 ("No person offered as a witness in any action or proceeding in any court, or before any officer or person having authority to examine witnesses or hear evidence, shall be excluded or excused by reason of such person's interest in the event of the action or proceeding; or because such person is a party thereto, or because such person is the husband or wife of a party thereto, or of any person in whose behalf such action or proceeding is commenced, prosecuted, opposed, or defended, except as hereinafter provided: 1. A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent, nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this subdivision does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other. 2. In civil actions or proceedings by or against executors, administrators, heirs-at-law, or next of kin, in which judgment may be rendered or ordered entered for or against them, neither party shall be allowed to testify against the other as to any transaction whatever with or statement by the testator or intestate, unless called to testify thereto by the opposite party; and where a corporation is a party in proceedings mentioned in this section, no agent, stockholder, officer or manager of such corporation shall be permitted to testify to any transaction had with the testator or intestate. But if the testimony of a party to the action or proceeding has been taken and he shall afterwards die, and after his death the testimony so taken shall be used upon any trial or hearing in behalf of his executors, administrators, heirs-at-law, or next of kin, then the other party shall be a competent witness as to any and all matters to which the testimony so taken relates; provided, further, that in any action or proceeding by or against any surviving husband or wife touching any business or property of either, or in which the survivor or his or her family are in any way interested, such husband or wife will be permitted, if they shall so desire, to testify under the general rules of evidence as to any or all transactions and conversations had with the deceased husband or wife during their lifetime touching such business or property"); § 9381 (conviction of perjury or subornation disqualifies the person as a witness in any proceeding "upon his own behalf", and in any proceeding "between adverse parties", against objection, until judgment of perjury, etc., is reversed; but no rights innocently acquired by a person claiming under such proceedings shall be prejudiced by illegal admission of an infamous person); § 10834 ("When two or more persons are included in the same information or indictment, the Court may, at any time before the defendants have gone into their defence, on the application of the State's attorney, direct any defendant to be discharged from the information or indictment, that he may be a witness for the State"); § 10835 ("When two or more persons are included in the same information or indictment, and the Court is of the opinion that in regard to a particular defendant there is not sufficient evidence to put him on his defence, it must order him to be discharged before the evidence is closed, that he may be a witness for his co-defendant"); § 10837 ("In the trial of a criminal action or proceeding before any Court or magistrate of this State, whether prosecuted by information, indictment, complaint, or otherwise, the defendant shall, at his own request and not

otherwise, be deemed a competent witness; but his neglect or refusal to testify shall not create or raise any presumption of guilt against him; nor shall such neglect or refusal be referred to by any attorney prosecuting the case, or considered by the Court or jury before whom the trial takes place"); § 9600 (family-desertion; like Wis. St. 1911, c. 576); § 10182 (offenses against liquor-law; buyers of the liquor, and members of a club, to be competent).

OHIO: *General Code Annotated* 1921, § 11493 ("All persons are competent witnesses except those of unsound mind, and children under ten years of age who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly"); § 11494 ("The following persons shall not testify in certain respects: . . . 3. Husband or wife, concerning any communication made by one to the other, or an act done by either in the presence of the other, during coverture, unless the communication was made, or act done, in the known presence or hearing of a third person competent to be a witness; the rule shall be the same if the marital relation has ceased to exist. 4. A person who assigns his claim or interest, concerning any matter in respect to which he would not, if a party, be permitted to testify. 5. A person who, if a party, would be restricted in his evidence under the next following section where the property or thing is sold or transferred by an executor, administrator, guardian, trustee, heir, devisee, or legatee, shall be restricted in the same manner in any action or proceeding concerning such property or thing"); § 11495 ("A party shall not testify when the adverse party is a guardian or trustee of either a deaf and dumb or an insane person, or of a child of a deceased person, or is an executor or administrator, or claims or defends as heir, grantee, assignee, devisee, or legatee of a deceased person, except — 1. The facts which occurred subsequent to the appointment of the guardian or trustee of an insane person, and, in the other cases, subsequent to the time the decedent, grantor, assignor, or testator died. 2. When the action or proceeding relates to a contract made through an agent by a person since deceased, and the agent is competent to testify as a witness, a party may testify on the same subject. 3. If a party, or one having a direct interest, testify to transactions or conversations with another party, the latter may testify as to the same transactions or conversations. 4. If a party offer evidence of conversations or admissions of the opposite party, the latter may testify concerning the same conversations or admissions. 5. In an action or proceeding by or against a partner or joint contractor, the adverse party shall not testify to transactions with or admissions by a partner or joint contractor since deceased, unless they were made in the presence of the surviving partner or joint contractor; this rule applies without regard to the character in which the parties sue or are sued. 6. If the claim or defence is founded on a book account, a party may testify that the book is his account book, that it is a book of original entries, that the entries therein were made by himself, a person since deceased, or a disinterested person, non-resident of the county; the book shall then be competent evidence, and may be admitted in evidence in any case, without regard to the parties, upon like proof by any competent witness. 7. If after testifying orally a party dies, the evidence may be proved by either party on a further trial of the case, whereupon the opposite party may testify to the same matters. 8. If a party dies and his deposition be offered in evidence, the opposite party may testify as to all competent matters therein. Nothing in this section contained shall apply to actions for causing death, or actions or proceedings involving the validity of a deed, will, or codicil; and when a case is plainly within the reason and spirit of the last three sections, though not within the strict letter, their principles shall be applied"); § 11988 (parties in divorce and alimony cases are to be competent like any other witness); § 13659 ("No person shall be disqualified as witness in any criminal prosecution by reason of his interest in the event thereof, as a party or otherwise, or by reason of his conviction of any crime; and husband and wife shall be competent witnesses to testify in behalf of each other in all criminal prosecutions, and to testify against each other in all actions, prosecutions, and proceedings for failure to provide for, neglect of, or cruelty to, their child or children under 16 years of age. Such interest, conviction, or relationship may be shown for the purpose of affecting the credibility of such witness. Husband or wife shall not testify concerning any communication made one to the other, or act done by either in the presence of each other during coverture, unless the communication was made or act done in the known presence or hearing of a third person competent to be a witness, or in case of personal injury by either the husband or wife to the other, or in case of the failure to provide for, or the neglect or cruelty of either to their children under 16 years of age. The rule shall be the same if the marital relation has ceased to exist; but the presence or whereabouts of the husband or wife shall not be construed to be an act under this section"); § 13661 ("On the trial of all indictments, complaints, and other proceedings, against a person charged with the commission of an offence, such person at his own request shall be a competent witness. The neglect or refusal of such person to testify shall not create a presumption against him, nor shall reference be made to, nor comment made upon, such neglect or refusal"); the last sentence of this § 13661 is no longer law; see *post*, § 2272; § 13031–13037 (pandering, etc.; the female is a competent

witness to "any and all matters, including conversations with the accused or by him with third persons in her presence, notwithstanding her having married the accused either before or after" the offence, and whether called "during the existence of the marriage or after its dissolution"); § 13670 ("When two or more persons are jointly indicted, before any of the accused has gone into his defense, the court may direct one of such accused to be discharged, that he may be a witness for the State. An accused person when there is not sufficient evidence to put him upon his defense, may be discharged by the court, or, if not so discharged, shall be entitled to the immediate verdict of the jury, for the purpose of giving evidence for others accused with him. Such order of discharge in either case shall be a bar to another prosecution for the same offense").

OKLAHOMA: *Compiled Statutes* 1921, § 1642 (infamy; like N. D. Comp. L. § 9381); § 585 ("No person shall be disqualified as a witness in any civil action or proceeding by reason of his interest in event of the same, as a party or otherwise, or by reason of his conviction of a crime; but such interest or conviction may be shown for the purpose of affecting his credibility"); § 586 (nothing in the preceding section is to affect the law as to the settlement of estates of decedents, etc., or as to the attestation of wills, etc.); § 587 ("Any party to a civil action or proceeding may compel any adverse party or person for whose benefit such action is instituted, prosecuted, or defended, at the trial or by deposition, to testify as a witness in the same manner and subject to the same rules as other witnesses"); § 588 ("No party shall be allowed to testify in his own behalf, in respect to any transaction or communication had personally by such party with a deceased person, when the adverse party is the executor, administrator, heir-at-law, next of kin, surviving partner, or assignee of such deceased person, where they have acquired title to the cause of action immediately from such deceased person; nor shall the assignor of a thing in action be allowed to testify in behalf of such party concerning any transaction or communication had personally by such assignor with a deceased person in any such case; nor shall such party or assignor be competent to testify to any transaction had personally by such party or assignor with a deceased partner or joint contractor in the absence of his surviving partner or joint contractor, when such surviving partner or joint contractor is an adverse party. If the testimony of a party to the action or proceeding has been taken, and he afterwards die, and the testimony so taken shall be used after his death, in behalf of executors, administrators, heirs-at-law, next of kin, assignee, surviving partner, or joint contractor, the other party or the assignor shall be competent to testify as to any and all matters to which the testimony so taken relates"); § 589 ("The following persons shall be incompetent to testify: First, persons who are of unsound mind at the time of their production for examination. Second, children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly. Third, husband and wife, for or against each other, except concerning transactions in which one acted as the agent of the other, or when they are joint parties and have a joint interest in the action; but in no case shall either be permitted to testify concerning any communication made by one to the other during marriage, whether called while that relation subsisted or afterwards"); § 2696 ("When two or more persons are included in the indictment, the Court may, at any time before the defendants have gone into their defence, on the application of the district attorney, direct any defendant to be discharged from the indictment, that he may be a witness for the Territory"); § 2697 ("When two or more persons are included in the same indictment, and the Court is of opinion that in regard to a particular defendant there is not sufficient evidence to put him on his defence, it must, before the evidence is closed, in order that he may be a witness for his co-defendant, submit its said opinion to the jury, who, if they so find, may acquit the particular defendant for the purpose aforesaid"); § 2698 ("On the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of a crime, offences, and misdemeanors before any Court or committing magistrate in this Territory, the person charged shall at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create any presumption against him, nor be mentioned on the trial; if commented upon by counsel, it shall be ground for a new trial"); § 2699 ("The rules of evidence in civil cases are applicable also to criminal cases, except as otherwise provided in this chapter"); St. 1895, c. 41, § 29 ("neither husband nor wife shall in any case be a witness against the other, except in a criminal prosecution for a crime committed one against the other, but they may in all cases be witnesses for each other, and shall be subject to cross-examination as other witnesses, and shall in no event on a criminal trial be permitted to disclose communications made by one to the other, except on a trial of an offence committed by one against the other").

OREGON: *Laws* 1920, § 731 ("All persons without exception, except as otherwise provided in this title, who, having organs of sense can perceive, and perceiving can make known their perceptions to others, may be witnesses. Therefore neither parties nor other persons who have an interest in the event of an action, suit, or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters

of religious belief; although in every case, except the latter, the credibility of the witness may be drawn in question, as provided in § 704"); § 732 ("The following persons are not admissible: 1. Those of unsound mind at the time of their production for examination. 2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly"; amended by St. 1893, p. 134, by permitting a deceased opponent's hearsay statements to be received; see quotation *post*, § 1576); § 733 ("There are particular relations in which it is the policy of the law to encourage confidence, and to preserve it inviolate; therefore a person cannot be examined as a witness in the following cases: 1. A husband shall not be examined for or against his wife without her consent, nor a wife for or against her husband without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during marriage. But the exception does not apply to a civil action, suit, or proceeding, by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other"); § 734 ("If a party to the suit, action, or proceeding offer himself as a witness, that is to be deemed a consent to the examination also of a wife, husband, attorney, clergyman, physician, or surgeon on the same subject, within the meaning of subdivisions 1, 2, 3, and 4 of the last section"); § 1530 ("When two or more persons are charged in the same indictment, the Court may, at any time before the defendant has gone into his defence, on the application of the district attorney, direct any defendant to be discharged from the indictment, so that he may be a witness for the State"); § 1531 ("When two or more persons are charged in the same indictment, and the Court is of opinion that, in regard to a particular defendant, there is not sufficient evidence to put him on his defence, it must, if requested by another defendant then on trial, order him to be discharged from the indictment, before the evidence is closed, that he may be a witness for his co-defendant"); § 1533 ("The law of evidence in civil actions is also the law of evidence in criminal actions and proceedings, except as otherwise specially provided in this Code"); § 1534 ("On the trial of or examination upon all indictments, complaints, information, and other proceedings before any Court, magistrate, jury, grand jury, or other tribunal, against persons accused or charged with the commission of crimes or offences, the person so charged or accused shall, at his own request but not otherwise, be deemed a competent witness, the credit to be given to his testimony being left solely to the jury, under the instructions of the Court, or to the discrimination of the magistrate, grand jury, or other tribunal before which such testimony may be given; provided, his waiver of such right shall not create any presumption against him; that such defendant or accused, when offering his testimony as a witness in his own behalf, shall be deemed to have given to the prosecution a right to cross-examination upon all facts to which he has testified, tending to his conviction or acquittal"); § 1535 ("In all criminal actions, where the husband is the party accused, the wife shall be a competent witness, and when the wife is the party accused, the husband shall be a competent witness; but neither husband nor wife, in such cases, shall be compelled or allowed to testify in such case unless by consent of both of them; provided, that in all cases of personal violence upon either by the other, the injured party, husband or wife, shall be allowed to testify against the other; provided, further, that in all criminal actions for polygamy, or adultery, the husband or wife of the accused shall be a competent witness, and shall be allowed to testify against the other, and without the consent of the other, as to the fact of marriage"); § 1309–8 (administration of estates of persons absent and presumed dead; "no person shall be disqualified from testifying by reason of his or her relationship as husband or wife to the presumed decedent, or of his or her interest in the estate of such person"); § 2091 (placing wife in house of prostitution; "the wife shall be a competent witness against her husband"); § 2171 (non-support of family by husband; privilege as to confidential communications not to be applicable; wife to be "competent and compellable").

PENNSYLVANIA: *Digest of Statute Law* 1920: St. 1887, May 23, § 1, Dig. § 21835, Witnesses, ("Except upon a preliminary hearing before a magistrate for the purpose of determining whether a person charged with a criminal offence triable in the Court of Oyer and Terminer ought to be committed for trial, and except also upon a hearing under 'habeas corpus' for the purpose of determining whether bail ought to be taken upon a commitment for murder in the first degree, or for the purpose of determining in any case how much bail ought to be required, or for the purpose of determining in any case whether a person committed for trial ought to be further held, and except, also, upon hearings before a grand jury, in none of which cases shall evidence for the defendant be heard, and except also as provided in § 2 of this act, all persons shall be fully competent witnesses in any criminal proceeding before any tribunal"); ib. § 2, cl. (*a*), Dig. § 21836 ("In such criminal proceedings, a person who has been convicted in a court of this Commonwealth of perjury, which term is hereby declared to include subornation of perjury, shall not be a competent witness for any purpose, although his sentence may have been fully complied with, unless the judgment or conviction be judicially set aside or reserved [reversed?], or unless the proceeding be one to

punish or prevent injury or violence attempted, done, or threatened to his person or property, in which cases he shall be competent to testify"); ib. § 2, cl. (*b*), as amended St. 1909, Apr. 27, § 1, Dig. § 21837 ("Nor shall husband and wife be competent or permitted to testify against each other, or in support of a criminal charge of adultery alleged to have been committed by or with the other, except that, in proceedings for desertion and maintenance, and in criminal proceeding against either for bodily injury or violence attempted, done, or threatened upon the other, or upon the minor children of said husband and wife, or the minor children of either of them, or any minor child in their care or custody or in the care or custody of either of them, each shall be a competent witness against the other; and except, also, that either shall be competent merely to prove the fact of marriage in support of a criminal charge of adultery alleged to have been committed by or with the other"); ib. § 2, cl. (*c*), Dig. § 21839 ("Nor shall either husband or wife be competent or permitted to testify to confidential communications made by one to the other, unless this privilege be waived upon the trial"); ib. § 4, Dig. § 21844 ("In any civil proceeding before any tribunal of this Commonwealth, or conducted by virtue of its order or direction, no liability merely for costs nor the right to compensation possessed by an executor, administrator, or other trustee, nor any interest merely in the question on trial, nor any other interest or policy of law, except as is provided in § 5 of this act, shall make any person incompetent as a witness"); ib. § 5, cl. (*a*), Dig. § 21845 (provisions of § 2, cl. (*a*), *supra*, applied to civil proceedings); ib. § 5, cl. (*b*), Dig. § 21846 (provisions of § 2, cl. (*c*), *supra*, applied to civil proceedings); ib. § 5, cl. (*c*), Dig. § 21847 ("Nor shall husband or wife be competent or permitted to testify against each other, except in those proceedings for divorce in which personal service of the subpœna or of a rule to take depositions has been made upon the opposite party, or in which the opposite party appears and defends, in which case either party may testify fully against the other, and except also that in any proceeding for divorce either party may be called merely to prove the fact of marriage"); St. 1913, Mar. 27, Dig. § 21850 ("In any proceedings brought by either the husband or wife to protect or recover the separate property of either, both shall be fully competent witnesses, except that neither may testify to confidential communications made by one to the other, unless this privilege be waived upon the trial"); St. 1887, May 23, § 5, cl. (*e*), Dig. § 21853 ("Nor, where any party to a thing or contract in action is dead, or has been adjudged a lunatic, and his right thereto or therein has passed, either by his own act or by the act of the law, to a party on the record who represents his interest in the subject in controversy, shall any surviving or remaining party to such thing or contract, or any other person whose interest shall be adverse to the said right of such deceased or lunatic party, be a competent witness to any matter occurring before the death of said party or the adjudication of his lunacy; unless the proceeding is by or against the surviving or remaining partners, joint promisors, or joint promisees, of such deceased or lunatic party, and the matter occurred between such surviving or remaining partners, joint promisors, or joint promisees and the other party on the record, or between such surviving or remaining partners, promisors, or promisees and the person having an interest adverse to them, in which case any person may testify to such matters; or, unless the action be ejectment against several defendants, and one or more of said defendants disclaims of record any title to the premises in controversy at the time the suit was brought and also pays into Court the costs accrued at the time of his disclaimer, or gives security therefor as the Court in its discretion may direct, in which case such disclaiming defendant shall be a fully competent witness; or, unless the issue or inquiry be 'devisavit vel non', or be any other issue or inquiry respecting the property of a deceased owner, and the controversy be between parties respectively claiming such property by devolution on the death of such owner, in which case all persons shall be fully competent witnesses"); ib. § 5, cl. (*f*), Dig. § 21854 ("But no person who is incompetent under clauses (*a*), (*b*), (*c*), and (*d*) [cl. *d* deals with attorneys' privileged communications] of this section shall become competent by the general language of clause (*e*)"); ib. § 6, Dig. § 21855 ("Any person, who is incompetent under clause (*e*) of section five by reason of interest, may, nevertheless, be called to testify against his interest, and in that event he shall become a fully competent witness for either party; and such person shall also become fully competent for either party by a release or extinguishment in good faith of his interest, upon which good faith the trial judge shall decide as a preliminary question"); St. 1891, June 11, § 1, Dig. § 21857 ("Hereafter, in any civil proceeding before any tribunal of this Commonwealth, or conducted by virtue of its order or direction, although a party to the thing or contract in action may be dead or may have been adjudged a lunatic, and his right thereto or therein may have passed, either by his own act or by the act of the law, to a party on a record who [re]presents his interest in the subject in controversy, nevertheless, any surviving or remaining party to such thing or contract or any other person whose interest is adverse to the said right of such deceased or lunatic party, shall be a competent witness to any relevant matter, although it may have occurred before the death of said party or the adjudication of his lunacy, if and only if such relevant matter occurred between himself and another person who may be living

at the time of the trial and may be competent to testify, and who does so testify upon the trial, against such surviving or remaining party or against the person whose interest may be thus adverse, or if such relevant matter occurred in the presence or hearing of such other living or competent person"); ib. § 2, Dig. § 21858 (foregoing testimony made competent may be given by deposition, which will be competent even though the other person "may die or become incompetent after the taking of such deposition"); St. 1887, May 23, § 7, as amended by St. 1911, Mar. 30, § 1, Dig. § 21863 ("In any civil proceeding, whether or not it be brought or defended by a person representing the interests of a deceased or lunatic assignor of any thing or contract in action, a party to the record or a person for whose immediate benefit such proceeding is prosecuted or defended, or any other person whose interest is adverse to the party calling him as a witness, may be compelled by the adverse party to testify as if under cross-examination, subject to the rules of evidence applicable to witnesses under cross-examination, and the adverse party calling such witnesses shall not be concluded by his testimony; but such person so cross-examined shall become thereby a fully competent witness for the other party as to all relevant matters, whether or not these matters were touched upon in his cross-examination; and also where one of several plaintiffs or defendants, or the person for whose immediate benefit such proceeding is prosecuted or defended, or such director or officer, or such other person having an adverse interest, is cross-examined under this section, his co-plaintiffs or co-defendants or fellow-directors or officers, shall thereby become fully competent witnesses on their own behalf or on behalf of the corporation or association of which they shall be directors or officers, as to all relevant matters, whether or not these matters were touched upon in such cross-examination"); St. 1887, May 23, § 10, Dig. § 21864 ("Except defendants actually upon trial in a criminal court, any competent witness may be compelled to testify in any proceeding, civil or criminal; but he may not be compelled to answer any question which, in the opinion of the trial judge, would tend to criminate him; nor may the neglect or refusal of any defendant, actually upon trial in a criminal court, to offer himself as a witness be treated as creating any presumption against him, or be adversely referred to by Court or counsel during the trial"); St. 1867, Apr. 13, § 3, Dig. § 9063, Desertion (criminal proceedings for desertion and non-support; wife shall be competent for State, and husband also shall be "a competent witness"); St. 1899, April 11 (preamble stating a purpose to remove existing disadvantages of the wife); ib. § 1, Dig. § 21848 ("In any civil action brought against the husband to recover necessaries furnished to the wife, if the husband makes defence at the trial upon the ground that the wife had left him without justification or excuse before the necessaries were furnished, or upon any other ground which attacks the wife's character or conduct, she shall be a competent witness in rebuttal for the plaintiff"); ib. § 2, Dig. § 21840 ("In any criminal proceeding brought against the husband, if he makes defence at the trial upon any ground which attacks the wife's character or conduct, she shall be a competent witness in rebuttal for the Commonwealth"); St. 1903, Mar. 13, § 3, Dig. § 9068, Desertion (in a prosecution for a husband's failure to support, "the wife shall be a competent witness"); St. 1907, May 8, § 1, Dig. § 21849, Witnesses ("in all civil actions brought by the husband, the wife shall be a competent witness in rebuttal, when her character or conduct is attacked upon the trial thereof, but only in regard to the matter of her character or conduct"); St. 1907, May 29, § 3 (parent's neglect of child; rule against "disclosure of confidential communications between husband and wife" shall not apply); St. 1909, April 27, § 1, Dig. § 14603, Married Women (wife desertion; action for maintenance; "husband and wife shall be fully competent witnesses"); St. 1911, May 11, Dig. § 21837 (amending St. 1887, May 23, Clause *b*; husband and wife may testify to fact of marriage on a charge of bigamy); St. 1913, May 1, Dig. § 21851, Witnesses (civil action against husband by deserted wife; wife to be competent against husband); St. 1913, May 9, Dig. § 9158, Divorce (divorce; libellant competent to prove residence); St. 1919, July 12, Dig. § 9072, Desertion (family-desertion; "the wife" or any custodian of minor children "shall be a competent witness"); St. 1915, April 21, Dig. § 9177, Divorce ("in all proceedings for divorce the libellant shall be fully competent to prove all the facts", regardless of personal service, etc.; removing the limitations of St. 1887, § 5, *supra*, and amending St. 1911, June 8, which originally attempted the enlargement).

PHILIPPINE ISLANDS: *Code of Civil Procedure* 1901, § 382 (like Cal. C. C. P. § 1879); § 383, par. 1 (like Cal. C. C. P. § 1880, par. 1, adding "to such degree as to be incapable of perceiving and making known their perceptions to others"); par. 2 (like ib. par. 2); par. 3 (like Cal. C. C. P. § 1881, par. 1, omitting the last two clauses); par. 7 (like Cal. C. C. P. § 1880, par. 3, but including "persons of unsound mind" with deceased persons); *Civil Code*, ed. 1918, §§ 1244–1246 (like P. R. Rev. St. & C. 1911, §§ 4318–4320); § 1247 ("The following are disqualified by law: 1. Those directly interested in the suit; 2. Ascendants as to suits of their descendants and the latter as to those of the former; 3. The father-in-law or mother-in-law as to suits of the son-in-law or daughter-in-law, and vice versa; 4. The husband as to suits of his wife and the wife as to those of her husband; 5. Any person who is

required to keep secret matters made known to him by reason of his station or profession, as to matters so communicated; 6. Those specially disqualified to be witnesses to certain instruments. — The provisions of paragraphs 2, 3, and 4 shall not be applicable to suits in which it is sought to prove the birth or death of children, or any other private family matter which it may not be possible to prove by other means"); *Penal Code* 1911, Gen. Order 58 of 1900, § 15 ("In all criminal prosecutions, the defendant shall be entitled . . . 3, to testify as a witness in his own behalf; but if a defendant offers himself as a witness, he may be cross-examined as any other witness; his neglect or refusal to be a witness shall not in any manner prejudice or be used against him"); § 34 (like Cal. P. C. § 1099; but replaced by Act No. 2709, *infra*); § 35 (like Cal. P. C. § 1100); § 55 (like Cal. C. C. P. § 1879, omitting the exceptions); § 58 ("except with the consent of both, or except in cases of crime committed by one against the other, neither husband nor wife shall be a competent witness for or against the other in a criminal action or proceeding to which one or both shall be parties"); St. 1917, Act No. 2709 ("When two or more persons are charged with the commission of a certain crime, the competent court, at any time before they have entered upon their defense, may direct any of them to be discharged, that he may be a witness for the Government when in the judgment of the court: (*a*) There is absolute necessity for the testimony of the accused whose discharge is requested; (*b*) There is no other direct evidence available for the proper prosecution of the crime committed, except the testimony of said accused; (*c*) The testimony of said accused can be substantially corroborated in its material points; (*d*) Said accused does not appear to be the most guilty, and (*e*) Said accused has not at any time been convicted of the crime of perjury or false testimony or of any other crime involving moral turpitude").

PORTO RICO: *Revised Statutes and Codes* 1911; the first group of provisions are adopted from the test of the California Code of Civil Procedure; the second group represent the Spanish law of the original Civil Code; they are obviously inconsistent: § 1406 (like Cal. C. C. P. § 1879); § 1407 (like Cal. C. C. P. § 1880, omitting par. 3); § 1408 (like Cal. C. C. P. § 1881, par. 1, omitting the last clause); § 1409 (like Cal. C. C. P. § 1882, as originally enacted, now repealed; consent to the foregoing testimony of § 1408 is "conclusively implied" when the person who made the communication voluntarily testifies to it in whole or in part; and the judge may also infer a consent in a given case; furthermore, when one spouse is dead or incapacitated, the other may testify to communications with consent of the representative); § 4318 ("Evidence of witnesses shall be admissible in all cases in which it should not have been expressly forbidden"); § 4319 ("All persons, of either sex, who are not disqualified by natural incapacity or by the provisions of law, may be witnesses"); § 4320 ("The following are disqualified by natural incapacity: 1. — Lunatics or insane persons. 2. — The blind and deaf, in those things a knowledge of which depends upon sight and hearing. 3. — Minors under 14 years of age"); §§ 6271, 6272 (joint indictees; like Cal. P. C. §§ 1099, 1100); 1915, Wilcox *v.* Axtmayer, 23 P. R. 319 (St. 1904, disqualifying interested survivors, was replaced by St. 1905, Evid. Act §§ 38, 39, which adopted Cal. C. C. P. §§ 1879, 1880 without the clauses disqualifying survivors; the ruling seems unsound).

RHODE ISLAND: *General Laws* 1909, c. 292, § 37 ("No person shall be disqualified from testifying in any action at law, suit in equity, or other proceeding at law or in equity, by reason of his being interested therein or being a party thereto"); § 39 ("In the trial of every civil cause, the husband or wife of either party shall be deemed a competent witness; provided, that neither shall be permitted to give any testimony tending to criminate the other or to disclose any communication made to him or her by the other, during their marriage, except on trials of petitions for divorce between them, and trials between them involving their property rights"); § 43 ("No person shall be deemed an incompetent witness because of his conviction of any crime, or sentence to imprisonment therefor; but shall be admitted to testify like any other witness, except that conviction or sentence for any crime or misdemeanor may be shown to affect his credibility"); § 44 ("No respondent in a criminal prosecution, offering himself as a witness, shall be excluded from testifying because he is such respondent; and neglect or refusal so to testify shall create no presumption nor be used in argument against him"); § 45 ("The husband or wife of any respondent in a criminal prosecution, offering himself or herself as a witness, shall not be excluded from testifying therein because he or she is the husband or wife of such respondent").

SOUTH CAROLINA: *Constitution* 1882, Art. I, § 12 ("No person shall be disqualified as a witness . . . or be subjected in law to any other restraints or disqualifications in regard to any personal rights than such as are laid upon others under like circumstances"; this does not appear in the Constitution of 1895); *Code of Criminal Procedure* 1922, § 966 ("In the trial of all criminal cases, the defendant shall be allowed to testify (if he desires to do so, and not otherwise) as to the facts and circumstances of the case"); § 967 ("No person shall be required to answer any question tending to criminate himself, nor shall husband or wife be required to disclose any communication made to each other during their coverture"); § 970 ("In every case where two or more persons shall be charged in any indictment or

fighting a duel, or being concerned therein, either of such persons may be used as a witness or witnesses in behalf of the State, by having his or their names stricken out of the indictment, or otherwise, at the discretion of the Attorney General or Solicitor, or other attorney acting for the State, conducting such prosecution, of which an entry shall immediately be made on the minutes of the Court"); *Code of Civil Procedure* 1922, § 667 ("A party to an action may be examined as a witness, at the instance of the adverse party, or of any one of several adverse parties, and for that purpose may be compelled, in the same manner and subject to the same rules of examination as any other witness, to testify, either at the trial, or conditionally, or upon commission"); § 672 ("A party examined by an adverse party, as in this Chapter provided, may be examined on his own behalf, subject to the same rules of examination as other witnesses. But if he testify to any new matter, not responsive to the inquiries put to him by the adverse party, or necessary to explain or qualify his answers thereto, or discharge when his answers would charge himself, such adverse party may offer himself as a witness on his own behalf in respect to such new matter, subject to the same rules of examination as other witnesses, and shall be so received"); § 673 ("A person for whose immediate benefit the action is prosecuted or defended, though not a party to the action, may be examined as a witness, in the same manner and subject to the same rules of examination as if he were named as a party"); § 674 ("A party may be examined on behalf of his co-plaintiff, or of a co-defendant, as to any matter in which he is not jointly interested or liable with such co-plaintiff or co-defendant, and as to which a separate and not joint verdict or judgment can be rendered. And he may be compelled to attend in the same manner as at the instance of an adverse party; but the examination thus taken shall not be used in the behalf of the party examined. And whenever, in the case mentioned in Sections 667 and 668, one of the several plaintiffs or defendants who are joint contractors, or are united in interest, is examined by the adverse party, the other of such plaintiffs or defendants may offer himself as a witness to the same cause or action or defense, and shall be so received"); § 683 ("No person offered as a witness shall be excluded by reason of his interest in the event of the action"); § 684 ("A party to an action or special proceeding in any and all courts, and before any and all officers and persons acting judicially, may be examined as a witness in his own behalf, or in behalf of any other party, conditionally, on commission, and upon the trial or hearing in the case, in the same manner and subject to the same rules of examination as any other witness; provided, however, that no party to the action or proceeding, nor any person who has a legal or equitable interest which may be affected by the event of the action or proceeding, nor any person who previous to such examination has had such an interest, however the same may have been transferred to or come to the party to the action or proceeding, nor any assignor of anything in controversy in the action, shall be examined in regard to any transaction or communication between such witness and a person at the time of such examination deceased, insane, or lunatic, as a witness against a party then prosecuting or defending the action as executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, or survivor of such deceased person, or as assignee or committee of such insane person or lunatic, when such examination, or any judgment or determination in such action or proceeding, can in any manner affect the interest of such witness or the interest previously owned or represented by him. But when such executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, survivor, or committee shall be examined on his own behalf in regard to such transaction or communication, or the testimony of such deceased or insane person or lunatic, in regard to such transaction or communication (however the same may have been perpetuated or made competent), shall be given in evidence on the trial or hearing in behalf of such executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, survivor, or committee, then all persons not otherwise rendered incompetent shall be made competent witnesses in relation to such transaction or communication on said trial or hearing. Nothing contained in section 8 of this Code of Procedure shall be held or construed to affect or restrain the operation of this section. 1. In any trial or inquiry in any suit, action, or proceeding in any court or before any person having, by law, or consent of parties, authority to examine witnesses or hear evidence, the husband or wife of any party thereto, or of any person in whose behalf any such suit, action, or proceeding is brought, prosecuted, opposed, or defended, shall, except as hereinafter stated, be competent and compellable to give evidence, the same as any other witness, on behalf of any party to such suit, action, or proceeding. 2. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during marriage"); § 704 ("In any proceeding in any of the Courts of this State in which any transaction shall be impeached for fraud by a creditor, or creditors, of either party to such transaction, or by any other person interested in establishing such fraud, the survivor, or survivors, of the parties to such alleged fraud, when one or more of the said parties shall be dead, shall be competent and compellable to testify in behalf of such creditor or creditors, or other person interested in establishing such fraud, any law, rule, or usage to the contrary notwithstanding: Provided, That nothing herein shall render such

survivor, or survivors, competent to testify in relation to such transaction in their own behalf in any proceeding instituted by him or them: Provided, further, That nothing herein shall render any person incompetent as a witness who is now competent under the laws and usage of this State"); *Criminal Laws* 1922, § 253 (perjury, and its penalty; "and the oath of such a person shall not be received in any court of record within this State").

SOUTH DAKOTA: *Revised Code* 1919, § 2717 ("No person offered as a witness in any action or special proceeding in any court or before any officer or person having authority to examine witnesses or hear evidence shall be excluded or excused by reason of such person's interest in the event of the action or special proceeding; or because such person is a party thereto; or because such person is a husband or wife of a party thereto or of any person in whose behalf such action or special proceeding is brought, prosecuted, opposed or defended, except as hereinafter provided: 1. [as amended by St. 1921, c. 412] A husband cannot be examined for or against his wife without her consent; nor a wife for or against her husband without his consent; nor can either, during the marriage, or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this subdivision does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, including cases of bigamy and adultery, nor to any action brought by either the husband or wife against any person to recover damages for criminal conversation with the other, or for the alienation of the affection of the other, or for any cause that involves the moral reputation of the other. 2. In civil actions or proceedings by or against executors, administrators, heirs-at-law or next of kin in which judgment may be rendered or order entered for or against them, neither party nor his assignor nor any person who has or ever had any interest in the subject of the action adverse to the other party, or to his testator or intestate, shall be allowed to testify against such other party as to any transaction whatever with or statement by the testator or intestate, unless called to testify thereto by the opposite party. But if the testimony of a party to the action or proceeding has been taken and he shall afterwards die and after his death the testimony so taken shall be used upon any trial or hearing on behalf of his executors, administrators, heirs-at-law or next of kin, then the other party shall be a competent witness as to any and all matters to which the testimony so taken relates"); § 3759 (like N. D. Comp. L. 1913, § 9381); § 4877 (like N. D. Comp. L. 1913, § 10834); § 4878 (like N. D. Comp. L. 1913, § 10835, except that the Court must submit its opinion to the jury, who may then acquit the person for the purpose); § 4879 (in all proceedings against persons charged with crimes, "the person charged shall, at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create any presumption against him"); § 2979 (in action for seduction, where defendant has married the person seducted, the wife is admissible against her husband); § 4109 (desertion of wife or child; husband or wife competent, but not to be called "against the other without the consent of such other witness").

TENNESSEE: *Shannon's Code* 1916, § 5592 ("Every person of sufficient capacity to understand the obligation of an oath is competent to be a witness"); §§ 5595, 7199 ("Persons are rendered incompetent by conviction and sentence for the following crimes, unless they have been restored to full citizenship, under the law provided for that purpose, viz.: abuse of female child, arson and felonious burning, bigamy, burglary, felonious breaking and entering mansion house, bribery, buggery, counterfeiting, or violating any of the provisions to suppress the same, destroying will, forgery, housebreaking, incest, larceny, perjury, robbery, receiving stolen property, rape, sodomy, stealing bills of exchange or other valuable papers, subornation of perjury"); § 5596 ("In all civil actions in the Courts of this State, no person shall be incompetent to testify because he or she is a party to or interested in the issue tried, or because of the disabilities of coverture, but all persons, including husband and wife, shall be competent witnesses, though neither husband nor wife shall testify to any matter that occurred between them by virtue of or in consequence of the marital relation"); § 5597 ("It shall not be lawful for any party to any action, suit, or proceeding in any court of this State to testify as to any transaction or conversation with or statement by any opposite party in interest, if such opposite [party] is incapacitated or disqualified to testify thereto, by reason of idiocy, lunacy, or insanity, unless called by the opposite side, and then [only] in the discretion of the Court"); § 5598 ("In actions or proceedings by or against executors, administrators, or guardians, in which judgments may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party"); § 5600 ("In the trial of all indictments, presentments, and other criminal proceedings, in any of the courts of this State, the party defendant thereto may, at his own request but not otherwise, be a competent witness to testify therein"); § 5601 ("The failure of the party defendant to make such request and to testify in his own behalf shall not create any presumption against him. But the defendant desiring to testify shall do so before any other testimony for the defence is heard by the Court

trying the case"); § 6655 ("no person verbally challenged" to a duel is competent to prove "the fact of such verbal challenge"); § 6859 (when a witness without his contrivance is examined by grand jury as to election offences, "no person against whom his evidence is given" is competent against him for an election offence committed prior to examination); § 7581 (convicts are competent against each other in prosecutions for prison offences); § 5593 (unbelievers are competent; quoted *post*, § 1828); § 5596*a* 1 ("In all criminal cases in the State, the husband or the wife shall be a competent witness to testify for or against the other"); § 5786 (attorney or other person may not testify in favor of assignee of former person interested with him, "under pretext of having transferred his interest", etc.).

TEXAS: *Revised Civil Statutes* 1911, § 3688 ("No person shall be incompetent to testify on account of color, nor because he is a party to the suit or proceeding or interested in the issue tried"); § 3689 ("The husband or wife of a party to a suit or proceeding, or who is interested in the issue to be tried, shall not be incompetent to testify therein, except as to confidential communications between such husband and wife"); § 3690 ("In actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the others as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party; and the provisions of this article shall extend to and include all actions by or against the heirs or legal representatives of a decedent arising out of any transaction with such decedent"); § 3691 ("No person shall be incompetent to testify on account of his religious opinions or for want of any religious belief"); § 4633 ("In all such suits and proceedings [for divorce from the bonds of matrimony] the husband and wife shall be competent witnesses for and against each other, but neither party shall be compelled to testify as to any matter that will criminate himself or herself"); *Revised Penal Code* 1911, § 91 ("Persons charged as principals, accomplices or accessories, whether in the same indictment or by different indictments, cannot be introduced as witnesses for one another, but they may claim a severance; and if any one or more be acquitted they may testify in behalf of the others"); § 506 *c*, St. 1911, p. 29 (pandering; the woman is a competent witness as to any transaction or conversation of the accused, notwithstanding marriage to him before or after the offense, and whether called during marriage or after dissolution); § 640 *c*, St. 1913, c. 101 (family-desertion; like D. Col. Code 1919, St. 1906); §§ 1449, 1450 (seduction; on a prosecution for marital misconduct after marrying the seduced woman, "the female so seduced shall be a competent witness against the defendant"); *Revised Code of Criminal Procedure* 1911, § 730 (on a prosecution of joint defendants, "when it is apparent that there is no evidence" against one, the jury may be directed to find a verdict as to him, "and if they acquit, he may be introduced as a witness in the case"); § 729 (State attorney may dismiss prosecution as to a defendant jointly indicted, "and the person so discharged may be introduced as a witness by either party"); § 788 ("All persons are competent to testify in criminal actions except the following: 1. Insane persons, who are in an insane condition of mind at the time when they are offered as witnesses, or who were in that condition when the events happened of which they are called to testify. 2. Children or other persons who, after being examined by the Court, appear not to possess sufficient intellect to relate transactions with respect to which they are interrogated, or who do not understand the obligation of an oath. 3. All persons who have been or may be convicted of felony in this State, or in any other jurisdiction, unless such conviction has been legally set aside, or unless the convict has been legally pardoned for the crime of which he was convicted. But no person who has been convicted of the crime of perjury, or false swearing, and whose conviction has not been legally set aside, shall have his competency as a witness restored by a pardon, unless such pardon by its terms specifically restore his competency to testify in a court of justice"); § 789 (in prosecutions for seduction, the female may testify); § 790 ("Any defendant in a criminal action shall be permitted to testify in his own behalf therein; but the failure of any defendant to so testify shall not be taken as a circumstance against him, nor shall the same be alluded to or commented on by counsel in the cause; provided, that where there are two or more persons jointly charged or indicted, and a severance is had, the privilege of testifying shall be extended only to the person on trial"); § 791 ("Persons charged as principals, accomplices, or accessories, whether in the same indictment or other indictments, cannot be introduced as witnesses for one another, but they may claim a severance; and if any one or more be acquitted, or the prosecution against them be dismissed, they may testify in behalf of the others"); § 793 ("All other persons except those enumerated in articles 788 and 805 [795?] whatever may be the relationship between the defendant and witness, are competent to testify"); § 794 ("Neither husband nor wife shall in any case testify as to communications made by one to the other while married; nor shall they, after the marriage relation ceases, be made witnesses as to any such communication made while the marriage relation subsisted, except in a case where one or the other is prosecuted for an offence; and a declaration or communication made by the wife to the husband, or by the husband to the

wife, goes to extenuate or justify an offence for which either is on trial"); § 795 ("The husband and wife may in all criminal actions be witnesses for each other, but they shall in no case testify against each other except in a criminal prosecution for an offence committed by one against the other"); § 796 (like Rev. Civ. St. § 3691); § 797 ("A defendant jointly indicted with others, and who has been tried and convicted, and whose punishment was fine only, may testify for the other defendant after he has paid the fine and costs"); § 802 ("In trials for forgery, the person whose name is alleged to have been forged is a competent witness, and in all cases not otherwise specially provided for, the person injured or attempted to be injured is a competent witness").

UTAH: *Constitution* 1895, Art. I, § 12 ("In criminal prosecutions, the accused shall have the right . . . to testify in his own behalf; . . . a wife shall not be compelled to testify against her husband, nor a husband against his wife"); *Compiled Laws*, 1917, § 7122 ("All persons without exception, otherwise than is specified in the next two sections, who, having organs of sense, can perceive, and, perceiving, can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although, in every case, the credibility of the witness may be drawn in question, by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility"); § 7123 ("The following persons cannot be witnesses: 1. Those who are of unsound mind at the time of their production for examination; 2. Children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly. 3. A party to any civil action, suit, or proceeding, and any person directly interested in the event thereof, and any person from, through, or under whom such party or interested person derives his interest or title or any part thereof, when the adverse party in such action, suit, or proceeding, claims or opposes, sues or defends, as guardian of any insane or incompetent person, or as the executor or administrator, heir, legatee, or devisee of any deceased person, or as guardian, or assignee, or grantee, directly or remotely, of such heir, legatee, or devisee, as to any statement by or transaction with such deceased, insane, or incompetent person, or matter of fact, whatever, which must have been equally within the knowledge of both the witness and such insane, incompetent, or deceased person, unless such witness be called to testify thereto by such adverse party, so claiming or opposing, suing or defending, in such action, suit, or proceeding"); § 7124 ("There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases: 1. A husband cannot be examined for or against his wife, without her consent, nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by or against the other, nor to a criminal action or proceeding for a crime committed by one against the other", nor for crimes referred to in an act making it a misdemeanor to fail to support family, being Comp. L. §§ 8112–8115, or in an act relating to pandering, being ib. §§ 8095–8101); § 9275 ("The rules for determining the competency of witnesses in civil actions shall be applicable also to criminal actions and proceedings except as otherwise provided in this Code"); § 8555 ("The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife"); § 9278 ("Except with the consent of both, or in cases of criminal violence upon one by the other", or on charge of pandering or desertion, as provided in Comp. L. §§ 8095–8101, 8112–8115, "neither husband nor wife shall be a competent witness for or against the other in a criminal action or proceeding to which one or both shall be parties"); § 9279 ("If a defendant offers himself as a witness he may be cross-examined by the counsel or the State the same as any other witness. His neglect or refusal to be a witness shall not in any manner prejudice him, nor be used against him on the trial or proceeding"); § 9280 ("When two or more persons are jointly or otherwise concerned in the commission of an offence, any one of such persons may testify for or against the other in relation to the offence committed, but the testimony of such witness must not be used against him in any criminal action or proceeding"); § 8982 ("When two or more persons shall be included in the same charge, the Court may, at any time before the defendants have gone into their defence, on the application of the county attorney, or other counsel for the State, direct any defendant to be discharged, that he may be a witness for the State"); § 8983 ("When two or more persons shall be included in the same charge, and the Court shall be of the opinion that in regard to a particular defendant there is not sufficient evidence to put him on his defence, it must order him to be discharged before the evidence is closed, that he may be a witness for his co-defendant"); § 384 (bastardy issue; "the mother and defendant shall be admitted as

competent witnesses"); § 4513 ("in criminal prosecutions the accused shall be entitled . . . to testify in his own behalf"); § 8101 (pandering; woman marrying accused may testify for or against him); § 8113 (family-desertion or non-support; husband and wife are competent for "all relevant matters"; privilege for marital communications "shall not apply"); § 8535 (civil death: like Cal. P. C. § 675).

VERMONT: *General Laws* 1917, § 1890 ("A person shall not be disqualified as a witness in a civil cause or proceeding, at law or in equity, by reason of his interest in the event of the same, as a party or otherwise, but such interest may be shown for the purpose of affecting his credit"); § 1891 ("In actions, except those founded on book account, where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the court to be insane, the other party shall not be admitted to testify in his own favor except to meet or explain the testimony of living witnesses produced against him, or upon a question upon which the testimony of the party afterwards deceased or insane has been taken in writing or by a stenographer in open court to be used in such action and is used therein; provided, however, that where such deceased or insane party, while living or before becoming insane, made entries in a book of accounts or cash-book, relating to the transactions involved in such action and showing the receipt or payment of money, in due course of business and before any controversy arose respecting the transaction to which such entries relate, such entries may be admitted in evidence as tending to show the facts therein recited to be true, in any action to which the estate of such deceased or insane party or his grantees or assigns, may be party, and the adverse party in all such actions may meet the evidence of such entries by any proper evidence. Causes pending on the twenty-eighth day of January, nineteen hundred and eleven, in which a trial on the merits thereof had actually been commenced, shall not be affected by the foregoing proviso, but all other causes so pending shall be subject thereto"); § 1892 ("When an executor or administrator is a party, the other party shall not be permitted to testify in his own favor, unless the contract in issue was originally made with a person who is living and competent to testify, except as to acts done or contracts made since the probate of the will, or since the appointment of the administrator, and to meet or explain the testimony of living witnesses produced against him"); § 1893 ("In actions founded on book account, and when the matter in issue and on trial is proper matter of book account, the party living may be a witness in his own favor, so far as to prove in whose handwriting his charges are, and when made, and no further, except to meet or explain the testimony of living witnesses produced against him"); § 1894 ("Husband and wife shall be competent witnesses for or against each other in all causes, civil or criminal, except that neither shall be allowed to testify against the other as to a statement, conversation, letter or other communication made to the other or to another person; nor shall either be allowed in any case to testify as to a matter which, in the opinion of the court, would lead to a violation of marital confidence, but nothing in this section shall be construed so as to prevent a libelant and libelee from testifying as to all matters in divorce causes"); § 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"); § 1897 ("A person shall not be incompetent as a witness in any court, matter or proceeding, by reason of his conviction of a crime other than perjury, subornation of perjury, or endeavoring to incite or procure another to commit the crime of perjury, but the conviction of a crime involving moral turpitude may be given in evidence to affect the credibility of a witness"); § 2354 ("In the trial of complaints, informations, indictments, and other proceedings against persons charged with crimes or offences, the person so charged shall, at his own request and not otherwise, be deemed a competent witness, the credit to be given to his testimony being left solely to the jury, under the instructions of the Court; but the refusal of such person to testify shall not be considered by the jury as evidence against him"); § 5379 ("In actions against a savings bank, savings institution, or trust company, by a husband to recover for moneys deposited by his wife in her name or as her money, the wife may be a witness as if she were an unmarried woman").

VIRGINIA: *Code* 1919, § 4498 (bribery offences; similar to ib. § 4780, *infra*); § 4579 (pandering, etc.); "any female hereinbefore referred to shall be a competent witness in any prosecution under this section to testify to any and all matters, including conversations with the accused or by him with third persons in her presence, notwithstanding she may have married the accused either before or after the violation of any of the provisions of this section, but she shall not be compelled to testify after such marriage"; § 4777 ("Approvers shall not be admitted in any case"); § 4778 ("In any case of felony or misdemeanor, the accused may be sworn and examined in his own behalf, and be subject to cross-examination as any other witness; but his failure to testify shall create no presumption against him, nor be the subject of any comment before the Court or jury by the prosecuting attorney"); § 4779 ("Conviction of felony or perjury shall not render the convict incompetent to testify; but the fact of conviction may be shown in evidence to affect

his credit"); § 4780 ("No person prosecuted for unlawful gaming shall be competent to testify against a witness for the Commonwealth in such prosecution, touching any unlawful gaming committed by him prior to the commencement of such prosecution"); § 6208 ("No person shall be incompetent to testify because of interest; or because of his being a party to any action, suit, or proceeding of a civil nature; but he shall, if otherwise competent to testify, and subject to the rules of evidence and practice applicable to other witnesses, be competent to give evidence in his own behalf and be competent and compellable to attend and give evidence on behalf of any other party to such action, suit, or proceeding; but in any case at law, the Court, for good cause shown, may require any such person to attend and testify 'ore tenus', and, upon his failure to so attend and testify, may exclude his deposition"); § 6210 ("Husband and wife shall be competent to testify for or against each other in all cases civil and criminal except as otherwise provided"); § 6211 ("In criminal cases husband and wife shall be allowed, and subject to the rules of evidence governing other witnesses, may be compelled to testify in behalf of each other; but neither shall be compelled, nor without the consent of the other, allowed to be called as a witness against the other except in the case of a prosecution for an offense committed by one against the other, but if either be called and examined in any case as a witness in behalf of the other, the one so examined shall be deemed competent, and subject to the exception stated in the next section, may be compelled to testify against the other under the same rules of evidence governing other witnesses. The failure of either husband or wife to testify, however, shall create no presumption against the accused, nor be the subject of any comment before the court or jury by the prosecuting attorney. In the prosecution for a criminal offense committed by one against the other, each shall be a competent witness except as to privileged communications"); § 6212 ("Neither husband nor wife shall without the consent of the other be examined in any case as to any communication privately made by one to the other while married, nor shall either of them be permitted without such consent to reveal in testimony after the marriage relation ceases any such communication made while the marriage subsisted").

WASHINGTON: *Constitution* 1889, I, § 22 ("In criminal prosecutions, the accused shall have the right . . . to testify in his own behalf"); *Remington & Ballinger's Codes and Statutes* 1909, § 1210 ("Every person of sound mind and suitable age and discretion, except as hereinafter provided, may be a witness in any action or proceeding"); § 1211 ("No person offered as a witness shall be excluded from giving evidence by reason of his interest in the event of the action, as a party thereto or otherwise, but such interest may be shown to affect his credibility; provided, however, that in an action or proceeding where the adverse party sues or defends as executor, administrator, or legal representative of any deceased person, or as deriving right or title by, through, or from any deceased person, or as the guardian or conservator of the estate of any insane person, or of any minor under the age of fourteen years, then a party in interest or to the record shall not be admitted to testify in his own behalf as to any transaction had by him with or any statement made to him by any such deceased or insane person or by any such minor under the age of fourteen years; provided, further, that this exclusion shall not apply to parties of record who sue or defend in a representative or fiduciary capacity and who have no other or further interest in the action"); § 1212 ("No person offered as a witness shall be excluded from giving evidence by reason of conviction of crime, but such conviction may be shown to affect his credibility; provided, that any person who shall have been convicted of the crime or perjury shall not be a competent witness in any case, unless such conviction shall have been reversed, or unless he shall have received a pardon"); § 1213 ("The following persons shall not be competent to testify: 1. Those who are of unsound mind, or intoxicated at the time of their production for examination. 2. Children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly"); § 1214 ("The following persons shall not be examined as witnesses: 1. A husband shall not be examined for or against his wife without the consent of the wife, nor a wife for or against her husband without the consent of the husband; nor shall either, during marriage or afterwards, without the consent of the other, be examined as to any communication made by one to the other during marriage. But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other"); § 2147 ("Witnesses competent to testify in civil cases shall be competent in criminal prosecutions; . . . Indians shall be competent witnesses as hereinbefore provided [?], or any prosecutions in which an Indian may be a defendant"); § 2148 ("Any person accused of any crime in this State by indictment, information, or otherwise, may, in the examination or trial of the cause, offer himself or herself as a witness in his or her own behalf, and shall be allowed to testify as other witnesses in such case, and when the accused shall so testify, he or she shall be subject to all the rules of law relating to cross-examinations of other witnesses; provided, that nothing in this Code shall be construed to compel such accused persons to offer himself or herself as a witness in such case; and provided, further, that it

shall be the duty of the Court to instruct the jury that no inference of guilt shall arise against the accused if the accused shall fail or refuse to testify as a witness in his or her own behalf"); § 2162 (joint indictees; substantially like Cal. P. C. §§ 1099, 1100, with "may" for "must" in the latter); § 2290 ("Every person convicted of a crime shall be a competent witness in any civil or criminal proceeding; but his conviction may be proved for the purpose of affecting the weight of his testimony; . . . he shall answer any proper question relevant to that inquiry, and the party cross-examining shall not be concluded by his answer thereto"); § 5935 (family-desertion; existing rules "prohibiting the disclosure of confidential communications between husband and wife shall not apply"; "both husband and wife shall be competent witnesses to testify for or against each other", to all facts, including marriage and parentage).

WEST VIRGINIA: *Code* 1914, c. 130, § 22 ("In any civil action, suit, or proceeding, the husband or wife of any party thereto, or of any person in whose behalf any such action, suit, or proceeding is brought, prosecuted, opposed, or defended, shall be competent to give evidence the same as any other witness on behalf of any party to such action, suit, or proceeding, except that no husband or wife shall disclose any confidential communication made by one to the other during their marriage"); § 23 ("No person offered as a witness in any civil action, suit, or proceeding shall be excluded by reason of his interest in the event of the action, suit, or proceeding, or because he is a party thereto, except as follows: No party to any action, suit, or proceeding, nor any person interested in the event thereof, nor any person from, through, or under whom any such party derives any interest or title by assignment or otherwise, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the time of examination deceased, insane, or lunatic, against the executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, or survivor of such deceased person or the assignee or committee of such insane person or lunatic. But this prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, survivor, or committee shall be examined on his own behalf, nor as to which the testimony of such deceased person or lunatic shall be given in evidence; provided, however, that where an action is brought for causing the death of any person by wrongful act, neglect, or default under c. 103 of the Code, the physician sued shall have the right to give evidence in any case in which he is sued; but in this event he can only give evidence as to the medicine or treatment given to the deceased, or operation performed, but he cannot give evidence of any conversation had with the deceased"); § 24 ("No person shall be incompetent as a witness on account of race or color"); c. 152, § 17 ("Except where it is otherwise expressly provided, a person convicted of felony shall not be a witness, unless he has been pardoned or punished therefor, but a person convicted of felony and sentenced therefore, except it be for perjury, may by leave of Court be examined as a witness in any criminal prosecution, though he has not been pardoned or punished therefor, but a person convicted of perjury shall not be a witness in any case, although he may have been pardoned or punished"); § 18 (analogous to § 4780, Virginia Code, but covering a number of offences); § 19 ("In any trial or examination in or before any Court or officer for a felony or misdemeanor, the accused shall, at his or her own request, but not otherwise, be a competent witness on such trial and examination. The wife or husband of the accused shall also, at the request of the accused, but not otherwise, be a competent witness of such trial and examination. But a failure to make such request shall not create any presumption against him or her, nor shall any reference be made to or comment upon such failure by any one during the progress of the trial in the hearing of the jury"); c. 50, § 108 (special rules of competency before justices of the peace); c. 62, § 30, St. 1909, c. 60 (offences against the game laws; like c. 152, § 18); c. 147, § 3 (person convicted of perjury or subornation shall be adjudged incapable "of giving evidence as a witness"); c. 165, § 9 (offences by convicts; "all other convicts in the penitentiary shall be competent witnesses for or against the accused"); St. 1911, c. 22, Code 1914, § 5171 (pandering; the female shall be competent "to testify for or against the accused as to any transaction or as to any conversation with the accused, or by him with another person or persons in her presence", notwithstanding her marriage to him before or after the offence and whether called during the marriage relation or afterwards); St. 1911, c. 23, Code 1914, § 5315 (pimping; similar provision).

WISCONSIN: *Statutes* 1919, § 4068 ("No person shall be disqualified as a witness in any action or proceeding, civil or criminal, by reason of his interest in the event of the same, as a party or otherwise; and every party shall be in every such case a competent witness except as otherwise provided in this chapter. But such interest or connection may be shown to affect the credibility of the witness. Any person who is a party of record in any civil action or proceeding, or any person for whose immediate benefit any such action or proceeding is prosecuted or defended or his or its assignor, officer, agent or employee, or the person who was such officer, agent, or employee at the time of the occurrence of the facts made the subject of the examination, or in case a county, town, village, or city be a party, any officer of such county, town, village, or city, may be examined upon the trial of any such action or proceeding as if

under cross-examination, at the instance of the adverse party or parties or any of them, and for that purpose may be compelled, in the same manner and subject to the same rules for examination as any other witness, to testify; but the party calling for such examination shall not be concluded thereby, and may rebut the evidence given thereon by counter or impeaching testimony"); § 4069 ("No person or stockholder, officer or trustee of a corporation in his or its own behalf or interest nor any person, stockholder, officer or trustee of a corporation from, through, or under whom a party derives his interest or title, shall be examined as a witness in respect to any transaction or communication by him personally with a deceased person or with a person then insane, in any civil action or proceeding in which the opposite party derives his title or sustains his liability to the cause of action from, through or under such deceased person or such insane person, or in which such insane person is a party prosecuting or defending by guardian, unless such opposite party shall first be examined or examine some other witness in his behalf concerning some transaction or communication between the deceased or insane and such party or person, or unless the testimony of such deceased person given in his lifetime or of such insane person be first read or given in evidence by the opposite party; and then, in either case respectively, only in respect to such transaction or communication of which testimony is so given or to the matters to which such testimony relates"); § 4070 ("No party, and no person from, through, or under whom a party derives his interest or title, shall be examined as a witness in respect to any transaction or communication by him personally with an agent of the adverse party or an agent of the person from, through, or under whom such adverse party derives his interest or title, when such agent is dead or insane or otherwise legally incompetent as a witness, unless the opposite party shall first be examined or examine some other witness in his behalf in respect to some transaction or communication between such agent and such other party or person; or unless the testimony of such agent, at any time taken, be first read or given in evidence by the opposite party; and then, in either case respectively, only in respect to such transaction or communication of which testimony is so given or to the matters to which such testimony relates"); § 4071 ("In all criminal actions and proceedings the party charged shall, at his own request, but not otherwise, be a competent witness; but his refusal or omission to testify shall create no presumption against him or any other party thereto"); § 4072 ("A husband or wife shall be a competent witness for or against the other in all cases, except that neither one without the consent of the other, during marriage, nor afterwards, shall be permitted to disclose a private communication, made during marriage, by one to the other, when such private communication is privileged. Such private communication shall be privileged in all except the following cases: 1. Where both husband and wife were parties to the action: 2. Where such private communication relates to a charge of personal violence by one upon the other: 3. Where one has acted as the agent of the other and such private communication relates to matters within the scope of such agency"); § 4073 ("A person who has been convicted of a criminal offence is, notwithstanding, a competent witness, but the conviction may be proved to affect his credibility, either by the record or by his own cross-examination, upon which he must answer any question relevant to that inquiry, and the party cross-examining him is not concluded by his answer"); § 4085 ("The Court before whom an infant or person apparently of weak intellect shall be produced as a witness may examine such person to ascertain his capacity and whether he understands the nature and obligations of an oath"); § 4581*h*–4583 (pandering; like W. Va. Code 1914, § 5171); § 4587*c* (family-desertion; like D. C. St. 1906; with a proviso against self-incrimination).

WYOMING: *Compiled Statutes Annotated* 1920, § 5804 ("All persons are competent witnesses, except those of unsound mind and children under ten years of age who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly"); § 5805 ("In no case shall the husband or wife be a witness against the other, except in criminal proceedings for a crime committed by one against the other, or in a civil action or proceeding by one against the other, or an action brought by the husband for criminal conversation with or seduction of his wife, or in an action brought by either husband or wife for the alienation of each other's affections; but they may in all civil or criminal cases be witnesses for each other the same as though the marital relation did not exist"); § 5806 ("The following persons shall not testify in certain respects: . . . 3. Husband or wife, except as provided in § 5805. 4. A person who assigns his claim or interest, concerning any matter in respect to which he would not, if a party, be permitted to testify. 5. A person who, if a party, would be restricted in his evidence under § 5807, shall, where the property or thing is sold or transferred by an executor, administrator, guardian or trustee, heir, devisee, or legatee, be restricted in the same manner in any action or proceeding concerning such property or thing"); § 5807 ("A party shall not testify where the adverse party is the guardian or trustee of either a deaf and dumb or an insane person, or of a child of a deceased person, or is an executor or administrator, or claims or defends as heir, grantee, assignee, devisee, or legatee of a deceased person; except, 1. To facts which occurred subsequent to the appointment of the guardian or trustee of an

insane person, and, in other cases, subsequent to the time the decedent, grantor, assignor, or testator died; 2. When the action or proceeding relates to a contract made through an agent, by a person since deceased, and the agent testifies, a party may testify on the same subject; 3. If a party, or one having a direct interest, testify to transactions or conversations with another party, the latter may testify as to the same transactions or conversations; 4. If a party offer evidence of conversations or admissions of the opposite party, the latter may testify concerning the same conversations or admissions; 5. In an action or proceeding by or against a partner or joint contractor, the adverse party shall not testify to transactions with or admissions by a partner or joint contractor since deceased, unless the same were made in the presence of the surviving partner or joint contractor; and this rule shall be applied without regard to the character in which the parties sue or are sued; 6. If the claim or defence is founded on a book account, a party may testify that the book is his account book, that it is a book of original entries, that the entries therein were made by himself, a person since deceased, or a disinterested person nonresident of the county; whereupon the book shall be competent evidence; and such book may be admitted in evidence in any case, without regard to the parties, upon like proof by any competent witness; 7. If a party, after testifying orally, die, the evidence may be proved by either party, on a further trial of the case, whereupon the opposite party may testify as to the same matters; 8. If a party die, and his deposition be offered in evidence, the opposite party may testify as to all competent matters therein. — Nothing in this section contained shall apply to actions for causing death, or actions or proceedings involving the validity of a deed, will, or codicil; and when a case is plainly within the reason and spirit of the last three sections, though not within the strict letter, their principles shall be applied"); § 5808 ("A party may compel the adverse party to testify orally or by deposition, as any other witness may be thus compelled"); § 7507 ("The defendant in all criminal cases, in all the courts in this State, may be sworn and examined as a witness, if he so elect, but shall not be required to testify in any case. If the defendant so elect, he may make a statement to the jury without being sworn, but the neglect or refusal to make a statement shall not create any presumption against him, nor shall any reference be made to nor shall any comment be made upon such neglect or refusal"); § 7520 ("When two or more persons shall be indicted together, the Court may, at any time before the defendant has gone into his defence, direct any one of the defendants to be discharged, that he may be a witness for the Territory. An accused party may, also, when there is not sufficient evidence to put him upon his defence, be discharged by the Court, or, if not discharged by the Court, shall be entitled to the immediate verdict of the jury, for the purpose of giving evidence for others accused with him"); § 4993 ("each party in a divorce proceeding shall be competent to testify in his or her own behalf"); § 5036 (desertion of family; like Wash. R. & B. Code 1909, § 5935); § 7511 (except as otherwise provided, the provisions for civil procedure as to witnesses apply in criminal cases so far as applicable).

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

TOPIC I: ORGANIC CAPACITY

SUB-TOPIC A: MENTAL DERANGEMENT

(INSANITY, IDIOCY, DISEASE, INTOXICATION)

CHAPTER XIX.

§ 492. **General Principle of Capacity.** There was a period (and it has not long passed away) when the lunatic and the idiot, in the superstitious belief of the times, which regarded madness as an infliction sent from Heaven, were treated as incapable of being witnesses at all:[1]

1628, Sir EDWARD COKE, Notes upon Littleton, 246 b: "'Non compos mentis' is of four sorts: 1. An idiot, which from his nativity, by a perpetual infirmity, is 'non compos mentis.' 2. He that by sickness, grief, or accident, wholly loses his memory and understanding. 3. A lunatic that hath sometime his understanding and sometime not, 'aliquando gaudet lucidis intervallis', and therefore he is called 'non compos mentis' so long as he hath not understanding. 4. Lastly, he that by his own vicious act for a time depriveth himself of his memory and understanding, as he that is drunken."

1842, Professor *Simon Greenleaf*, Evidence, § 365: "It makes no difference from which cause this defect of understanding may have arisen; nor whether it be temporary and curable, or permanent; whether the party be hopelessly an idiot or maniac, or only occasionally insane, as a lunatic; or be intoxicated; or whether the defect arises from mere immaturity of intellect, as in the case of children. While the deficiency of understanding exists, be the cause of what nature soever, the person is not admissible to be sworn as a witness."

But this indiscriminate rule of exclusion, since the progress of our intelligence respecting mental derangement and defect, has been modified and rationalized. While it is still attempted to draw a line which prevents certain classes of persons from being listened to at all — a doubtful policy in any case (*post*, § 501) — the law endeavors to make its tests fit the purpose. The question being whether the person is trustworthy as a witness, the law now

§ 492. [1] *Accord:* Co. Litt. 6 b; Comyn's, Digest, "Testmoigne", A, 1; 1786, White's Case, 2 Leach Cr. C., 3d ed., 482; 1813, Livingston *v.* Kiersted, 10 Johns. 362. The only relaxation of this rule was permitted where the proposed witness was, at the time of trial, enjoying a lucid interval.

asks whether *in each case* the derangement or defect is such as to make the person untrustworthy as a witness; it no longer excludes absolutely:

1851, *R.* v. *Hill*, 2 Den. & P. C. C. 254; [2] the proposed witness said: "I am fully aware that I have a spirit, and 20,000 of them; they are not all mine; I must inquire — I can, where I am; I know which are mine. Those ascend from my stomach to my head, and also those in my ears. . . . They speak to me constantly; they are now speaking to me. . . . I know what it is to take an oath; my catechism taught me from my infancy when it is lawful to swear"; he was then sworn, and gave a perfectly connected and rational account of a transaction which he reported himself to have witnessed; he was in some doubt as to the day of the week on which it took place, and said: "These creatures insist upon it it was Tuesday night, and I think it was Monday. . . . The spirits assist me in speaking of the date; I thought it was Monday, and they told me it was Christmas Eve, — Tuesday; but, I was an eye-witness." The defence contended that the witness was 'non compos mentis', and that as soon as any unsoundness of mind is manifested in a witness, he ought to be rejected as incompetent; the Court of Criminal Appeal negatived this. CAMPBELL, L. C. J.: "It has been argued that any particular delusion, commonly called monomania, makes a man inadmissible. This would be extremely inconvenient in many cases in proof either of guilt or innocence; it might also cause serious difficulties in the management of lunatic asylums. I am, therefore, of opinion that the judge must, in all such cases, determine the competency and the jury the credibility. . . . The rule which has been contended for would exclude the testimony of Socrates, for he had one spirit always prompting him." TALFOURD, J.: "It would be very disastrous if mere delusions were held to exclude a witness. Some of the greatest and wisest of mankind have had particular delusions."

1865, CHAPMAN, J., in *Kendall* v. *May*, 10 All. 64: "This is the only rational and just rule that can be adopted. Insanity exists in various degrees. . . . Persons who are affected to such an extent that it is expedient to place them in insane hospitals or under guardianship often possess sufficient knowledge . . . of events that took place in their presence to make them useful and trustworthy as witnesses. A rigid rule that would exclude the testimony of all such persons as untrustworthy witnesses would not be conformable to facts and therefore would not be founded in good sense."

1892, WALKER, J., in *Worthington* v. *Mencer*, 96 Ala. 310, 11 So. 72: "One's infirmity may be such as to render it expedient to place him under guardianship, and even to subject him to personal restraints, and yet he may be fully competent to understand the nature of an oath, to observe facts correctly, and to relate them intelligently and truly. A sweeping rule of disqualification which excludes such a person as a witness would be arbitrary and unsupported by sound reason. The true reason for not admitting the testimony of a person 'non compos mentis' in any case is because his malady involves such a want or impairment of faculty that events are not correctly impressed on his mind, or are not retained in his memory, or that he does not understand his responsibility as a witness. When the reason for the exclusion of the witness does not exist, he should be permitted to testify."

This broad and rational principle — that the derangement or defect, in order to disqualify, must be such as substantially negatives trustworthiness upon the *specific subject of the testimony* — is now practically everywhere accepted.[3]

[2] Also reported in 5 Cox Cr. C. 259; 15 Jur. 470; 5 Eng. L. & Eq. 547; 6 Moore P. C. 341.

[3] *Federal:* 1822, Evans v. Hettich, 7 Wheat. 470; 1882, District of Columbia v. Armes, 107 U. S. 521; 1897, Wright v. Express Co., 80 Fed. 85; 1897, Pittsburg & W. R. Co. v. Thompson, 27 C. C. A. 333, 82 Fed. 720 (principle of the Armes case applied; the mere fact of being a committed lunatic is not decisive, though it raises a presumption; the Ohio statute excluding persons of "unsound mind" does not change this principle); 1920, New York Evening Post v. Chaloner, 2d C. C.

In three particular respects this rationalization of the rule affects its present content; in two of them the field of competency becomes broader, in one of them narrower. *First*, the mere fact of derangement or defect does not in itself exclude the witness; the various forms of monomania are no longer treated as equivalent to complete lunacy. *Secondly*, the inquiry is always as to the relation of the derangement or defect to the subject to be testified about. If on this subject no aberration appears, the person is acceptable, however untrustworthy on other subjects. *Thirdly*, the mere fact of soundness at the time of trial is no longer sufficient; for derangement or defect at the time of the events to be testified to may make the person untrustworthy. — The inquiry looks to the capacity to observe as well as to the other elements, the capacity to recollect and to narrate.

§ 493. **Capacity of Observation.** If the inquiry is to deal with the relation of the derangement or defect of each person to his actual trustworthiness, it seems clear that each of the three elements (*ante*, § 478) must be considered.

Therefore, in the first place, an incapacity to *observe intelligently* at the time of the events to be observed would suffice to exclude the person:[1]

1859, WALDO, J., in *Holcomb* v. *Holcomb*, 28 Conn. 179: "The force of all human testimony depends as much upon the ability of the witness to observe the facts correctly as upon his disposition to describe them honestly, and if the mind of the witness is in such a condition that it cannot accurately observe passing events, . . . the story will make but a feeble impression upon the hearer."

But this necessary conclusion does not seem to have been yet generally accepted; the usual attitude is to consider as immaterial a derangement occurring *before* the time of testifying:[2]

A., 265 Fed. 204, 217; *Alabama:* 1877, Allen *v.* State, 60 Ala. 19, *semble;* 1892, Worthington *v.* Mencer, 96 Ala. 310, 11 So. 72 (quoted *supra*); 1892, Walker *v.* State, 97 Ala. 85, 12 So. 83; 1911, McKinstry *v.* Tuscaloosa, 172 Ala. 344, 54 So. 629 (Worthington *v.* Mencer followed); *California:* 1893, Clements *v.* McGinn, — Cal. —, 33 Pac. 920; *Georgia:* 1907, Cuesta *v.* Goldsmith, 1 Ga. App. 48, 57 S. E. 983 (following Pittsburg & W. R. Co. *v.* Thompson); *Idaho:* 1906, State *v.* Simes, 12 Ida. 310, 85 Pac. 914; *Illinois:* 1912, People *v.* Enright, 256 Ill. 221, 99 N. E. 936; *Maryland:* 1915, Weeks *v.* State, 126 Md. 223, 94 Atl. 774 (carnal knowledge of an imbecile; the imbecile held qualified to testify to the offence); *Massachusetts:* 1865, Kendall *v.* May, 10 All. 64 (quoted *supra*); *Minnesota:* 1881, Cannady *v.* Lynch, 27 Minn. 436, 8 N. W. 164; 1916, State *v.* Herring, 268 Mo. 514, 188 S. W. 169 (manslaughter of patients in an insane asylum by the attendants; the patients admitted to testify); *Montana:* 1909, State *v.* Berberick, 38 Mont. 423, 100 Pac. 209 (applied to a confession); *Oklahoma:* 1898, Guthrie *v.* Shaffer, 7 Okl. 459, 54 Pac. 698; *Pennsylvania:* 1921, Com. *v.* Loomis, 270 Pa. 254, 113 Atl. 428 (the disease must be such as renders the witness "incapable of understanding the obligation of an oath and of intelligently testifying as to facts he had observed"; a poor statement of the principle); *South Carolina:* 1893, State *v.* Weldon, 39 S. C. 318, 17 S. E. 689; *Virginia:* 1894, Coleman *v.* Com., 25 Gratt. 873; *Washington:* 1902, Czarecki *v.* R. & N. Co., 30 Wash. 288, 70 Pac. 750; *West Virginia:* 1915, State *v.* Hoke, 76 W. Va. 36, 84 S. E. 1054; — and the cases cited in the ensuing notes.

Compare the statutes quoted *ante*, § 488; their precise wording is not usually of importance, as applied in the decisions.

§ 493. [1] *Accord:* 1897, Wright *v.* Express Co., 80 Fed. 85, *semble;* 1892, Worthington *v.* Mencer, 96 Ala. 310, 11 So. 72; 1882, District of Columbia *v.* Armes, 107 U. S. 521. 1917, Thomas *v.* State, 73 Fla. 115, 74 So. 1; 1915, State *v.* Tetrault, 78 N. H. 14, 95 Atl. 669 (rape under age of feeble-minded female; the trial Court's discretion determines); 1922, Langston *v.* State, — N. C. —, 111 S. E. 561 (idiot witness).

[2] *Accord:* 1822, Evans *v.* Hettich, 7 Wheat. U. S. 470; 1853, Campbell *v.* State, 23 Ala.

1878, HORTON, C. J., in *Sarbach* v. *Jones*, 20 Kan. 500: "The existence of such delusions on his part at the time of the occurrences which he is called upon to relate goes to his credit and not to his competency, when he is of sound mind at the time he is called upon to testify. As there can be neither perfect sanity nor perfect insanity, so no witness, not incompetent within the statute, is to be absolutely excluded because he has been insane and is called upon to narrate matters some of which occurred while he is alleged to have been unconscious."

If this absence of limitation can be regarded as a deliberate step towards the doctrine of the future (*post*, § 501) that all attempts at exclusion for mental or moral incapacity be abandoned, and that each witness' testimony be taken for what it seems to be worth, after testing by cross-examination and impeaching by other evidence, then this step to that end is to be welcomed. But the apparent effect of these decisions seems, in some instances at least, to be an inadvertent one. The Courts have been desirous to point out that the fact of insanity is in itself no bar, and have thus declared broadly that any past insanity, merely as such, is no hindrance, if the witness is sane when testifying.

§ 494. **Capacity of Recollection.** The capacity to recollect is an essential part of the idea of testimonial qualification (*ante*, § 478), and is often noted by the Courts in their definitions.[1] But it seldom occurs as the subject of a specific form of disqualifying aberration.

§ 495. **Capacity of Communication.** The capacity of communication is the third essential requirement (*ante*, § 478), and is the one most commonly in controversy. It has two aspects:

(1) First, it involves a capacity *mentally to understand* the nature of questions put and to form and communicate intelligent answers.[1] (2) Secondly,

74; 1893, Clements *v.* McGinn, — Cal. —, 33 Pac. 920 (former commitment for insanity of a person since discharged does not render incompetent); 1859, Carlton *v.* Carlton, 40 N. H. 20, *semble;* 1922, Nations *v.* State, — Tex. Cr. — , 237 S. W. 570 (unvacated judgment of committal to asylum in March, 1920, the person having later been paroled, held not of itself to disqualify the witness). The statutes (*ante*, § 488) founded on the California Code are responsible chiefly for this result.

§ **494.** [1] 1882, District of Columbia *v.* Armes, 107 U. S. 521; 1892, Worthington *v.* Mercer, 96 Ala. 310, 11 So. 72; 1810, Swift, Evidence, Conn., 46 ("sufficient memory to retain facts"); 1894, Bowdle *v.* R. Co., 103 Mich. 292, 61 N. W. 529; 1881, Cannady *v.* Lynch, 27 Minn. 436, 8 N. W. 164 (assimilating statute to common law); 1822, Hartford *v.* Palmer, 16 Johns. N. Y. 143 (understanding sufficient to "retain in their memory the events"); 1876, People *v.* Hospital, 3 Abb. N. C. 251, Ordronaux, C.; 1874, Coleman's Case, 25 Gratt. Va. 876 (sufficient "to retain in memory the events").

The plausible ruling has been made that a witness may not testify to his *own prior insanity;* 1919, Com. *v.* Dale, 264 Pa. 362, 107 Atl. 743 (homicide; to show the prior insane disposition of the accused's father, the father himself was not admitted to testify to his own insane impulses). But there is no ground of principle for this; and the reason advanced ("it would open the door to a very wide field, into which fraud, dishonesty, and perjury may creep") belongs to the general class of reasons that once formed the basis for extensive testimonial incapacity but were completely discarded more than two generations ago.

§ **495.** [1] 1882, District of Columbia *v.* Armes, 107 U. S. 521; 1892, Walker *v.* State, 97 Ala. 85, 12 So. 83 ("narrate the transaction in what appears to be an intelligent, rational manner"); 1810, Swift, Evidence, 46, Conn. ("sufficient understanding to relate facts"); 1894, Bowdle *v.* R. Co., 103 Mich. 292, 61 N. W. 529; 1909, State *v.* Berberick, 38 Mont. 423, 100 Pac. 209 (insanity at the time of a confession); State *v.* Church, 199 Mo. 605, 98 S. W. 16 (confession admitted, subject to impeachment by evidence of insanity); 1874, Coleman's Case, 25 Gratt. Va. 876.

The following ruling seems erroneous: 1879, State *v.* Feltes, 51 Ia. 496, 1 N. W. 755 (insanity at the time of a confession, held not to exclude it).

does it involve a sense of *moral responsibility*, of the duty to make the narration correspond to the recollection and knowledge, *i.e.* to speak the truth as he sees it? It would seem that the clear absence of such a sense would disqualify the witness. The question is complicated by the necessity, in the earlier cases, of inquiring after that religious sense of the oath-obligation which was in former times paramount, and by the difficulty of determining whether the language of the judges was directed to that subject or to the present one. It is important to know whether, since the oath has been abolished or made optional (*post*, § 1828), an independent testimonial requirement exists, in the shape of a sense of moral responsibility to speak the truth. On principle, it seems to exist; and it has often been pointed out as essential with reference to mental derangement.[2]

§ 496. **Standard of Intelligence is in Trial Court's Discretion.** If it is asked further what shall be the standard by which this capacity to observe, recollect, and communicate is to be judged, the law is found very properly declining to lay down any more detailed rules. The trial Court must determine this capacity.[1] Any more restricted rule, however ingenious, would fail of its purpose, and would hamper rather than assist the process of procuring trustworthy testimony.

§ 497. **Capacity Presumed; Methods of Ascertainment; Judge and Jury.** (*a*) The general rule here applies (*ante*, § 484) that the *capacity* of the person offered as a witness is *presumed*; *i.e.* to exclude a witness on the ground of mental or moral incapacity the existence of the incapacity must be made to appear.[1]

[2] 1851, R. *v.* Hill, 2 Den. & P. C. C. 254, 5 Cox Cr. C. 259, *semble;* 1892, Worthington *v.* Mencer, 96 Ala. 310, 11 So. 72 ("understand his responsibility as a witness"); 1882, District *v.* Armes, 107 U. S. 521, *semble;* 1810, Swift, Evidence, 46, Conn. ("sense of right and wrong"; where "utterly incapable of any sense of truth", they are excluded); 1865, Kendall *v.* May, 10 All. Mass. 63 ("sufficient knowledge of the nature of an oath"; at this time religious tests had been abolished); 1881, Cannady *v.* Lynch, 27 Minn. 437, 8 N. W. 164 ("possess the ability and appreciate the duty to relate events truly"); 1822, Hartford *v.* Palmer, 16 Johns. N. Y. 142; 1874, Coleman's Case, 25 Gratt. Va. 876 ("a sufficient share of understanding to appreciate the nature and obligation of an oath, to distinguish between right and wrong");

Compare the cases cited *post*, § 1822 (oath-capacity).

§ 496. [1] *Eng.* 1840, R. *v.* Hill, 2 Den. & P. C. C. 254, *semble; Federal:* 1882, District of Columbia *v.* Armes, 107 U. S. 521; 1920, New York Evening Post *v.* Chaloner, 2d C. C. A., 265 Fed. 204, 217; *Ariz.* 1914, Fernandez *v.* State, 16 Ariz. 269, 144 Pac. 640 (an aged Indian woman); *Cal.* 1912, People *v.* Harrison, 18 Cal. App. 288, 123 Pac. 200; *Del.* 1841, Armstrong's Lessees *v.* Timmons, 3 Harringt. 345; *Ia.* 1906, State *v.* Crouch, 130 Ia. 478, 107 N. W. 173; *Ky.* 1909, Covington *v.* O'Meara, 133 Ky. 762, 119 S. W. 187; *Mass.* 1865, Kendall *v.* May, 10 All. 63; *Minn.* 1881, Cannady *v.* Lynch, 27 Minn. 436, 8 N. W. 164; *Nebr.* 1891, Davis *v.* State, 31 Nebr. 248, 47 N. W. 851; 1895, State *v.* Meyers, 46 id. 152, 64 N. W. 697; *N. J.* 1819, Den *v.* Vancleve, 2 South. N. J. 653; *W. Va.* 1915, State *v.* Hoke, 76 W. Va. 36, 84 S. E. 1054.

The following decisions commit an atrocity in the name of the law: 1907, State *v.* Smith, 203 Mo. 695, 102 S. W. 526 (rape on a deaf-and dumb woman); 1901, Lee *v.* State, 43 Tex. Cr. 285, 64 S. W. 1047 (rape by intercourse with a woman mentally incapable; the incapacity which is essential to the crime, held also to make the woman incompetent to testify).

For the degree of mental derangement that *impeaches credibility*, see *post*, § 932.

§ 497. [1] 1856, Formby *v.* Wood, 19 Ga. 581 (a lunatic's affidavit); 1888, Mayor *v.* Caldwell, 81 Ga. 78, 7 S. E. 99 (here the deposition of one afterwards adjudged a lunatic, examined by commission and certified to have been duly sworn, was assumed as competent); 1909, Covington *v.* O'Meara, 133 Ky. 762, 119 S. W.

What is sufficient in order that the offering party may be put to the necessity of adducing evidence of capacity, and the judge to the necessity of determining the existence of capacity, has not been made entirely clear by decisions. It may be supposed that a mere *objection raised* and a claim to have a 'voir dire' examination would suffice. Moreover, the *offering of any extrinsic evidence* whatever would suffice to make it necessary for the judge to record a similar finding; though an upper Court should pay no attention to the lack of such a finding unless the nature of the evidence appeared. But it is generally accepted that the fact that the witness is, at the time of testifying, or was shortly beforehand, a lawful *inmate of an asylum* for mental disease or defect, or an adjudged lunatic or defective, makes it necessary that his capacity should be examined into and an express finding appear.[2]

(*b*) The ways in which the *insanity may appear* are four: (1) The general behavior of the person, while in court and before taking the stand, may be such as to exhibit the derangement to the judge; (2) The person may be questioned on the 'voir dire', so that his condition appears at once;[3] (3) Other witnesses to the derangement may be offered before the person's testimony is begun;[4] (4) The examination or cross-examination may disclose clearly the incapacity, in which case the preceding part of testimony may be struck out; or may

187; 1918, Owen *v.* Com., 181 Ky. 257, 204 S. W. 162; 1881, Cannady *v.* Lynch, 27 Minn. 437, 8 N. W. 164; 1908, Williams *v.* State, 52 Tex. Cr. 430, 107 S. W. 825.

[2] 1834, *Ex parte* ——, 3 Dowl. Pr. 161, *semble* (habeas corpus ad test.); 1871, Spittle *v.* Walton, L. R. 11 Eq. 420 (in taking an affidavit from an inmate of an asylum, the preliminary inquiry into capacity must appear); 1897, Pittsburg & W. R. Co. *v.* Thompson, 27 C. C. A. 333, 82 Fed. 720 (cited *ante*, §492); 1909, Covington *v.* O'Meara, 133 Ky. 762, 119 S. W. 187 (judgment of lunacy four years before); 1835, Re Christie, 5 Paige Ch. 241 (petition by adjudged lunatic; officer certifying it must state that capacity has been examined); 1876, Ordronaux, C., in People *v.* Hospital, 3 Abb. N. C. 252 (witness formerly in asylum).

For the admissibility of a *judgment of lunacy*, see *post*, § 1671.

For *prior* and *subsequent insanity*, see *ante*, § 233.

In Mayor *v.* Caldwell, 81 Ga. 78, 7 S. E. 99 (1888), the decision held merely that the trial Court was not wrong in assuming the competency of the insane deponent and in leaving the jury to give the deposition what credit they pleased; there is no attempt to lay down the doctrine that the testimony of a conceded lunatic, if attacked, shall go to the jury without preliminary inquiry as to competency.

The apparent doctrine of Clements *v.* McGinn, — Cal. —, 33 Pac. 920 (1893), that a discharge from a State asylum is 'prima facie' evidence of competency, seems proper, and would render a preliminary examination in such case not indispensable.

[3] 1847, Attorney-General *v.* Hitchcock, 1 Exch. 95, per Parke, B.; 1882, District of Columbia *v.* Armes, 107 U. S. 521 (the Court may examine); 1920, New York Evening Post Co. *v.* Chaloner, 2d C. C. A., 265 Fed. 204, 216 (on defendant's objection to plaintiff's sanity as a witness, and on request for a 'voir dire' examination, the trial judge denied the request, and admitted the witness; held not error on the facts); Ariz. Rev. St. 1913, Civ. C. § 1688 (Court may examine); 1876, White *v.* State, 52 Miss. 216, 223 (defendant may examine as to sanity of prosecution's witness, even though the judge had before trial determined it to his own satisfaction). *Contra, semble:* 1921, Ellarson *v.* Ellarson, Sup. App. Div., 190 N. Y. Suppl. 6.

It would seem that it is not the *judge's duty* to examine, if he does not choose to; so that if the opponent himself declines to examine on 'voir dire', the judge's refusal to do so is proper in his discretion; *contra:* 1906, State *v.* Simes, 12 Ida. 310, 85 Pac. 914.

[4] 1847, Attorney-General *v.* Hitchcock, *supra*. *Contra*, but unsound: 1844, Robinson *v.* Dana, 16 Vt. 474. In Mayor *v.* Caldwell, 81 Ga. 78, 7 S. E. 99 (1888), a lunatic's deposition being offered, though the trial Court was held right in refusing to hear impeaching evidence and to determine for itself and in sending all the evidence to the jury to consider, the general doctrine of considering extrinsic evidence was not denied.

disclose grounds of doubt, in which case a 'voir dire' or other witnesses may be resorted to.[5]

(*c*) The preliminary determination of capacity is for the judge not the jury (*ante*, § 487, *post*, § 2550); and it is therefore an improper practice for the judge to leave the testimony provisionally to the jury, to be rejected by them if found ineligible according to legal standard;[6] the jury have nothing to do with preliminary questions of admissibility. But, after the Court has passed on the witness' capacity, it is still open to the jury to conclude that the witness is not credible and to reject the testimony entirely; and the Court's decision does not necessarily affect the estimate which the jury must make.[7]

§ 498. **Deaf-and-Dumb Persons not Idiots.** At the time when unscientific ideas prevailed concerning mental derangement and defect, the deaf-and-dumb were so far treated as idiots that they were presumed to be incapable of testifying, until the contrary was shown.[1] To-day this presumption has disappeared:[2]

> 1845, JEWETT, J., in *People* v. *McGee*, 1 Den. 21: "[The woman] was of sense sufficient to have intelligence conveyed to her and to communicate intelligence to T. by signs and motions. . . . If she had sufficient reason to have intelligence conveyed to her by T. and to communicate facts to the understanding of T., although she was not able to talk or write, she could have been sworn and testified through him by signs."

No doubt it may sometimes be wise to examine into the capacity of such persons; but ordinarily the only question will be as to the possibility of communicating with them (*post*, § 811) by some certain system of signs. So far as such persons are shown to be mentally defective, the principles applicable to lunatics will govern.

[5] 1866, R. *v.* Whitehead, L. R. 1 C. C. R. 33. Compare the cases cited *post*, § 1820 (oath).

[6] *Accord:* 1915, Shields *v.* State, 16 Ga. App. 680, 85 S. E. 1057 (useful contrast of opinions by Russell, C. J., and Broyles, J.); 1912, People *v.* Enright, 256 Ill. 221, 99 N. E. 936; 1911, State *v.* Whitsett, 232 Mo. 511, 134 S. W. 555 (citing the above text).

Contra: 1894, Mead *v.* Harris, 101 Mich. 585, 60 N. W. 284, *semble;* 1908, Williams *v.* State, 52 Tex. Cr. 430, 107 S. W. 825. In Mayor *v.* Caldwell, 81 Ga. 78, 7 S. E. 99 (1888), the decision was merely that the trial Court was not wrong on the facts in declining to withdraw the evidence (a deposition) from the jury.

It is strange that these *contra* Courts did not see how preposterous it is to try to bind the jury's mind by a legal definition of admissibility. The jury's only inquiry ought to be the general credibility of the witness, which is distinct (*ante*, § 12) from admissibility. Times seem degenerate when such fundamentals can be ignored.

[7] 1895, Bowdle *v.* R. Co., 103 Mich. 292, 61 N. W. 529 (McGrath, J., diss., construing Mead *v.* Harris, *supra*).

§ 498. [1] 1680, Hale, Pl. Cr. I, 34; 1786, R. *v.* Ruston, 1 Leach Cr. L., 4th ed., 408; 1827, Morrison *v.* Lennard, 3 C. & P. 127; 1769, Bl. Com. IV, 303; 1842, Greenl. Evid. § 366.

[2] *Accord:* 1896, Ritchey *v.* People, 23 Colo. 314, 47 Pac. 272 (a deaf-mute, admitted, in spite of difficulty in conducting the examination); 1906, State *v.* Simes, 12 Ida. 310, 85 Pac. 914 (rape of a female mentally incapable of consent; the woman held not thereby also incompetent as a witness); 1906, State *v.* Crouch, 130 Ia. 478, 107 N. W. 173; 1893, State *v.* Howard, 118 Mo. 127, 143, 24 S. W. 41 (deaf-mute not assumed mentally incompetent); 1893, State *v.* Weldon, 39 S. C. 318, 17 S. E. 689; 1882, Quinn *v.* Halbert, 55 Vt. 228 (admitting the testimony of one who "was bereft of the power of speech, and could not explain any position, but only assent or dissent in answer to a direct question by a nod or shake of the head").

Contra: State *v.* Smith, Mo., cited *ante*, § 496.

§ 499. **Intoxication.** It follows from the modern theory of mental derangement (*ante*, § 492) that intoxication, even habitual, does not in itself incapacitate a person offered as a witness. The question is, in each instance, whether the witness was so bereft of his powers of observation, recollection, or narration, that he is thoroughly untrustworthy as a witness on the subject in hand:[1]

1794, *Walker's Trial*, 23 How. St. Tr. 1153; re-examination of Thomas Dunn, an informer. *Dunn* [answering a question, to explain his past behavior]: "I went there when I was intoxicated, the same as I am now." Mr. Justice HEATH: "How long have you been intoxicated?" "Not very long; I have my recollection about me, though it may seem to the Court that I may be ill or may not." "Were you intoxicated when you gave your evidence just now?" "I was not. . . . Drunk or sober, I will speak the truth." Mr. Justice HEATH: "I do not know that we can examine a man that is drunk." The counsel for the prosecution, Mr. Law, proceeded to ask further questions. Mr. Justice HEATH: "How can you, Mr. Law, examine him after he has told you he is intoxicated? He has made himself so exceedingly drunk, it is impossible to examine him"; but the cross-examiner, Mr. Erskine, was allowed to proceed.

1854, CHILTON, C. J., in *Eskridge* v. *State*, 25 Ala. 33: "It does not follow necessarily that, because the party was much intoxicated, his reason was so far dethroned as to disable him from comprehending the effect of his admissions or from giving a true account of the occurrence to which they had reference."

First, then, the *capacity of observation* (*ante*, § 478) at the time of the events to be testified to, may be such as should exclude the witness as untrustworthy.[2] Yet here is found a tendency, already noted (*ante*, § 493), to forget this requisite, and to declare that the time of taking the stand is that which alone is to be considered:[3]

1824, DUNCAN, J., in *Gebhart* v. *Shindle*, 15 S. & R. 238: "The point of inquiry is the moment of examination; is the witness then offered so besotted in his understanding as to be deprived of his intelligence? If he is, exclude him; if he be a hard drinker, an habitual drunkard, yet if at that time he is sober and possessed of a sound mind, he is to be received."

Secondly, the *capacity of recollection* may appear to be so affected that the witness is untrustworthy:

1819, *Hartford* v. *Palmer*, 16 Johns. 143: "It is a temporary derangement of the mind; and it is impossible for such men to have such a memory of events of which they may have had a knowledge as to be able to present them fairly and faithfully."

Finally, the *capacity of intelligent and truthful narration* may appear to be destroyed temporarily. Here regard is to be had only to the time when the person is put on the stand to testify:[4]

1819, *Hartford* v. *Palmer*, 16 Johns. 143: "A present and existing intoxication to a considerable degree utterly disqualifies the person so affected to narrate facts and events in a

§ 499. [1] *Accord:* 1880, People *v.* Ramirez, 56 Cal. 536.

[2] 1883, State *v.* Costello, 62 Ia. 407, 17 N. W. 605, *semble*.

[3] *Accord:* 1874, Coleman *v.* Com., 25 Gratt. Va. 865.

[4] *Accord:* 1883, State *v.* Costello, 62 Ia. 407, *semble;* 1904, State *v.* Sejours, 113 La. 676, 37 So. 599 (intoxication at the time of the shooting, held not to disqualify on the facts); 1824, Gebhart *v.* Shindle, 15 S. & R. Pa. 238. *Contra:* 1921, State *v.* Magyar, — N.J.L. —, 114 Atl. 252 (a witness "grossly intoxicated" when testifying, admitted; no authority cited).

For drunkenness as *impeaching credibility*, see *post*, § 933.

way at all to be relied on. It would, we think, be profaning the sanctity of an oath to tender it to a man who had no present sense of the obligations it imposed."

1845, ROGERS, J., in *Gould* v. *Crawford*, 2 Pa. St. 90: "The Court will not suffer a person to be examined as a witness who is in such a state that he cannot understand the obligation of an oath. . . . Yet such cases must depend on the sound discretion of the Court that hears the cause. There are degrees of intoxication; of which the Court alone can judge."

A *confession* must be judged with reference to the time of its utterance; the mere fact of intoxication at the time does not of itself exclude the confession;[5] but *drunkenness induced for the purpose of securing* a confession may in the circumstances exclude the confession.[6]

§ 500. **Disease, Blindness, etc.** The *capacity of observation* may be otherwise so lacking, particularly through blindness, that the witness may be incompetent to testify on the specific subject to which the incapacity relates. The *capacity of recollection* or *of communication* may also be so affected by disease or otherwise as to lead to the same result.[1] The discretion of the Court must control.[2]

§ 501. **Policy of Abolishing Disqualification through Mental Derangement.** The tendency of modern times is to abandon all attempts to distinguish between incapacity which affects only the degree of credibility and incapacity which excludes the witness entirely. The whole question is one of degree only, and the attempt to measure degrees and to define that point at which total incredibility ceases and credibility begins is an attempt to discover the intangible.[1] The subject is not one which deserves to be brought

[5] 1696, Vaughan's Trial, 13 How. St. Tr. 507 ff.; 1835, R. *v.* Spilsbury, 7 C. & P. 187; 1904, R. *v.* Lai Ping, 11 Br. C. 102 (confession while depressed by opium, admitted); 1878, Lester *v.* State, 32 Ark. 730; 1879, State *v.* Feltes, 51 Ia. 496, 1 N. W. 755; 1914, Lindsey *v.* State, 66 Fla. 341, 63 So. 832; 1898, State *v.* Berry, 50 La. An. 1309, 24 So. 329; 1906, State *v.* Hogan, 117 La. 863, 42 So. 352; 1914, McCleary *v.* State, 122 Md. 394, 89 Atl. 1100 ("greater or less absence of mental faculty, as the result of intoxication" held not to exclude); 1857, Com. *v.* Howe, 9 Gray Mass. 112, *semble;* 1899, Com. *v.* Chance, 174 Mass. 245, 54 N. E. 551 (recent recovery from delirium tremens); 1881, State *v.* Grear, 28 Minn. 426, 10 N. W. 472; 1906, State *v.* Church, 199 Mo. 605, 98 S. W. 16 (insanity); 1862, Jefferds *v.* People, 5 Park. Cr. N.Y. 547; 1883, Williams *v.* State, 12 Lea Tenn. 212; 1897, Leach *v.* State, 99 Tenn. 584, 42 S. W 195 (slight intoxication); 1894, White *v.* State, 32 Tex. Cr. 625, 636, 25 S. W. 784; 1902, State *v.* Haworth, 24 Utah 398, 68 Pac. 155 (intoxication).

[6] Ga. Code 1910, § 5781 (admissions obtained by "drunkenness induced for the purpose" are not receivable); 1903, McNutt *v.* State, 68 Nebr. 207, 94 N. W. 143 (liquor given by the sheriff, who then questioned the accused; held inadmissible); 1886, McCabe *v.* Com—., Pa. —, 8 Atl. 54, *semble* (a confession made under the influence of liquor given by an officer to make the accused talk).

§ 500. [1] 1876, Isler *v.* Dewey, 75 N. C. 466; 1885, Hoard *v.* State, 15 Lea Tenn. 321, *semble* (wound in head).

[2] 1861, People *v.* Robinson, 19 Cal. 40 (confession in sleep); 1893, Dickson *v.* Waldron. 135 Ind. 507, 35 N. E. 1 (person injured by a wound); 1891, State *v.* Morgan, 35 W. Va. 260, 13 S. E. 385 (soliloquy at night while on a couch, admitted; *semble*, admissible even though made while asleep).

The following case raises an interesting question: 1913, State *v.* Strong, 83 N. J. L. 177, 83 Atl. 506 (confession to a clairvoyant, held inadmissible, *semble*).

It has been ruled that the use of *opium*, as affecting the powers of observation and recollection, cannot suffice to exclude the user: 1898, State *v.* Cannon, 52 S. C. 452, 30 S. E. 589 (morphine); 1895, State *v.* White, 10 Wash. 611, 39 Pac. 160.

For these defects as admissible to *impeach* the witness, see *post*, § 934.

§ 501. [1] From the point of view of logic and psychology as applicable to argument before the jury (not the rules of Admissibility), see the materials collected in the present author's

within the realm of legal principle, and it is profitless to pretend to make it so. Here is a person on the stand; perhaps he is a total imbecile, in manner, but perhaps, also, there will be a gleam of sense here and there in his story. The jury had better be given the opportunity of disregarding the evident nonsense and of accepting such sense as may appear. There is usually abundant evidence ready at hand to discredit him when he is truly an imbecile or suffers under a dangerous delusion. It is simpler and safer to let the jury perform the process of measuring the impeached testimony and of sifting out whatever traces of truth may seem to be contained in it. The step was long ago advocated by the English commission of judges, in their proposals of reform,[2] and has been approved by two such distinguished writers on the law of Evidence as Mr. Best [3] and Mr. Justice Taylor.[4]

"Principles of Judicial Proof, as given by Logic Psychology, and General Experience, and illustrated in Judicial Trials" (1913; §§ 191–195).

[2] 1853, Common Law Practice Commissioners (Jervis, Cockburn, Martin, Barmwell, Willes, and Walton, all afterwards Judges, except the last), Second Report, p. 10: "Plain sense and reason would obviously suggest that any living witness who could throw light upon a fact in issue should be heard to state what he knows, subject always to such observations as may arise as to his means of knowledge or his disposition to tell the truth."

[3] Evidence, §§ 62, 144.

[4] Evidence, § 1210. It was originally proposed by Bentham: Rationale of Jud. Evid. b. IX, pt. III, c. VI (Works, VII, 427).

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

TOPIC I (*continued*): ORGANIC CAPACITY

SUB-TOPIC B: MENTAL IMMATURITY (INFANCY)

CHAPTER XX.

§ 505. **General Principle.** That, with reference to the general capacity to observe, recollect, and narrate, the same principles apply to mental immaturity that are applied to mental derangement, seems undoubted. The question, however, of paramount importance in the earlier common law precedents has been the eligibility of children to take the oath; and the religious sense required for this has usually been the sole subject of argument, to the neglect of the question whether, independently of the oath, any particular degree of intelligence is necessary as a purely testimonial element. It is not always possible to determine whether the language of the Courts is used in view of the oath-test or of an independent testimonial requirement. But this much may be taken as settled, that no rule defines *any particular age* as conclusive of incapacity; in each instance the capacity of the particular child is to be investigated.[1]

§ 506. **Capacity of Observation, Recollection, and Communication.** (1) The capacity of *observation* (*ante*, § 478) is the first of the essential requirements, and has been occasionally so noted by the Courts.[1] (2) The capacity of

§ 505. [1] 1779, R. *v.* Brasier, 1 Leach Cr. L. 199 ("There is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility . . . is to be collected from their answers to questions propounded to them by the Court"; said primarily of the oath-test); 1902, State *v.* King, 117 Ia. 484, 91 N. W. 768 ("All modern decisions seem to declare intelligence, and not age, the proper test"). *Accord:* 1889, McGuff *v.* State, 88 Ala. 147, 7 So. 35; 1873, Draper *v.* Draper, 68 Ill. 17; 1866, State *v.* Ross, 18 La. An. 342; 1867, State *v.* Denis, 19 id. 193; 1903, State *v.* Williams, 11 La. 179, 35 So. 505; 1909, Chavigny *v.* Hava, 125 La. 710, 51 So. 696 (boy of 10 years, admitted); 1813, Com. *v.* Hutchinson, 10 Mass. 225; 1887, Hughes *v.* R. Co., 65 Mich. 10, 31 N. W. 605; 1913, New Orleans & N. E. R. Co. *v.* Mobly, 106 Miss. 323, 63 So. 665 (child of 6, admitted); 1909, Evers *v.* State, 84 Nebr. 708, 121 N. W. 1005; 1819, Den *v.* Vancleve, 2 South. N. J. 653; 1895, Terr. *v.* DeGutman, 8 N. M. 92, 42 Pac. 68; 1922, Rogers *v.* Com., — Va. —, 111 S. E. 231 (child under 6, admitted).

The statutory definitions of infants' capacity are collected *ante*, § 488.

§ 506. [1] 1874, Wade *v.* State, 50 Ala. 164 ("intelligent enough to observe"); 1883, Kelly *v.* State, 75 id. 22 ("of sufficient years and discretion to know what occurs"); 1867, Flanagin *v.* State, 25 Ark. 96; 1858, People *v.*

recollection is also an essential requirement;[2] though little likely to be called into question, and probably often intended to be covered by the expressions defining the next requirement. (3) For the capacity of *communication*, as in the case of mental derangement (*ante*, § 495), there are two elements to be taken into consideration: (*a*) There must be a capacity to *understand* questions put, and to frame and express intelligent answers.[3] (*b*) There must be a sense of *moral responsibility*, — a consciousness of the duty to speak the truth. Here it is that the difficulty chiefly comes in determining whether the Courts intend to establish a testimonial requirement independent of the oath. It would seem that they do.[4]

§ 507. **Standard of Intelligence; Discretion of Trial Court.** Agreeably to sound policy, and to the analogy of principle in cases of mental derange-

Bernal, 10 Cal. 66 ("sufficient intelligence to receive just impressions of the fact"; compare the phrasing of the California and related codes); 1890, Ridenhour *v.* R. Co., 102 Mo. 288, 13 S. W. 889 (applying the statutory definition); 1881, State *v.* Jackson, 9 Or. 459.

In People *v.* Delancy, — Cal. App. —, 199 Pac. 896 (1921) the elaborate opinions contain a careful analysis of these three elements as covered by Cal. C. C. P. § 1880.

[2] 1876, Stephen, Dig. Evid., Art. 107; 1883, Kelly *v.* State, 75 Ala. 22 ("of sufficient years and discretion . . . to remember what occurs"); 1867, Flanagin *v.* State, 25 Ark. 96; 1920, Anderson *v.* State, 88 Tex. Cr. 307, 226 S. W. 414.

[3] 1680, Hale, Pl. Cr., I, 302 ("of a competent discretion"); 1876, Stephen, Dig. Evid., Art. 107 ("understanding the questions put to him, giving rational answers to those questions"); 1874, Wade *v.* State, 50 Ala. 164 ("intelligence enough to narrate"); 1883, Kelly *v.* State, 75 Ala. 22 ("of sufficient intelligence to narrate what occurs"); 1858, People *v.* Bernal, 10 Cal. 66 ("sufficient capacity to relate facts correctly"); 1894, State *v.* Douglas, 53 Kan. 667, 671, 37 Pac. 172; 1894, White *v.* Com., — Ky. —, 28 S. W. 348 ("sufficient intelligence to truthfully narrate facts to which its attention is directed"); 1861, Com. *v.* Mullins, 2 All. Mass. 296 ("the possession of sufficient intelligence to testify in the case"); 1896, Com. *v.* Robinson, 165 Mass. 426, 43 N. E. 121 ("sufficient intelligence"); 1895, Territory *v.* De Gutman, 8 N. M. 92, 42 Pac. 68 ("sufficient discretion and understanding", "sufficient natural intelligence"); 1881, State *v.* Jackson, 9 Or. 459; 1920, Macale *v.* Lynch, 110 Wash. 444, 188 Pac. 517 (personal injury to a child under 6; his testimony 14 months later, excluded, owing to the mental effect of his sufferings, etc., in the interval).

[4] *England:* 1779, R. *v.* Brasier, 1 Leach Cr. L. 199 ("the sense and reason they entertain of the danger and impiety of falsehood"); 1876, Stephen, Evid., Art. 107, and App. Note XL ("knowing that he ought to speak the truth"); 1810, Swift, Evidence, 45 ("their sense of the obligation to speak the truth, . . . understand the distinction between right and wrong").

United States: 1895, Wheeler *v.* U. S., 159 U. S. 523, 16 Sup. 93 ("appreciation of the difference between truth and falsehood, as well as of his duty to tell the former"); 1889, McGuff *v.* State, 88 Ala. 150, 7 So. 35, *semble* ("sense and reason they entertain of the danger and impiety of falsehood"); 1907, Clinton *v.* State, 53 Fla. 98, 43 So. 312; 1878, Johnson *v.* State, 61 Ga. 36 ("the capacity to understand the nature of an oath, — which means, perhaps, the degree of intelligence the child shows, so as to satisfy the Court that she is impressed that she ought to tell the truth on such a solemn occasion rather than a lie"); 1869, Simpson *v.* State, 31 Ind. 90; 1905, Bright *v.* Com., 120 Ky. 298, 86 S. W. 527; 1842, State *v.* Whittier, 21 Me. 347, *semble* ("a sense of accountability for moral conduct"); 1813, Com. *v.* Hutchinson, 10 Mass. 225 ("a sufficient sense of the wickedness and danger of false swearing"); 1896, Com. *v.* Robinson, 165 Mass. 426, 43 N. E. 121 ("sufficient sense of the duty of telling the truth"); 1862, Washburn *v.* People, 10 Mich. 374, 386, *semble;* 1880, McGuire *v.* People, 44 Mich. 287, 6 N. W. 669, *semble;* 1887, Hughes *v.* R. Co., 65 Mich. 10, 31 N. W. 605 ("A child cannot testify unless capable of appreciating the obligation of his oath, if he takes an oath, or his affirmation if that is substituted. . . . He must be able to comprehend it; . . . disposed to tell the truth under some sense of obligation"); 1876, State *v.* Levy, 23 Minn. 108; 1920, Goy *v.* Director-General of Railroads, — N. H. —, 111 Atl. 855; N. Mex. Annot. St. 1915, § 2165; 1881, State *v.* Jackson, 9 Or. 459; 1895, State *v.* Reddington, 7 S. D. 368, 68 N. W. 170; 1893, State *v.* Michael, 37 W. Va. 568, 16 S. E. 803, *semble.*

Compare the precedents cited *post*, § 1821 (oath).

It would seem that, irrespective of theology, the child could be instructed in moral duties, for the purpose of testifying: 1902, State *v.* King, 117 Ia. 484, 91 N. W. 768.

ment and defect, the trial Court must be the one to determine finally, upon all the circumstances, whether the child has sufficient intelligence according to the foregoing requirements:[1]

1895, BREWER, J., in *Wheeler* v. *U. S.*, 159 U. S. 523, 16 Sup. 93: "The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence, as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record, the decision of the trial judge will not be disturbed on review, unless from that which is preserved it is clear that it was erroneous."

Nevertheless, the Supreme Courts, instead of enforcing this principle rigidly, continue to revise rulings upon the competency of children whom they have never seen or heard.[2] Time should not be wasted on such a task.

§ 507. [1] *Accord: Ala.* 1906, Birmingham R. L. & P. Co. *v.* Wise, 149 Ala. 492, 42 So. 821; *Ark.* 1910, Crosby *v.* State, 93 Ark. 156, 124 S. W. 781; *Cal.* 1896, People *v.* Craig, 111 Cal. 469, 44 Pac. 186; 1897, People *v.* Baldwin, 117 id. 244, 49 Pac. 186; 1901, People *v.* Daily, 135 id. 104, 67 Pac. 16; 1902, People *v.* Swist, 136 id. 520, 69 Pac. 223; 1904, People *v.* Stouter, 142 Cal. 146, 75 Pac. 780; 1921, People *v.* Lopez, — Cal. App. —, 197 Pac. 144; *D. C.* 1894, Williams *v.* U. S., 3 D. C. App. 335, 339; *Ga.* 1873, Peterson *v.* State, 47 Ga. 527; 1896, Minton *v.* State, 99 id. 254, 25 S. E. 626; 1915, Holden *v.* State, 144 Ga. 338, 87 S. E. 27; *Ill.* 1904, Shannon *v.* Swanson, 208 Ill. 52, 69 N. E. 869; 1921, People *v.* Johnson, 298 Ill. 52, 131 N. E. 149; *Ind.* 1912, Tyrrel *v.* State, 177 Ind. 14, 97 N. E. 14 (child of 8); *Ia.* 1902, State *v.* King, 117 Ia. 484, 91 N. W. 768; 1907, State *v.* Meyer, 135 Ia. 507, 113 N. W. 322; *Ky.* 1910, Merchant *v.* Com., 140 Ky. 12, 130 S. W. 793 (child of 8, admitted); *Md.* 1895, Freeny *v.* Freeny, 80 Md. 406, 31 Atl. 304; *Mass.* 1861, Com. *v.* Mullins, 2 All. 296; 1896, Com. *v.* Robinson, 165 Mass. 426, 43 N. E. 121; 1919, Com. *v.* Teregno, 234 Mass. 56, 124 N. E. 889 (child of 7, admitted); 1921, Com. *v.* Tatisos, — Mass. —, 130 N. E. 495; *Mich.* 1897, People *v.* Walker, 113 Mich. 367, 71 N. W. 641; *Minn.* 1876, State *v.* Levy, 23 Minn. 108; 1920, Maynard *v.* Keough, 145 Minn. 26, 175 N. W. 891 (defendant, a child of 8, testified to being bitten by defendant's dog three years before; competency "must be determined by capacity at the time the testimony is offered"); *Miss.* 1913, New Orleans & N. E. R. Co. *v.* Nobly, 106 Miss. 323, 63 So. 665; *Mo.* 1890, Ridenhour *v.* R. Co., 102 Mo. 288, 13 S. W. 889; 1896, State *v.* Nelson, 132 Mo. 184, 33 S. W. 809; 1896, State *v.* Prather, 136 Mo. 20, 37 S. W. 805; 1908, State *v.* Brown, 209 Mo. 413, 107 S. W. 1068; 1909, State *v.* Headley, 224 Mo. 177, 123 S. W. 577; 1913, State *v.* Anderson, 252 Mo. 83, 158 S. W. 817; *N. H.* 1895, State *v.* Sawtelle, 66 N. H. 488, 32 Atl. 831; *N. J.* 1900, State *v.* Cracker, 65 N. J. L. 410, 47 Atl. 643; 1905, State *v.* Tolla, 72 N. J. L. 515, 62 Atl. 675; *N. Mex* Annot. St. 1915, § 2165 (quoted *ante*, § 488); 1913, State *v.* Armijo, 18 N. M. 262, 135 Pac. 555; *N. C.* 1914, State *v.* Pitt, 166 N. C. 268, 80 S. E. 1060; 1919, State *v.* Phillips, 178 N. C. 713, 100 S. E. 577; *N. D.* 1907, State *v.* Werner, 16 N. D. 83, 112 N. W. 60; *Okl.* 1918, Darneal *v.* State, 14 Okl. Cr. 540, 174 Pac. 290 (applying Rev. L. 1910 § 5050); *Or.* 1881, State *v.* Jackson, 9 Or. 459; 1914, State *v.* Jensen, 70 Or. 156, 140 Pac. 740 (rape; child of 4, admitted); 1919, State *v.* Batcham, 94 Or. 524, 186 Pac. 5 (applying L. Or. L. § 732); *Pa.* 1905, Com. *v.* Furman, 211 Pa. 549, 60 Atl. 1089 (good opinion); 1913, Piepke *v.* Philadelphia & R. Co., 242 Pa. 321, 89 Atl. 124; *P. I.* 1913, U. S. *v.* Buncad, 25 P. I. 530, 536; *S. C.* 1813, State *v.* Leblanc, 1 Tread. Const. 357; *Tenn.* 1900, Burke *v.* Ellis, 105 Tenn. 702, 58 S. W. 855; *Tex.* 1905, Freasier *v.* State, — Tex. Cr. —, 84 S. W. 360; 1920, Carter *v.* State, 87 Tex. Cr. 299, 221 S. W. 603 (assault with intent to rape; children of 6 and 7, held qualified); 1917, Hipple *v.* State, 80 Tex. Cr. 531, 191 S. W. 1150 (attempt to rape a child of 3; the child not admitted); *Ut.* 1899, State *v.* Blythe, 20 Utah 378, 58 Pac. 1108; 1915, State *v.* McMillan, 46 Utah 19, 145 Pac. 833 (a girl of 8 years, admitted); *Va.* 1911, Johnson *v.* Com., 111 Va. 877, 69 So. 1104; 1922, Rogers *v.* Com., — Va. —, 111 S. E. 231; *Wash.* 1903, State *v.* Bailey, 31 Wash. 89, 71 Pac. 715; 1909, State *v.* Myrberg, 56 Wash. 384, 105 Pac. 622; 1911, Kalberg *v.* Bon Marche, 64 Wash. 452, 117 Pac. 227; 1917, State *v.* Smith, 95 Wash. 271, 163 Pac. 759; *W. Va.* 1901, Uthermohlen *v.* Bogg R. M. & M. Co., 50 W. Va. 457, 40 S. E. 410 (good opinion by Brannon, P.); *Wis.* 1894, State *v.* Juneau, 88 Wis. 180, 59 N. W. 580.

[2] 1895, Wheeler *v.* U. S., 159 U. S. 523, 1 Sup. 93 (child 5½ years old admitted); 1902, Walker *v.* State, 134 Ala. 86, 32 So. 703 (child of 10 years, held qualified); 1903, Castleberry *v.* State, 135 Ala. 24, 33 So. 424 (rape;

§ 508. **Capacity Presumed; Method of Ascertainment.** In the precedents dealing with the oath-test, the fact of capacity is *not presumed* but must be shown, where the child is under fourteen years of age,[1] or certainly where it is under seven years of age[2]; and the same rules are commonly applied under the present principle.[3] The *method of ascertainment* of children's testimonial capacity are the same as those employed for the oath, and the subject can best be examined under that head (*post*, § 1820).

§ 509. **Policy of Abolishing Disqualification by Infancy.** A rational view of the peculiarities of child-nature, and of the daily course of justice in our courts, must lead to the conclusion that the effort to measure 'a priori' the degrees of trustworthiness in children's statements, and to distinguish the point at which they cease to be totally incredible and acquire suddenly some degree of credibility, is futile and unprofitable.[1] The desirability of abandoning this

the child, 8 years old, held competent); 1898, St. Louis I. M. & S. R. Co. *v.* Waren, 65 Ark. 619, 48 S. W. 222 (statute applied); 1913, Penny *v.* State, 109 Ark. 343, 159 S. W. 1127 (child of 9, held qualified); 1902, People *v.* Swist, 136 Cal. 520, 69 Pac. 223 (boy 6 years of age, held competent); 1921, People *v.* Delaney, — Cal. App. —, 199 Pac. 896 (lewd conduct with a boy not quite 4 years old; the age of the child held not to exclude him, if qualified under C. C. P. § 1880); 1894, Williams *v.* U. S., 3 D. C. A. pp. 335, 340 (admitting a child of 7½ years as competent); 1896, Gaines *v.* State, 99 Ga. 703, 26 S. E. 760 (excluded on the facts); 1896, Republic *v.* Ah Wong, 10 Haw. 524, 528 (child of 5, excluded on the facts; Judd, C. J., diss.); 1904, Sokel *v.* People, 212 Ill. 238, 72 N. E. 382 (a girl of nine, admitted); 1911, People *v.* Lewis, 252 Ill. 281, 96 N. E. 1005 (child of 6, admitted); 1907, State *v.* Meyer, 135 Ia. 507, 113 N. W. 322 (child of 6, admitted); 1902, State *v.* Wilson, 109 La. 74, 33 So. 85 (rape, the little girl, between 3 and 4 years old, held not sufficiently intelligent); 1901, Com. *v.* Ramage, 177 Mass. 349, 58 N. E. 1078 (child 6 years old, admitted); 1921, Com. *v.* Tatisos, — Mass. —, 130 N. E. 495 (child 5 years and 10 months old at the time of an alleged assault with intent to rape, held admissible in the trial Court's discretion); 1902, People *v.* Beech, 129 Mich. 622, 89 N. W. 363 (child of 6, held incompetent); 1903, Trim *v.* State, — Miss. —, 33 So. 718 (child 5 years of age, held competent); 1896, State *v.* Nelson, 132 Mo. 184, 33 S. W. 809 (child 9 years old, admitted); 1920, State *v.* Belknap, — Mo. —, 221 S. W. 39 (statutory rape; child of 9, admitted); 1920, Goy *v.* Director-General of Railroads — N. H. —, 111 Atl. 855 (boy of 7, excluded on the facts); 1905, State *v.* Tolla, 72 N. J. L. 515, 62 Atl. 675 (child of 6, admitted); 1921, State *v.* Claymoust, — N. J. L. —, 114 Atl. 155 (carnal abuse; child 4 years old excluded as a witness, but her identifying statement admitted); 1907, State *v.* Werner, 16 N. D. 83, 112 N. W. 60 (child of 8, admitted); 1913, Piepke *v.* Philadelphia & R. Co., 242 Pa. 321, 89 Atl. 124 (boy of 7, held improperly rejected); 1907, People *v.* Rivera, 12 P. R. 386, 399 (child of 5); 1912, U. S. *v.* Tan Teng, 23 P. I. 145 (rape; a girl of 7, admitted); 1913, U. S. *v.* Buncad, 25 P. I. 530 (murder; boy of 8, admitted); 1920, Anderson *v.* State, 88 Tex. Cr. 307, 226 S. W. 414 (negro boy of 7, held properly excluded on the facts); 1899, State *v.* Blythe, 20 Utah 378, 58 Pac. 1108 (child 6 years old, admitted); 1920, Getty *v.* Hutton, 110 Wash. 124, 188 Pac. 10 (child of 6, admitted).

Compare the statutes cited *ante*, § 488, and the cases cited *post*, § 1821 (oath).

§ 508. [1] 1680, Hale, Pl. Cr., I, 302.

[2] 1779, R. *v.* Brasier, 1 Leach Cr. L. 199; 1905, Clark *v.* Finnegan, 127 Ia. 644, 103 N. W. 970 (child of seven, admitted); and cases cited *post*, § 1821.

[3] 1904, Shannon *v.* Swanson, 208 Ill. 52, 69 N. E. 869 (at 14 there is a presumption of competency; below that age, there is to be an inquiry into his qualifications); 1902, State *v.* King, 117 Ia. 484, 91 N. W. 768 (child under 14, presumed incompetent); 1903, State *v.* Frazier, 109 La. 458, 33 So. 561 (a child of 10, whose dying declarations were admitted, presumed incompetent); 1887, Hughes *v.* R. Co., 65 Mich. 10, 31 N. W. 605, *semble* (here the child was under 7, and the failure of the trial judge to examine and expressly find sufficient understanding was held erroneous); 1895, Terr. *v.* De Gutman, 8 N. M. 92, 42 Pac. 68 (child under 14, presumed incompetent); 1893, State *v.* Michael, 37 W. Va. 568, 16 S. E. 803 (stating confusedly that under 14 there is no presumption of competency, and under 6 there is a presumption of incompetency; the effect being that below 14 the offeror must show the child's capacity).

The opponent's objection must be made at the time the witness is called to the stand: 1916, State *v.* Merrick, 172 N. C. 870, 90 S. E. 257.

§ 509. [1] From the point of view of logic and psychology as applicable to argument

attempt and abolishing all grounds of mental or moral incapacity has already been noted, in dealing with mental derangement (*ante*, § 501). The reasons apply with equal or greater force to the testimony of children. Recognizing on the one hand the childish disposition to weave romances and to treat imagination for verity, and on the other the rooted ingenuousness of children and their tendency to speak straightforwardly what is in their minds, it must be concluded that the sensible way is to put the child upon the stand and let it tell its story for what it may seem to be worth. To this result legislation must come.[2] To be genuinely strict in applying the existing requirement is either impossible or unjust; for our demands are contrary to the facts of child-nature:

1881, *Robert Louis Stevenson*, Child's Play (in "Virginibus Puerisque"): "It is when we make castles in the air and personate the leading character in our own romances that we return to the spirit of our first years. In all the child's world of dim sensations, play is all in all. 'Making believe' is the gist of his whole life, and he cannot so much as take a walk except in character. . . . One thing, at least, comes very clearly out of all these considerations, that whatever we are to expect at the hands of children, it should not be any peddling exactitude about matters of fact. They walk in a vain show, and among mists and rainbows; they are passionate after dreams and unconcerned about realities; speech is a difficult art not wholly learned; and there is nothing in their own tastes or purposes to teach them what we mean by abstract truthfulness. . . . Show us a miserable unbreeched human entity, whose whole profession it is to take a tub for a fortified town and a shaving-brush for the deadly stiletto, and who passes three fourths of his time in a dream and the rest in open self-deception, and we expect him to be as nice upon a matter of fact as a scientific expert bearing evidence! Upon my heart, I think it less than decent."

1887, CAMPBELL, C. J., in *Hughes* v. *R. Co.*, 65 Mich. 10, 31 N. W. 605: "We are compelled to apply the law as we find it, until changed by legislation. But we are greatly impressed with the practical imperfection of the present rules. In France, and probably elsewhere, the Courts refuse to administer an oath to children of tender years, and allow them to be examined without anything more than suitable cautions, leaving their statements on direct and cross-examination to be taken for what they are worth. This seems to be a sensible proceeding, and is probably quite as efficacious as our present system and less likely to abuse. . . . It would be better, we think, to put their testimony on the more rational ground that it is calculated to be of some value, and capable under a proper examination of being reasonably well weighed for what it is worth."

before the jury (not the rules of Admissibility), see the materials collected in the present author's "Principles of Judicial Proof, as given by Logic, Psychology, and General Experience, and illustrated in Judicial Trials" (1913), §§ 172–178.

[2] This advanced step has in effect been taken by the modern English statutes of 1889 and 1904, cited *post*, § 1828, and the Canadian statutes cited *ante*, § 488.

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

TOPIC I (*continued*): ORGANIC CAPACITY

SUB-TOPIC C: MORAL DEPRAVITY

CHAPTER XXI.

515. **General Principle.** A quality which effects only the elements of Communication (*ante*, § 478) is Moral Depravity. One who is wholly capable of correct Observation and of accurate Recollection may still be so lacking in the sense of moral responsibility as to be likely to tell his story with entire indifference as to its correspondence with the facts observed and recollected by him. The question is whether any person should upon such grounds be deemed to lack the fundamental capacity of a witness.

There are two objections to any attempt to establish such an incapacity. The first is that in rational experience no class of persons can safely be asserted to be so thoroughly lacking in the sense of moral responsibility or so callous to the ordinary motives of veracity as not to tell the truth (as they see it) in a large or the larger proportion of instances; or, in more accurate analysis, no such defect, if it exists, can be so well ascertainable as to justify us in predicating it for the purpose of exclusion.[1] The second reason is that, even if such a defect existed and were ascertainable, its operation is so uncertain and elusive that any general rule of exclusion would be as likely in a given instance to exclude the truth as to exclude falsities. It is therefore not a proper foundation for a rule of exclusion.

§ 515. [1] The exposition of this has been made by Mr. Bentham, in a passage quoted for another purpose, *post*, § 519.

Nevertheless, this conclusion of rational experience is of comparatively modern acceptance. Tradition has handed down to us a number of instances in which certain classes of persons were either excluded or attempted to be excluded on the ground of moral irresponsibility or depravity. In times of more primitive development, such an attitude was not inconsistent with the prevailing social and moral notions;[2] and the abandonment of that attitude has been due to a change in those notions. Some of them never found positive recognition in judicial rulings; they remained merely as unsuccessful attempts. In other instances a definite recognition was given; and the abandonment has come either through judicial disowning or through legislative abolition.

The circumstances which were thus once conceived to involve a disqualification may be grouped as five in number: (1) Race or color; (2) Sex; (3) Religion; (4) Infamy (conviction of crime); (5) Turpitude of sundry sorts.

§ 516. (1) **Alienage, Race, or Color.** It is everywhere a deep-rooted instinct to distrust the alien of another nation, — much more the alien of another theology or race or color. The progressive diminution of the strength of this instinct, from the days of primitive commercial interchange between neighboring tribes to the modern solidarity of international commerce, has been almost imperceptibly slow; the last hundred years have probably seen more rapid progress, in European and American spheres, than all the preceding centuries. It is a part of this primitive instinct to distrust the good faith and honesty of the alien. It was a much-mooted question in Christendom, down into the 1600s, whether faith should be pledged or need be kept with infidels, or alien infidels, or alien enemies.[1] The singular inconsistency of such a maxim, in furnishing to the alien equal grounds for charging ourselves with the very fault which forms our pretext for condemning him, both typifies the hypocritical basis of all such rules, wherever persisting, and explains the slowness with which progress is made towards better mutual understanding between alien peoples. They are hypocritical, because they assume a superiority which does not in substance exist; and they obstruct progress, because they perpetuate our blindness to the degree of our own faults and of the alien's virtues.

[2] Compare the history of the rules for number of witnesses, *post*, § 2032.

§ 516. [1] 'Nullum valere fœdus cum hostibus religionis.' Different phases are seen in the following works: Grotius, De Jure Belli et Pacis, b. II, c. 15, § 8; Phillimore, International Law, 3d ed., vol. II, p. 74; Hallam, Literature of Europe, II, 163, 176, 179, Hallam, Middle Ages, II, 103; Laurent, Histoire du droit des gens, ed. 1865, X, 439; Lecky, Rationalism in Europe, II, 111; Hinschius, Kirchenrecht, VI, pt. 1, p. 99, § 364; Decretalium Greg. IX, lib. V, til. VII, De Haereticis, c. 1 ('Dubius in fide infidelis est, nec omnino credendum est qui fidem veritatis ignorant'); Coke, in Calvin's Case, 7 Rep. 2 *a*, 17 *a* ("All infidels are in law 'perpetui inimici', . . . for between them, as with the devils whose subjects they be, and the Christian, there is perpetual hostility and can be no peace"). Chief Justice Willes, in 1745, in that great landmark of enlightened legal opinion, the case of Omichund *v.* Barker (1 Atk. 21), commenting on this doctrine of Coke's as contrary to "common humanity", declared that "the devils, to whom he [Coke] has delivered them [the Pagans], could not have suggested anything worse.".

It is no doubt true that certain races are less strongly moved to constant truth-speaking than are others; and the causes, sociological and physiological, are sometimes not difficult to analyze.[2] But it is by no means certain that the English-speaking peoples are the most veracious; it is probable (according to travellers' reports) that some others excel them; so that the difference becomes merely a question of degree. Moreover, the quality of truth-speaking is only one part of the larger trait of honesty and loyalty in general; and, among the other qualities which go to make up that larger trait, there are certainly some in which the Occidental peoples are not much, if at all, superior to some of the Oriental peoples. Again, whatever comparison can be made at all between Occidental and Asiatic or African peoples, as to their standards of veraciousness, ought to be based on the respective practice of each people among its own members, *i.e.* the Chinese dealing with the Chinese, the German with the German, and so on; because there has everywhere and always been a tendency (rooted in human nature), as between aliens, to abandon reciprocally their own native standards, which they would have observed towards their own people; and thus such dealings afford no criterion for judging the normal standard of their people. Add to this, finally, that the classes of native persons with whom the resident alien comes into contact are usually the less scrupulous and honorable; and it will be understood that such observers have decidedly less trustworthy sources for forming a judgment upon the people as a whole, and that thus the reports which they send home are by no means a sound basis for public opinion and legislative enactment.[3] Taking all these considerations together, it may be concluded that any judgment of condemnation for the testimony of aliens in general, or of a particular race of people, is likely to be, in the first place, absolutely incorrect, as not founded on facts; in the second place, relatively unjust, as assuming a superiority of honesty which can only be hypothetical; in the third place, unwise, as tending merely to perpetuate ill-feeling and misunderstanding; and, finally, unsound in principle, as exclud-

[2] Some of them have been noted by the present writer in an article in the American Law Register, N. S., 1897, pp. 437, 445, entitled "The Administration of Justice in Japan.'

From the point of view of logic and psychology as applicable to argument before the jury (not the rules of Admissibility), see the materials collected in the present author's "Principles of Judicial Proof, as given by Logic, Psychology, and General Experience and illustrated in Judicial Trials" (1913), § 164–171.

[3] To offer here the authorities for the above generalizations would be to go too far astray. But the extent of material to support them would probably be surprising to most persons; the following may serve as a single illustration: Hon. C. W. Bradley, LL.D., in a report in H. Ex. Doc. 29, p. 176, 40th Cong., 3d sess.: "It is a mortifying fact that, were a balance to be struck between the aggregate losses suffered by Americans from Chinese pirates, Chinese thieves and debtors, on the one hand, and, on the other, the injuries inflicted on Chinese merchants, tradesmen, compradors, and citizens in the non-payment of debts honestly due them by American merchants, agents, shipmasters, mariners, etc., we should find that balance to our debt in a ratio of full 90 per cent. I speak advisedly. On the score, too, of official fidelity and punctuality in fairly carrying out their treaty obligations as against their own countrymen, I apprehend that the consular officers of America and Europe have been guilty of as many and as serious laches as can be produced against the native magistracy of China in their official shortcomings towards foreigners."

ing indiscriminately a mass of testimony which ought rather to be weighed and credited in each individual instance for what it may seem to be worth.[4]

Such exclusion of testimony, nevertheless, has existed, at one time or another, in four forms:

(*a*) *Aliens*, in general. It would seem that at one time in our history, for some purposes at least, a ban had prevailed against aliens as witnesses.[5] But this primitive notion has long since ceased to have any recognition;[6] except, to be sure, in our Federal naturalization statute.[7]

(*b*) *Negroes*. By the laws of the Southern States, before the Civil War, persons of the negro race were disqualified from testifying, either absolutely or only in proceedings against white persons; and even in some of the Northern and Western States the same rule obtained.[8] It does not seem to have been regarded as abrogated by implication through the Fourteenth Amendment to the Federal Constitution;[9] and such laws existed in at least one Southern State as late as 1876.[10] They now remain no longer in any jurisdiction, except perhaps Nebraska.[11]

[4] Compare what is said *post*, § 936, as to the discrediting of a witness by reason of race.

[5] *Circa* 1300, Waterford Custumal, c. 8 ("No foreigner shall be a witness against a citizen, unless he has no other witness, or unless he has come in a ship, etc."), in Bateson's Borough Customs, I, 168, Selden Society Pub., vol. XVIII, 1904; 1571, Duke of Norfolk's Trial, 1 How. St. Tr. 958, 1002 (Duke: "Is the Bishop of Ross a sufficient witness against me? There be points enough in the law to prove him no sufficient witness. He is a stranger and a Scot; a stranger can be no sufficient witness, much less a Scot; . . . if a Scot come into England without a passport, he may be a lawful prisoner. . . . [Bracton saith] they must be 'legales', lawful men, and so cannot strangers be, as the bishops of Ross and Rodolph"; L. C. J. Catlin: "Bracton indeed is an old writer of our law, and by Bracton indeed he may be a witness; a stranger, a bondman, may be a witness. Ask you all the Judges here." And the Judges affirmed that he may. . . . Attorney Wilbraham: "This were a strange device, that Scots might not be witnesses; for so, if a man would commit treason, and make none privy but Scots, the treason were unpunishable, and so were a kind of men found out with whom a man might freely conspire treason").

The early discrimination against Jews (Riggs' Select Pleas, Starrs, and Records of the Jewish Exchequer, p. 1; Selden Soc., vol. XV, 1902) was another phase of the same attitude.

[6] 1631, Lord Audley's Trial, 3 How. St. Tr. 401, 411 (a person who had not taken the oath of allegiance, held competent); 1634, Coke, Fourth Institute, 279 (says that Bracton's statement "is to be understood of an alien infidel").

[7] U. S. Rev. St. 1878, § 2165, cl. 6, being St. 1816, March 22, c. 32, § 2 (aliens applying for naturalization must prove their five years' residence by the oath or affirmation of citizens of the United States); 1892, Fong Yue Ting *v.* U. S., 149 U. S. 698, 730, 13 Sup. 1016 (statute noted as valid); St. 1906, June 29, § 4, c. 3592, Code 1919, § 3675 (naturalization laws revised; originally St. 1816, Mar. 22, above; beside the applicant's oath is required "the testimony of at least two credible witnesses, who are citizens of the U. S.", as to the facts of residence, moral character, etc.); ib. § 10, Code 1919, § 3680 (in case of less than five years' residence in the State where petition is filed, etc., etc., the residence there may be established by two witnesses, and the residence elsewhere by "two or more witnesses who are citizens of the U. S.", upon notice to the Bureau, etc.). Compare § 2066, *post*.

[8] In Iowa as late as the Code of 1855, § 2388. These statutes are collected in Appleton, Evidence, App. pp. 271–278. An interesting example will be found in Southard's Trial, Va., 1851, 2 Amer. St. Tr. 905, 907.

[9] No authorities on the precise point have been found.

[10] Ala. Code 1876.

[11] Nebr. Rev. St. 1922, § 8835; quoted *ante*, § 488.

There is an express prohibition against such exclusion in the following jurisdictions: U. S. Rev. St. 1878, §§ 858, 1078, now replaced by St. 1911, Mar. 3, c. 231, Judicial Code, § 186, Code 1919, §§ 1155, 1977; Tex. Rev. Civ. St. 1911, § 3688; W. Va. Code, Code 1914, c. 130, § 24. These statutes are set out *ante*, § 488.

(*c*) *Indians.* In the course of our "benevolent assimilation" of the Indian race — that process which with its moral problems need at least not have been shadowed by excessive assumptions of virtuous superiority [12] — there were a number of regions in which testimonial incapacity was by law predicated of the Indians.[13] These have now almost all disappeared in the course of enlightened progress.[14] The traces that remain will probably persist so long as, in any part of the community, that public opinion is recognized which regards the Indian chiefly as an object of selfish exploitation and unscrupulous plunder; for this brutal spirit is likely enough to combine with greed for the Indian's land a distrust of his testimony.

(*d*) *Chinese.* No statutory exclusion of the Chinese race as witnesses seems ever to have obtained in any State law except that of California; and this has there disappeared since the Code of 1872. The condition of public feeling in that community against the economic encroachments of Chinese laborers explains and extenuates (while it may not excuse) this blunder in the policy of the testimonial law. But the just and eloquent denunciation which that law once received from a Federal judge [15] seems to have been forgotten; for a similar law, though more restricted in scope, has since made its appearance in a place where it was less to be expected, namely, in the Federal statute-book.[16] Of these statutes it can only be said that they do not come consistently from a Legislature which in this series of enactments was itself breaking solemn treaty-faith with the very nation whose members it thus condemned as oath-breakers; and that the supposed special danger of perjury by Chinese attempting to evade those statutes of exile was precisely what might be expected from the people of any country when a hostile measure is attempted to be enforced by the harshest means.[17]

[12] Here, again, it would be impracticable to cite authorities upon the relative merits of Indian character; the following will indicate how incorrect some of the ordinary notions are: Professor N. S. Shaler, "Kentucky", 109: "In the early days, the Indian warfare was singularly humane; they never outraged their women prisoners; and rarely butchered their captives. They had now learned a more brutal warfare from the whites. There can be no question that the Indian customs of war were debased by the example of their enemies."

[13] An early exception may be found in the Massachusetts Colonial Laws (J. B. Thayer, in "A Chapter of History", Harvard Law Review, IX, 1).

[14] There apparently remains some sort of disqualification in the following statute: Nebr. Rev. St. 1922, § 8835; 1909, Pumphrey *v.* State, 84 Nebr. 636, 122 N. W. 19 (a Japanese presumed competent under this statute).

Indians are expressly made competent by Wash. R. & B. Code 1909, § 2147.

Discrimination by reason of race is expressly prohibited in W. Va. Code, c. 130, § 24; see also Kan. Gen. St. 1915, § 5158 (Indians). These statutes are set out *ante*, § 488.

[15] 1867, Sawyer, J., in People *v.* Jones, 31 Cal. 573 (where the accused, robbing a Chinaman, had said that it did not matter whether the latter recognized him, since a Chinaman could not testify against him).

[16] U. S. St. 1892, May 5, c. 60, § 6, Code 1919, § 3658 (Chinese claiming to remain in U. S. must prove the fact of residence prior to passage of the act "by at least one credible white witness"); 1892, Fong Yue Ting *v.* U. S., 149 U. S. 698, 726, 730, 742, 759, 13 Sup. 1016 (statute held constitutional; three judges dissenting); U. S. St. 1893, Nov. 3, c. 14, § 2, Code 1919, § 3645, amending § 6 of St. 1892 (a Chinese re-entering as a merchant formerly residing here must prove his mercantile character by "two credible witnesses other than Chinese"); 1900, Li Sing *v.* U. S., 180 U. S. 486, 21 Sup. 449 (statute applied).

Compare the authorities *post*, § 2054, as to requiring *corroboration* for Chinese testimony; and *post*, § 937, with reference to *discrediting* a witness by reason of his race.

[17] Of the "grievous wrong" of this statute

§ 517. (2) **Sex.** In spite of the example of some of the surrounding peoples, notably of Scotland,[1] there seems never to have been in the law of England any general testimonial disability based on sex.[2] This failure to discriminate against women is perhaps another illustration of what has been sometimes forgotten, that the oppressive civil disabilities, so often inveighed against, of women in England, had regard solely to the married state, and not to sex itself.

§ 518. (3) **Religion.** The religious belief of a witness was of consequence, at common law, chiefly with reference to his ability or willingness to submit to the test of the oath — a test wholly independent (as pointed out *post*, § 1823) of his testimonial capacity.[1] But there is an aspect in which the witness' religion may be considered as affecting his testimonial capacity, namely, when the *religion sanctions false testimony*. Does the belief in such religion — termed by Bentham "cacotheism"[2] — make its adherent so untrustworthy that he ought not to be listened to at all? Upon the considerations already noticed under the foregoing topics,[3] it would seem that even in this extreme case it is impolitic to exclude the witness; because he may perhaps tell the truth, and because the ordinary tests of untruth are sufficient to justify us in taking the risk of at least listening. The question is hardly likely to occur in practice; and yet, if the Jesuit, or the Roman Catholic in general, entertained this belief (as was sometimes formerly charged) that the Church in certain situations sanctioned false testimony, the very case would seem to be presented. Nevertheless, at the time when that charge against Papists and Jesuits was generally believed in Protestant England, the Courts steadily refused to make it a ground of exclusion;[4] though it was conceded to discredit the witness.[5] The conclusion is, then, that no rule of exclusion for "cacotheists" (as distinct from theological incapacity to take the oath) has ever been recognized in our law.[6]

of 1892, Mr. Justice Brewer, himself the son of a missionary, has said judicially (Fong Yue Ting *v.* U. S., 149 U. S. 698, 744, 13 Sup. 1016): "In view of this enactment of the highest legislative body of the foremost Christian nation, may not the thoughtful Chinese disciple of Confucius ask 'Why do they send missionaries here?'"

§ 517. [1] 1705, Captain Green's Trial, 14 How. St. Tr. 1199, 1292 (Scotland; "in crimes atrocious, occult, and excepted, a woman is never refused").

[2] It is true that, as late as 1627, Coke in the Commentary on Littleton (6 *b*; see also 29 *b*, 158 *b*) says that "in some cases women are by law wholly excluded to bear testimony, as to prove a man to be a villein" (1285, 13 Edw. I, Brooke's Abridgment, De Nativo Habendo). But this likely refers to the even then obsolete process of "trial by witnesses", and not to the witnesses in the modern sense, who had only come into general use a century before Coke's time (*post*, § 575). The passage from Coke, quoted *post*, § 575, naming all the grounds of incompetency, does not name sex. For an interesting summary of the disqualifications by sex in the Roman and other foreign systems of law, see Best, Evidence, § 64; Hinschius, Kirchenrecht, VI, pt. 1, p. 98, n. 2, § 364.

§ 518. [1] The authorities upon *capacity to take the oath* are collected *post*, §§ 1815–1829.

[2] Rationale of Judicial Evidence, b. IX, pt. III, c. V, § 2 (Bowring's ed., vol. VII, p. 423); b. I, c. XI, § 7 (vol. VI, p. 271); Introductory View of the same, c. XXI, § 3 (vol. VI, p. 106).

[3] See also the passage from Bentham, quoted *post*, § 519.

[4] 1679, Whitebread's Trial, 7 How. St. Tr. 311, 361, 379 (Witness: "I hope a Roman Catholic may be a lawful witness"; L. C. J. Scroggs: "Yes, I deny it not"); 1685, Oates' Trial, 10 id. 1079, 1192.

[5] *Post*, § 936. There was a discrimination against Jews in Norman times; but this was probably due to their alien character (*ante*, § 516, n. 5).

[6] The only contrary expression was probably used of oath-capacity; 1823, O'Neall, J., in Anon., 1 Hill S. C. 258 ("the belief of a witness that he was not bound on oath to tell the

§ 519. (4) **Infamy, by Conviction of Crime; History and General Policy.** The disqualification of a person who has been convicted of crime seems not to have been fully established in our law until well on into the 1600s; although the readiness of the Crown lawyers in treason trials to favor all testimony for the prosecution, however tainted, may serve to explain the earlier instances of its admission in criminal cases as exceptions to a general rule. It is firmly enough established, and some learning about it already exists (though not without marks of novelty), by the end of the 1600s.[1]

The thought underlying this exclusion is nowadays plain enough; the man who has been guilty of a heinous crime cannot be trusted in any respect, therefore cannot be trusted in his testimony. This thought is one which might be supposed peculiar to the social stratification of England, where class degradation was of itself a serious source of untrustworthiness,[2] and where a judicial accusation of crime was in fact a perquisite chiefly of the "lower classes."[3] But the early prevalence of the same notion of incompetency in other systems of law, and its persistence in many of the Southern communities of our own modern democracy, indicate that there is something generic and universal in its origin. Perhaps this generic feature was confined to the effect of infamy as a punishment for crime, while its moral significance as a source of distrust in testimony was peculiarly marked in English conditions. At any rate, in one respect at least, English social facts affected its scope; for one of its irrational and inconsistent limitations, namely, that the judgment of conviction, and not the actual guilt, caused the disqualification, may be accounted for by remembering the English tendency (noted in other connections also, *post*, § 982) in social life to ignore offences so long as they do not bring the offender to the formal ignominy of legal condemnation, *i.e.* to accept an external, not an internal, standard of guilt. No doubt, this same limitation rested to some extent on the notion of disqualification as a part of the punishment for the crime, *i.e.* that the "infamy", or degradation, which by these social standards must follow immediately upon judgment of guilt, should naturally involve an exclusion from equal status in the witness-box.[4]

truth would, if coming from his own lips, render him incompetent to be sworn").

§ 519. [1] 1613, Browne *v.* Crashaw, 2 Bulstr. 154 (two persons attainted of felony were excluded; for, per Coke, C. J., "he is not a fit person to serve of a jury, nor yet to be an indifferent witness; and by the same reason the testimony of such a one for a witness in all cases is to be rejected"); 1616, Earl of Somerset's Trial, 2 How. St. Tr. 965, 985 (illustrating the practice of using the sworn testimony of a convicted accomplice); 1637, Bishop of Lincoln's Trial, 3 How. St. Tr. 804, 807, 812 (an objection that a witness had been "sentenced in the Star Chamber", was overruled, since it was not "for any matter of perjury, or crime that should take his testimony").

[2] *Post*, § 575. Compare our traditional phrase "of poor but honest parents."

The earlier class-distinctions seem to have had some such disqualification attached; weavers and fullers, in the 1200s. could not bear witness against a free man: Beverly Town Documents, ed. Leach, Introd. p. xlv, text p. 134 (1209 A.D., Selden Society Pub., vol. XIV, 1900).

[3] "Most accused persons are poor, stupid, and helpless" (Stephen, History of the Criminal Law, I, 442).

[4] On the history of the various meanings of "infamy" and "infamous", as importing consequences of punishment and disqualification of various sorts, see the learned essay of Professor Henry Schofield, "Cruel and Unusual Punishment" (1911, Illinois Law Rev. V, 321; reprinted in his "Essays on Constitutional Law and Equity", 1921).

Nevertheless, in whatever degree the disqualification may have been thought of as a part of the punishment of the offender himself, it was obvious that this theory could not of itself justify the incidental punishment of innocent persons who might need the convict's testimony; and hence the justification had ultimately to be founded on some more acceptable reason. Hence, as soon as the rule begins to be reasoned about, we find it placed upon the more plausible theory of *actual moral turpitude*, *i.e.* the person is to be excluded because from such a moral nature it is useless to expect the truth, — a notion which at least avoided the fallacy of the punishment-theory, and came finally to be put forward as the orthodox one of the common law:

Ante, 1727, Chief Baron GILBERT, Evidence, 139: "The second sort of persons excluded from testimony for want of integrity are such as are stigmatized. Now there are several crimes that so blemish that the party is ever afterwards unfit to be a witness, . . . and the reason is very plain, because every plain and honest man affirming the truth of any matter under the sanction and solemnity of an oath is entitled to faith and credit, . . . but where a man is convicted of falsehood and other crimes against the common principles of honesty and humanity, his oath is of no weight, because he hath not the credit of a witness, . . . and he is rather to be intended as a man profligate and abandoned than one under the sentiments and convictions of those principles that teach probity and veracity."

1824, Mr. *Thomas Starkie*, Evidence, 83: "Since the object of the oath is to bind the conscience of the witness, . . . it follows also that the testimony of a person who by the turpitude of his conduct has shown that he is regardless of all laws both human and divine ought not to be received, for it cannot reasonably be expected that such a person would regard the obligation of an oath."

1810, Chief Justice SWIFT, Evidence, 52: "Persons convicted of crimes evincive of a want of regard for those moral and religious principles that constitute the obligation of an oath are excluded from testifying."

This theory, plausible enough at first sight, and calculated to persist until general social conditions permitted a different sort of reasoning to obtain recognition, sufficed to maintain the common-law doctrine in full force until the time of Bentham. His lucid exposition of its shortcomings and his determined attack upon its fallacies proved irresistible. The almost complete disappearance of this disqualification from Anglo-American law in the last century has been due to those arguments, first promulgated by him, of which the following are salient passages:[5]

1827, Mr. *Jeremy Bentham*, Rationale of Judicial Evidence, b. IX, pt. III, c. III (Bowring's ed. vol. VII, pp. 406 ff.): "Improbity, in whatever shape or degree, is still farther [than interest] from being a proper ground of exclusion. . . . Let us begin with perjury. In perjury may be seen by far the strongest case: the case in which the pretence for exclusion on the score of security against deception wears the fairest outside. . . . Perjury, in addition to the prevalence of the ordinary motives on some individual occasion or occasions, indicates the particular species of delinquency into which the individual has thus

[5] These arguments will be found epitomized in the treatise of Chief Justice Appleton of Maine, on Evidence (1860), c. III. Similar ones were published (*circa* 1823) by Mr. Justice Edward Livingston of Louisiana, in his introductory Report to the Code of Evidence (Works, ed. 1872, I, 468).

been impelled; viz. mendacity: the very species by which the most plausible of all pretences for exclusion on the ground of improbity is afforded. In any other case, the argument for the exclusion is no more than this: He has violated the obligations of morality in some sorts of ways; therefore it is more or less probable that he will, upon occasion, violate them in this sort of way. In the case of mendacity it runs thus: He has violated the obligations of morality not only in other sorts of ways, but in this very sort of way, on former occasions; therefore it is more or less probable that so he will on the occasion now in hand. For suspicion, a most perfectly proper ground; for rejection, none whatever. Reasons: those already mentioned [for interest and the like]; to which may be added those which follow. [1] In this line of delinquency, beyond most, if not all others, the scale is lengthy, the degrees are numerous. . . . To all these different levels the eye of judicial suspicion has the power of adjusting itself. Exclusion knows no gradations: blind and brainless, it has but one alternative; — shut or open, like a valve; up or down, like a steam-engine. . . . [2] When the door of the witness-box is shut against a proposed witness on this score, it is generally on the ground of some single transgression of this sort. But a single transgression of this sort, — what does it prove? . . . That on one assignable occasion the convict has been known to fall into that sort of transgression, which every human adult must also have fallen into, more times than one, on occasions assignable or unassignable. 'I said', says the Psalmist, 'I said in my wrath, all men are liars.' It was in his wrath that the observation came from him; but he need not have wished to retract it in his coolest moments. From a single lie told in the course of ever so long a life, a man may, without any grammatical impropriety, be denominated a liar. . . . Upon the whole, he who considers how few in comparison are the occasions in which any advantage (howsoever impure, and overbalanced by ultimate disadvantage) is to be gained by falsehood, will, I imagine, join with me in the opinion, that, from the mouth of the most egregious liar that ever existed, truth must have issued at least a hundred times, for once that falsehood, wilful falsehood, has taken its place. . . . What I am contending against (let it never be out of sight) is absolute rejection: rejection in all cases: — not suspicion and distrust. [3] The very repugnance, with which it is but natural the reader should have received the proposition of opening the door of justice to testimony of this tainted kind, is a sort of proof and earnest of the safety of the measure. . . . So broad, so prominent is the stigma — so conspicuous and impressive the warning which it gives, — the danger is, not that the man thus distinguished should gain too much credence, but that he should not gain enough. 'Fœnum habet in cornu.' [4] Suppose an inexorable door shut against him; or, although open, suppose an inexorably deaf ear turned to him; and observe the consequence: — that crimes, all imaginable crimes, may be committed with impunity, with sure impunity, on his person and in his presence. . . . [5] Infamy, and (as a visible sign of infamy) exclusion from the sanctuary of justice, . . . one of the instances, which, in but too great number, may be found in the English as well as other established systems, of the sort of punishment which has been called *mis-seated* punishment: punishment 'in alienam personam': a sort of punishment which, in this particular application of it, may be styled *chance-medley* punishment. The punishment does not fall upon the witness who is disqualified, but upon all persons who may have need of his evidence. A certain person has offended, and, to add a sting to his punishment, an unoffending crowd is collected below, and a pailful of punishment is thrown down upon their heads out of a window. An innocent stranger is laid hold of, and a sword run through his body, that with the point of it a useless scratch may be given to the caitiff who has provoked all this vengeance. . . . [6] If from that modification of improbity which consists in a breach of veracity on the very sort of occasion in question (viz. judicial testimony), no sufficient ground for exclusion can be deduced, — much less (it is evident) can it, from improbity manifesting itself in any other shape. . . . A sample or two must serve instead of a complete list. To judge of offences by punishments, the most detestable of mankind should be found in the class of traitors. . . . During

the warfare between the Two Roses, — that is, from generation to generation, — the good people of England, good and bad together, were alternately loyalists and traitors: consequently, if the men of law were fit to be believed, in all that time scarce a man in the country that was fit to be believed. Look back, as above, to a few hundred years' distance in the track of time, you see a whole nation composed of traitors. Look on to few hundred degrees' distance in the track of space, you may see a whole colony composed of felons: and felons not 'in posse' merely, like the traitors, but 'in esse', duly converted into that state in due form of law. Upon the evidence of this or that one of those felons, this or that other of them has from time to time suffered death: murdered, thereby, or not murdered, is a question I leave undiscussed for the amusement of those who sent them there. . . . Take homicide in the way of duelling. Two men quarrel; one of them calls the other a liar. So highly does he prize the reputation of veracity, that, rather than suffer a stain to remain upon it, he determines to risk his life, challenges his adversary to fight, and kills him. Jurisprudence, in its sapience, knowing no difference between homicide by consent, by which no other human being is put in fear — and homicide in pursuit of a scheme of highway robbery, of nocturnal housebreaking, by which every man who has a life is put in fear of it, — has made the one and the other murder, and consequently felony. The man prefers death to the imputation of a lie, — and the inference of the law is, that he cannot open his mouth but lies will issue from it. 'Such are the inconsistencies which are unavoidable in the application of any rule which takes improbity for a ground of exclusion. Take it for a ground of suspicion only, all these absurdities are avoided. . . . If the legislator had his choice of witnesses upon every occasion, and witnesses of all sorts in his pocket, he would do well not to produce any, upon any occasion, but such over whose conduct the tutelary motives exercised despotic sway; in a word, to admit no other men for witnesses than perfect men. But perfect men do not exist: and if the earth were covered with them, delinquents would not send for them to be witnesses to their delinquency. In such a state of things, then, the legislator has this option, and no other: to open the door to all witnesses, or to give license to all crimes. For all purposes, he must take men as he finds them: and, for the purpose of testimony, he must take such men as happen to have been in the way to see, or to say they have been in the way to see, what, had it depended upon the actors, would have been seen by nobody."

There can be, then, no justification for the disqualification of a person by reason of conviction of crime; and legislation has now in most jurisdictions recognized this, with more or less thoroughness, by abolishing the common law rule. In a few jurisdictions, nevertheless, it remains in full scope (though defined by statute), and in some others it is retained for the crime of perjury (quoted in full, *ante*, § 488). These anachronisms ought not to be longer countenanced:

1902, RIDDICK, J., in *Vance* v. *State*, 70 Ark. 272, 68 S. W. 37: "We take this occasion, also, to call attention to the backward state of the law in this State in reference to the competency of witnesses convicted of felony. The statutes which render such witnesses incompetent belong to a class of antiquated laws which suppress evidence, and which the wisdom of modern ages has discredited and shown to be unreasonable and injurious. They are of the same class as the laws which formerly forbade the parties to the suit from testifying, and closed the mouth of the defendant on trial for his life, and should be repealed, as these laws have been repealed, for such matters should go only to the credit or impeachment of the witness, not to the exclusion of his testimony. There is no valid reason why a person who knows anything material to the decision of a case on trial should not be permitted to tell it, whatever may be his character, the jury being allowed to weigh his testimony in connection with his character and antecedents. These statutes not only suppress evidence,

but the application of them often presents difficult and doubtful questions, which, being decided in the hurry of trial, frequently result on appeal in reversals, and in this way justice is often thwarted. There are very few States[1] that now retain such laws, and we think our legislators might well consider whether they should not be repealed in this State also."

§ 520. Same: Kind of Crime that Disqualifies.[1]

1842, Professor *Simon Greenleaf*, Evidence, § 373: "It is a point of no small difficulty to determine precisely the crimes which render the perpetrator thus infamous. The rule is justly stated to require, that 'publicum judicium' must be upon an offence, implying such a dereliction of moral principle, as carries with it a conclusion of a total disregard to the obligation of an oath."[2] But the difficulty lies in the specification of those offences. The usual and more general enumeration is, *treason*, *felony*, and the 'crimen falsi.'[3] In regard to the two former, as all treasons, and almost all felonies were punishable with death, it was very natural that crimes, deemed of so grave a character as to render the offender unworthy to live, should be considered as rendering him unworthy of belief in a Court of Justice. But the extent and meaning of the term, 'crimen falsi,' in our law, is nowhere laid down with precision. In the Roman Law, from which we have borrowed the term, it included not only forgery, but every species of fraud and deceit.[4] If the offence did not fall under any other head, it was called 'stellionatus',[5] which included 'all kinds of cozenage and knavish practice in bargaining.' But it is clear, that the Common Law has not employed the term in this extensive sense, when applying it to the disqualification of witnesses; because convictions for many offences, clearly belonging to the 'crimen falsi' of the civilians, have not this effect. Of this sort are deceits in the quality of provisions, deceits by false weights and measures, conspiracy to defraud by spreading false news,[6] and several others. On the other hand, it has been adjudged, that persons

§ 520. [1] This topic, being practically almost obsolete, and destined soon to become entirely so, may be here sufficiently expounded by quoting the words of Professor Greenleaf, which have served to guide our Courts in their rulings since 1842. Those passages, including such notes as are here reproduced, are placed in quotation marks; the scanty modern rulings are added without such marks.

[2] "2 Dods. R. 186, per Sir Wm. Scott."

[3] "Phil. & Am. on Evid. p. 17; 6 Com. Dig. 353, *Testmoigne*, A. 4, 5; Co. Lit. 6, b.; 2 Hale, P. C. 277; 1 Stark. Evid. 94, 95. A conviction for petty larceny disqualifies, as well as for grand larceny: Pendock *v.* Mackinder, Willes' R. 665"; *accord*, for grand larceny, 1899, State *v.* Clark, 60 Kan. 450, 56 Pac. 767.

[4] "Cod. Lib. 9, tit. 22, ad legem Corneliam de falsis. Cujac. Opera, Tom. ix. in locum. (Ed. Prati, a. d. 1839, 4to, p. 2191–2200); 1 Brown's Civ. & Adm. Law, p. 425; Dig. lib. 48, tit. 10; Heinec. in Pand. Pars vii. § 214–218. The 'crimen falsi', as recognized in the Roman Law, might be committed, 1. by words, as in perjury; 2. by writing, as in forgery; 3. by act, or deed; namely, in counterfeiting or adulterating the public money, — in fraudulently substituting one child for another, or a supposititious birth, — or in fraudulently personating another, — in using false weights or measures, — in selling or mortgaging the same thing to two several persons in two several contracts, — and in officiously supporting the suit of another by money, &c., answering to the common law crime of maintenance. Wood, Instit. Civil Law, p. 282, 283; Halifax, Analysis Rom. Law, p. 134."

[5] "Dig. lib. 47, tit. 20, l. 3, Cujac. (in locum) Opera, tom. ix. (Ed. supra) p. 2224. Stellionatus nomine significatur omne crimen, quod nomen proprium non habet, omnis fraus, quæ nomine proprio vacat. Translatum autem esse nomen stellionatus, nemo est qui nesciat, ab animali ad hominem vafrum, et decipiendi peritum: Ib. Heinec. ad Pand. Pars vii, § 147, 148; 1 Brown's Civ. & Adm. Law, p. 426."

[6] "The Ville de Varsovie, 2 Dods. R. 174, but see Crowther *v.* Hopwood, 3 Stark. R. 21."

The following crimes have been held passed upon as sufficient or not to disqualify: 1908, U. S. *v.* Sims, C. C. N. D. Ala., 161 Fed. 1009 (embezzlement; careful opinion by Hundley, J.); 1912, Keliher *v.* U. S., C. C. A., 193 Fed. 8 (conviction of a misdemeanor subjecting to imprisonment for more than a year, held not to disqualify); 1913, Maxey *v.* U. S., 8th C. C. A., 207 Fed. 327 (conviction for fraudulent use of the mails, held to disqualify); Com. *v.* Dame, 8 Cush. Mass. 384 (maliciously obstructing railroad cars, not sufficient); 1910, Hawkins *v.* U. S., 3 Okl. Cr. 651, 108 Pac. 561 (murder-conviction disqualifies; here on a case arising from Indian Territory); 1897, State *v.* Green, 48 S. C. 136, 26 S. E. 234; (fraudulently disposing of a crop subject to lien, not sufficient); 1918, Cooper Grocery Co. *v.* Neblett, — Tex. Civ.

are rendered infamous, and therefore incompetent to testify, by having been convicted of forgery,[7] perjury, subornation of perjury,[8] suppression of testimony by bribery, or conspiracy to procure the absence of a witness,[9] or other conspiracy, to accuse one of a crime,[10] and barratry.[11] And from these decisions it may be deduced, that the 'crimen falsi' of the Common Law not only involves the charge of falsehood, but also is one which may injuriously affect the administration of justice, by the introduction of falsehood and fraud. At least it may be said, in the language of Sir William Scott,[12] 'so far the law has gone, affirmatively; and it is not for me to say where it should stop, negatively.'"

§ 521. Same: Judgment, not Guilt, Disqualifies.

1842, Professor *Simon Greenleaf*, Evidence, § 375 :[1] "We have already remarked, that no person is deemed infamous in law, until he had been legally found guilty of an infamous crime. But the mere verdict of the Jury is not sufficient for this purpose; for it may be set aside, or the judgment may be arrested, on motion for that purpose. It is *the judgment*, and that only, which is received as the legal and conclusive evidence of the party's guilt, for the purpose of rendering him incompetent to testify.[2] And it must appear that the

App. —, 203 S. W. 365 (conviction for selling liquor without paying the federal revenue tax, imposing a sentence of hard labor; held not an infamous crime, and therefore not to disqualify under P. C. § 55).

[7] "R. *v.* Davis, 5 Mod. 74."

[8] "Co. Lit. 6, b.; 6, Com. Dig. 353, *Testm.* A. 5."

[9] "Clancey's case, Fortesc. R. 208; Bushell *v.* Barrett, Ry. & M. 434."

[10] "2 Hale, P. C. 277; Hawk. P. C. b. 2, c. 46, § 101; Co. Lit. 6, b.; R. *v.* Priddle, 2 Leach, Cr. Cas. 496; Crowther *v.* Hopwood, 3 Stark. R. 21, arg.; 1 Stark. Evid. 95; 2 Dods. R. 191."

[11] "R. *v.* Ford, 2 Salk. 690; Bull. N. P. 292. The receiver of stolen goods is incompetent as a witness; see the trial of Abner Rogers, p. 136, 137. If a statute declare the perpetrator of a crime 'infamous', this, it seems, will render him incompetent to testify: Phil. & Am. on Evid. p. 18; 1 Phil. Evid. p. 18; 1 Gilb. Evid. by Lofft, p. 256, 257."

[12] "2 Dods. R. 191. See also 2 Russ. on Crimes, 592, 593." Compare the same question as it arises from the use of conviction of crime to impeach a witness, *post*, § 980; the definition may in that case be somewhat different.

§ 521. [1] See note 1, § 520, *ante*.

[2] ENGLAND: "6 Com. Dig. 354, *Testm.* A. 5; R. *v.* Castel Careinion, 8 East 77; Lee *v.* Gansell, Cowp. 3; Bull. N. P. 292; Fitch *v.* Smalbrook, T. Ray. 32"; 1867, R. *v.* Webb, 11 Cox Cr. 133, Lush, J. (convict under death-sentence, disqualified, because under the old law a person attainted and sentenced to death was deemed civilly dead). CANADA: 1915, R. *v.* Kuzin, 21 D. L. R. 378, Man. (murder; a person convicted of murder and sentenced to death, held qualified as a witness; careful review of the subject by Cameron, J. A.); UNITED STATES: "People *v.* Whipple, 9 Cow. N. Y. 707; People *v.* Herrick, 13 Johns. N. Y. 82; Cushman *v.* Loker, 2 Mass. 108; Castellano *v.* Peillon, 2 Mart. La. N. S. 466"; 1901, Yates *v.* State, 43 Fla. 177, 29 So. 965 (there must be a judgment or sentence); 1915, State *v.* Marshall, 95 Kan. 628, 148 Pac. 675 (conviction of perjury, sentence to the penitentiary, and release on parole does not disqualify; the "civil rights . . . are not suspended until the actual incarceration begins," distinguishing prior cases); 1851, Smith *v.* Brown, 2 Mich. 161, 163 (verdict of perjury offered against B. to overthrow his answer in equity on the matter for which he was found guilty of perjury; excluded, because pending a motion in arrest of judgment B. had died; cases cited additionally to those above); 1888, Arcia *v.* State, 26 Tex. App. 193, 9 S. W. 685 (judgment on the verdict, not followed by sentence, held insufficient under local statutory provisions); 1888, Woods *v.* State, 26 Tex. App. 490, 508, 10 S. W. 108 (contrary result reached, where sentence was lacking, for an offence punishable only by fine); 1893, Jones *v.* State, 32 Tex. Cr. 135, 22 S. W. 404 (following Arcia *v.* State); 1896, Evans *v.* State, 35 Tex. Cr. 485, 34 S. W. 285 (same); 1900, Flournoy *v.* State, — Tex. Cr. —, 59 S. W. 902 (same); 1907, Rice *v.* State, 50 Tex. Cr. 648, 100 S. W. 771 (verdict without sentence does not disqualify); 1918, Burnett *v.* State, 83 Tex. Cr. 97, 201 S. W. 409 (similar).

It would follow that, if judgment appears to have been rendered, the party offering the witness must show that it has been *reversed* or the offence *pardoned:* 1878, State *v.* Howard, 19 Kan. 507, 509; 1899, State *v.* Clark, 60 Kan. 450, 56 Pac. 767.

But a mere showing that an *appeal* has been taken should not suffice: 1900, Best *v.* Best, 22 Wash. 695, 60 Pac. 58 (conviction suffices, though a pending appeal results later in reversal of judgment; yet in such case continuance should be allowed). *Contra:* 1898, Stanley *v.* State, 39 Tex. Cr. 482, 46 S. W.

judgment was rendered by a Court of competent jurisdiction.[3] Judgment of outlawry for treason or felony will have the same effect;[4] for the party, in submitting to an outlawry, virtually confesses his guilt; and so the record is equivalent to a judgment upon confession. If the guilt of the party should be shown by oral evidence, and even by his own admission (though in neither of these modes can it be proved, if the evidence be objected to), or, by his plea of guilty, which has not been followed by a judgment,[5] the proof does not go to the competency of the witness, however it may affect his credibility."[6]

§ 522. Same: Conviction in Another Jurisdiction.

1842, Professor *Simon Greenleaf*, Evidence, § 376:[1] "Whether judgment of an infamous crime, passed by a foreign tribunal, ought to be allowed to affect the competency of the party as a witness, in the Courts of this country, is a question upon which jurists are not entirely agreed. But the weight of modern opinion seems to be that personal disqualifications not arising from the law of nature but from the positive law of the country, and especially such as are of a penal nature, are strictly territorial, and cannot be enforced in any country other than that in which they originate.[2] Accordingly it has been held, upon great consideration, that a conviction and sentence for a felony in one of the United States, did not render the party incompetent as a witness, in the Courts of another State; though it might be shown in diminution of the credit due to his testimony."[3]

645 (disqualified only after sentence accepted or judgment affirmed); 1898, Foster *v.* State, 39 Tex. Cr. 399, 46 S. W. 231 (not disqualified pending appeal taken; the objector to show that the appeal had been dismissed).

A remarkable instance of enlightened judicial legislation is the following; 1916, Rosen *v.* U. S., 2d C. C. A., 237 Fed. 810 (sentence to the Elmira reformatory, held not a disqualifying conviction; "the tendency of modern thought is towards the abolition of the archaic rules"; Ward, J., diss.).

[3] "Cooke *v.* Maxwell, 3 Stark. R. 183."

[4] "Co. Lit. 6, b.; Hawk. P. C. b. 2, c. 48, § 22; 3 Inst. 212; 6 Com. Dig. 354, *Testm.* A. 5; 1 Stark. Evid. 95, 96. In Scotland it is otherwise: Tait's Evid. p. 347."

[5] "R. *v.* Hinks, 1 Den. Cr. Cas. 84", 2 C. & K. 462; 1919, Fitter *v.* U. S., 2d C. C. A., 258 Fed. 567, 575 (person pleading guilty, but not sentenced, is not disqualified).

[6] "R. *v.* Castel Careinion, 8 East 77; Wicks *v.* Smalbroke, 1 Sid. 51; T. Ray. 32, s. c.; People *v.* Herrick, 13 Johns. N. Y. 82." Compare the same question in relation to the impeachment of a witness, *post*, § 980.

Whether the judgment may be proved by *asking the witness on cross-examination*, *i.e.* otherwise than by a certified copy of the record, depends upon a different principle, examined *post*, § 1270.

Whether the conviction prevents the use of a *deposition taken* before conviction or the proof of an *attesting signature* affixed to a will or deed before conviction, involves other principles, examined *post*, §§ 1409, 1506.

§ 522. [1] See note 1, *ante*, § 520.

[2] "Story on Confl. of Laws, §§ 91, 92, 104, 620–625; Martens's Law of Nations, B. 3, c. 3, §§ 24, 25."

[3] "Com. *v.* Green, 17 Mass. 515, 539–549"; proceeding upon (1) the difficulty of raising an issue as to the record, (2) the diversity of ideas as to criminal conduct in different countries, (3) the hardship of disqualifying by old and forgotten offences in other lands, (4) the principle that penal laws have no effect beyond the jurisdiction, (5) the fact that infamy is a punishment as well as stigma on character.

Accord: 1891, Logan *v.* U. S., 144 U. S. 303, 12 Sup. 617; 1916, Brown *v.* U. S., 6th C. C. A., 233 Fed. 353 (conviction of felony in a Tennessee court, held not to disqualify a witness in a Federal court sitting in Tennessee); 1916, Rosen *v.* U. S., 2d C. C. A., 237 Fed. 810 (but, per Ward, J., only, conviction for forgery in New York, held to disqualify in the Federal District Court sitting in New York); 1905, Robinson *v.* State, 50 Fla. 115, 39 So. 465 (conviction not shown to be in a court of the State, held not to disqualify under Rev. St. 1892, § 1096); 1920, Day *v.* Lusk, — Mo. —, 219 S. W. 597 (conviction of crime in other States, held not to disqualify); 1878, Sims *v.* Sims, 75 N. Y. 466, 468; 1879, National Trust Co. *v.* Gleason, 77 N. Y. 400, 410; 1908, *In re* Ebbs, 150 N. C. 44, 63 S. E. 190 (State *v.* Candler, *infra*, discussed, in a proceeding for disbarment; point not decided); 1909, Samuels *v.* State, 110 Va. 901, 66 S. E. 222 (conviction of perjury in a Federal court sitting in Virginia does not disqualify in a Virginia court); 1910, Kain *v.* Angle, 111 Va. 415, 69 S. E. 355 (same).

Contra: 1824, State *v.* Candler, 3 Hawks N. C. 307 (Taylor, C. J.: "As truth and justice are not confined by geographical limits but are coextensive with the concerns and relations of civilized communities, the crime which in reason renders a witness incompetent

§ 523. Same: Disqualification removed by (1) Reversal of Judgment; (2) Pardon; (3) Serving of Sentence.

1842, Professor *Simon Greenleaf*, Evidence, §§ 377, 378: "The disability thus arising from infamy may, in general, be removed in two [three] modes; (1) by reversal of the judgment; (2) by a pardon; [and (3) by serving the sentence].

(1) The *reversal of the judgment* must be shown in the same manner that the judgment itself must have been proved, namely, by production of the record of reversal, or, in proper cases, by a duly authenticated exemplification of it.[1]

(2) The *pardon* must be proved by production of the charter of pardon under the great seal; and though it were granted after the prisoner had suffered the entire punishment awarded against him, yet it has been held sufficient to restore the competency of the witness; though he would, in such case, be entitled to very little credit.[2] The rule, that a pardon restores the competency and completely rehabilitates the party, is limited to cases where the disability is a consequence of the judgment, according to the principles of the Common Law.[3] But where the disability is annexed to the conviction of a crime by the express words of a statute, it is generally agreed that the pardon will not, in such a case, restore the competency of the offender; the prerogative of the sovereign being controlled by the authority of the express law. Thus, if a man be adjudged guilty on an indictment for perjury, at Common Law, a pardon will restore his competency; but if the indictment be founded on the statute of 5 Eliz. c. 9, which declares, that no person convicted and attainted of perjury, or subornation of perjury, shall be from thenceforth received as a witness in any Court of record, he will not be rendered competent by a pardon." [4]

in one country must do so in all"); 1838, Chase *v.* Blodgett, 10 N. H. 30; 1880, State *v.* Foley, 15 Nev. 72; 1914, Goldstein *v.* State, 73 Tex. Cr. 558, 166 S. W. 149, 171 S. W. 708 (under C. Cr. P. § 788, as applied in Pitner *v.* State, 23 Tex. App. 366, 5 S. W. 210).

"In the cases of State *v.* Ridgely, 2 Har. & McHen. Md. 120; Clark's lessee *v.* Hall, Ib. 378; and Cole's lessee *v.* Cole, 1 Har. & Johns. Md. 572; which are sometimes cited in the negative, this point was not raised nor considered; they being cases of persons sentenced in England for felony, and transported to Maryland, under the sentence, prior to the Revolution."

§ 523. [1] See note 2, *ante*, § 521.

[2] "U. S. *v.* Jones, 2 Wheeler Cr. C. 451."

The rule that a *pardon removes the disqualification* has been recognized from the beginning, though in the earlier practice there was some difference of opinion whether the burning in the hand was also essential; *England:* 1673, Tong's Case, Kelyng 18; 1679, Reading's Trial, 7 How. St. Tr. 259, 296; 1680, Castlemaine's Trial, 7 How. St. Tr. 1067, 1083, 1089 (by the K. B. and C. P.; mere pardon for felony does not make competent, unless there was a burning in the hand); 1685, Fernley's Trial, 11 How. St. Tr. 381, 426; 1695, Crosby's Trial, 12 How. St. Tr. 1291, 1296; 1696, Rookwood's Trial, 13 id. 183, 185 (pardoned, but not burnt in the hand; admitted); Earl of Warwick's Trial, 13 How. St. Tr. 1011–1019 (given benefit of clergy, but the burning in the hand respited; excluded); *United States:* 1891, Boyd *v.* U. S., 142 U. S. 450, 12 Sup. 292; 1891, Logan *v.* U. S., 144 id. 303, 12 Sup. 617; 1913, Thompson *v.* U. S., 9th C. C. A., 202 Fed. 401 (perjury); 1913, Roberson *v.* Woodfork, 155 Ky. 206, 159 S. W. 793; 1834, Perkins *v.* Stevens, 24 Pick. Mass. 277 (a general pardon restores competency); 1880, State *v.* Foley, 15 Nev. 67, and cases cited; 1870, Curtis *v.* Cochran, 50 N. H. 242; 1904, Miller *v.* State, 46 Tex. Cr. 59, 79 S. W. 567 (here a question as to the application of a pardon to a different conviction); 1853, Anglea *v.* Com., 10 Gratt. Va. 696 (except for perjury, under the Virginia Code).

[3] "If the pardon of one sentenced to the penitentiary for life, contains a proviso, that nothing therein contained shall be construed, so as to relieve the party from the legal disabilities consequent upon his sentence, other than the imprisonment, the proviso is void, and the party is fully rehabilitated: People *v.* Pease, 3 Johns. Cas. N. Y. 333."

[4] "R. *v.* Ford, 2 Salk. 689; Dover *v.* Maestaer, 5 Esp. 92, 94; 2 Russ. on Crimes, 595, 596; R. *v.* Greepe, 2 Salk. 513, 514; Bull, N. P. 292; Phil. & Am. on Evid. 21, 22." *Accord: Fla.* Rev. G. St. 1919, § 2704. *Contra:* 1895, Diehl *v.* Rogers, 169 Pa. 316, 32 Atl. 424. "See also Mr. Hargrave's Juridical Arguments, Vol. 2, p. 221, *et seq.*, where this topic is treated with great ability. Whether the disability is, or is not, made a part of the judgment, and entered as such on the record, does not seem to be of any importance. The form in which this distinction is taken in the earlier cases, evidently shows that its force was understood to consist in this, that in the former case the disability

1680, SCROGGS, C. J., in *Castlemaine's Trial*, 7 How. St. Tr. 1067, 1083: "In this I am clear: If a man were convicted of perjury, that no pardon will make him a witness, because it is to do the subject wrong. A pardon does not make a man an honest man; it takes off reproaches; . . . it is only to prevent upbraiding language, which tends to the breach of the peace. . . . [But otherwise for other felonies]; this I make more doubtful than the other, for a man, maybe, that hath committed a robbery would be afraid to forswear himself; for though one is a great, the other is a greater sin, and that in the subject matter."

(3) Professor *Greenleaf*, 'ubi supra': 'By Stat. 9 Geo. 4, c. 32, § 3, *enduring the punishment* to which an offender has been sentenced for any felony not punishable with death, has the same effect as a pardon under the great seal, for the same offence; and of course it removes the disqualification to testify; and the same effect is given by § 4, of the same statute, to the endurance of the punishment awarded for any misdemeanor, except perjury and subornation of perjury.[5] But whether these enactments have proceeded on the ground, that the incompetency is in the nature of punishment, or, that the offender is reformed by the salutary discipline he has undergone, does not clearly appear."

§ 524. **Same: Statutory Changes.** Acting upon the reasons already set forth (*ante*, § 519), the Legislatures of almost every jurisdiction have long ago either entirely abolished or narrowly restricted the disqualification by conviction of crime. The earliest statute seems to have been that of England, in 1843. The statutes in the United States, when not providing for entire abolition, usually retain the common law rule for perjury only (including subornation); while a few retain it in its original scope as to kinds of crimes, but apply it in criminal trials only; but neither of these limitations has any justification in logic or policy.[1]

was declared by the statute, and in the latter, that it stood at Common Law."

For the same question, arising in relation to the *impeachment* of a witness, see *post*, § 980.

[5] "See also 1 W. 4, c. 37, to the same effect." 1909, State *v.* Blount, 124 La. 202, 50 So. 12; 1906, Quillin *v.* Com., 105 Va. 874, 54 S. E. 337 (confinement for sixty days in a jail on a 'capias pro fine' is not a satisfaction of a punishment of fine); 1910, Davidson *v.* Watts, 111 Va. 394, 69 S. E. 328.

§ 524. [1] The statutes have been already set out, *ante*, § 488; in the following list a rough summary is given, with the local rulings construing the effect of the statutes: ENGLAND 1843 (abolished); CANADA (abolished); UNITED STATES: *Federal* (local law to apply, but perjury and subornation disqualify; however, in consequence of the conformity principle, *ante*, § 6, the rule varied, until Rosen *v.* U. S., *infra*): 1913, Maxey *v.* U. S., 8th C. C. A., 207 Fed. 327 (person convicted of felony in a Federal court in Arkansas, held disqualified, under the common law rule, unchanged by Congress); 1917, McCoy *v.* U. S., 5th C. C. A., 247 Fed. 861 (trial in Florida; prior conviction of a witness in the Federal Court in Arkansas, held not disqualified, under Fla. Terr. St. 1843, Mar. 15, being the law in force there at the time of Florida's admission to the Union); 1918, Rosen *v.* U. S., 245 U. S. 467, 38 Sup. 148 (receiving stolen mail-matter; witness convicted of forgery in N. Y., held competent in a trial in the U. S. District Court for N. Y., on the principle of § 6, *ante*; the opinion is silent on the present principle, and is obscure); 1918, Reed *v.* U. S., 2d C. C. A., 252 Fed. 21 (conviction by military court-martial, held not to disqualify; citing Rosen *v.* U. S., *supra*); 1920, Ammerman *v.* U. S., 8th C. C. A., 277 Fed. 136 (conviction for felony, held not to disqualify; following Rosen *v.* U. S., *supra*); *Ala.* (abolished, except for perjury or subornation); *Alaska:* (abolished); *Ariz.* (abolished); *Ark.* (abolished); 1922, Johnson *v.* State, — Ark. —, 238 S. W. 23 (convicts from the State farm, admitted); *Cal.* (abolished); *Colo.* (abolished); *Columbia* (abolished, except for perjury); *Conn.* (abolished); *Del.* (abolished); *Fla.* (abolished, except for perjury); *Ga.* (abolished); *Haw.* (abolished, except for perjury and subornation); *Ida.* (abolished); *Ill.* (abolished); *Ind.* (*semble*, abolished); *Ia.* (*semble*, abolished); *Kan.* (abolished for civil cases); *Ky.* (no person convicted of perjury or equivalent offences is to be competent); 1886, Com. *v.* McGuire, 83 Ky. 57 (disqualification no longer exists except for perjury, etc., under Stats. § 1180); 1890, Com. *v.* Minor, 89 Ky. 555, 13 S. W. 5 (same; but this rule is limited to criminal cases, since § 606, Civ. Code, disqualifies convicts in civil cases); 1896, Hancock *v.* Parker, 100 Ky. 143, 37 S. W. 594 (admitting in a criminal

Where a statute *removing a disqualification, e.g.* of an accused, and a statute imposing a disqualification by infamy, apply to the same person, the former statute should of course by implication prevail.[2]

§ 525. (5) "**Allegans turpitudinem suam**"; **General Principle.** During the 1600s and 1700s there appeared in several quarters of the law of Evidence a tendency to recognize as a general principle of disqualification the maxim 'nemo turpitudinem suam allegans audiendus est.' The notion underlying the maxim is that a person who comes upon the stand to testify that he has at a former time spoken falsely or acted corruptly is by his very confession a liar or a villain, and therefore untrustworthy as a witness.

Before examining the validity of the principle as a whole for our law of Evidence, it will be desirable to notice the specific situations in which it has been invoked. There are five of these, each dealt with in a group of precedents independent of the other and only loosely connected by the general notion of the above maxim.

§ 526. **Same: Accomplice, as disqualified by his Guilt.** It was frequently urged against an accomplice, during the 1600s and 1700s, that since by his own confession he was guilty of crime, this turpitude thus acknowledged made him as incompetent as if it were proved by conviction for the crime. This argument is only broadly related to the above maxim, and yet this relation is frequently noticed in the opinions dealing with the other instances. It must be distinguished from the argument of disqualification as a co-indictee (*post*, § 580) and of disqualification by reason of a promise of pardon (*post*, § 580). The argument, however, was judicially repudiated from the very beginning — partly on the ground of necessity, partly on the ground that

case a convict in penitentiary for obtaining money by false pretences); 1904, Illinois C. R. Co. *v.* McManus' Adm'r, 118 Ky. 780, 82 S. W. 399 (conviction for burglary does not exclude); *La.* (abolished); 1889, State *v.* Mack, 41 La. An. 1079, 1082, 6 So. 808 (held to be in criminal cases abolished); 1890, State *v.* McManus, 42 La. An. 1194, 8 So. 305 (same); 1903, State *v.* Williams, 111 La. 179, 35 So. 505; (State *v.* McManus approved); *Me.* (abolished); *Md.* (abolished, except for perjury); *Mass.* (abolished); *Mich.* (abolished); *Minn.* (abolished); *Miss.* (abolished, except for perjury and subornation of perjury); *Mo.* (abolished); 1920, Day *v.* Lusk, — Mo. —, 219 S. W. 597 (statute applied); *Mont.* (abolished); *Nebr.* (abolished); *Nev.* (abolished); *N. H.* (abolished); *N. J.* (abolished); 1921, State *v.* Magyar, — N. J. L. —, 114 Atl. 252 (under St. 1906, Evidence, § 1, conviction of perjury no longer disqualifies); *N. M.* (abolished); *N. Y.* (abolished); *N. C.* (abolished); *N. D.* (abolished, *semble*, except for perjury or subornation, conditionally); *Oh.* (abolished); *Okl.* (abolished, except for perjury and subornation of perjury, conditionally); 1904, Martin *v.* Terr., 14 Okl. 593, 78 Pac. 88 (convict, admissible); 1905, Wells *v.* Terr., 15 Okl. 195, 81 Pac. 425 (similar); *Or.* (abolished); *Pa.* (abolished, except in part for perjury); 1899, Com. *v.* Clemmer, 190 Pa. 202, 42 Atl. 675 (one under sentence of death, admitted); *R. I.* (abolished); *S. D.* (like N. D.); *Tenn.* (retained for a long list of crimes specified; convicts competent against each other for prison offences); 1887, Morgan *v.* State, 86 Tenn. 472 (statutory competency as defendant overrides disqualification by former conviction); *Tex.* (retained); *Utah* (abolished); *Vt.* (abolished, except for perjury or subornation or attempted subornation of perjury); *Va.* (abolished); *Wash.* (abolished, except for perjury); *W. Va.* (retained, except, for other than perjury-convictions, in criminal cases by leave of Court); *Wis.* (abolished); *Wyo.* (abolished).

[2] 1911, Turner *v.* State, 100 Ark. 199, 139 S. W. 1124 (a defendant in a criminal trial is not disqualified by prior conviction of crime).

turpitude, though self-confessed, was no hindrance unless there had been a conviction of crime:[1]

1663, *Tong's Case*, Kelyng 18: "It was resolved that some of those persons who were equally culpable with the rest may be made use of as witnesses against their fellows; . . . and the law alloweth every one to be a witness who is not convicted or made infamous for some crime; and if it were not so, all treasons would be safe, and it would be impossible for anyone who conspires with never so many others to make a discovery to any purpose."

1696, *Charmock's Trial*, 12 How. St. Tr. 1377, 1403. *Defendant* (objecting to the witness to treason): "He makes himself a criminal by his own confession, and that of a very heinous crime, and it is equal . . . as if he had confessed it upon an indictment, and then he law can take no notice of him as a good witness." L. C. J. Holt (charging the jury): "Now, as to that objection, I must tell you, . . . you may consider that traitorous conspiracies are deeds of darkness as well as wickedness, the discovery whereof can properly come only from the conspirators themselves. . . . And though men have been guilty of such heinous offences in being partakers or promoters in such designs, yet if they come in and repent and give testimonies thereof by discovering the truth, great credit ought to be given to them, for such evidence was ever accounted good."

1827, Abbott, C. J., in *Thistlewood's Trial* (Cato Street Conspirators), 33 How. St. Tr. 681, 921 as reported in Campbell's Lives, IV, 312: "Dark and deep designs are seldom fully developed except to those who consent to become participators in them, and can therefore be seldom exposed and brought to light by the testimony of untainted witnesses. Such testimony is to be received on all occasions with great caution; it is to be carefully watched, deliberately weighed, and anxiously considered. He who acknowledges himself to have become a party to a guilty purpose does by that very acknowledgment depreciate his own personal character and credit. If, however, it should ever be laid down as a practical rule in the administration of justice that the testimony of accomplices should be rejected as incredible, the most mischievous consequences must necessarily ensue; because it must not only happen that many heinous crimes must pass unpunished, but great encouragement will be given to bad men by withdrawing from their minds the fear of detection and punishment through the instrumentality of their partners in guilt; and thereby universal confidence will be substituted for that distrust of each other which naturally possesses men engaged in wicked projects and which often operates as a restraint against the perpetration of offences to which the coöperation of a multitude is required."

§ 526. [1] *Accord:* 1774, Clarke *v.* Shee, Cowp. 197 (action for money paid by the plaintiff's clerk from the plaintiff's funds to the defendant for a lottery chance; against the clerk's testifying for the plaintiff, Mr. Buller, afterwards Judge, argued that the clerk "is a 'particeps criminis', and therefore clearly incompetent, for no man shall be admitted to prove his own turpitude. as perjury or the like; this man was called to prove himself guilty of a breach of trust in embezzling his master's money and also of a breach of the Act of Parliament; therefore his evidence was inadmissible"; Mr. Davenport, for the defendant, argued that "here the plaintiff is an innocent person, and therefore had a right to call him"; Lord Mansfield, C. J., said that "there can be no doubt but that W. was an admissible witness"; citing the case of a man who had "taken the bribery oath" being called to prove himself bribed); 1775, Shaftesbury Case, 2 Doug. El. C. 2d ed. 303, 308, 315 (voter's confessions of bribery, objected to as not admissible "to invalidate what he had solemnly sworn" by the purging oath at the polls, a ruling of the House to this effect in 1696 being cited; objection repudiated; the reporter cites another House ruling, of 1715, in accord); 1833, Southampton Case, Per. & Kn. El. C. 213, 226 (repudiated).

In the United States an early trace of the doctrine appears: 1789, State *v.* Annice, N. Chipm. 9 (indictment for adultery with E.; E. not admitted "in this case" to prove her own turpitude); 1878, State *v.* Colby, 51 Vt. 291, 295 (preceding case repudiated).

It is surprising to see the point raised nowadays: 1905, Miller *v.* State, 165 Ind. 566, 76 N. E. 245 (receiving stolen goods; the thief may prove the theft).

In the *Philippines* and in *Porto Rico* the accomplice was under the Spanish system apparently disqualified; but this is no longer law: 1905, U. S. *v.* Ocampo, 5 P. I. 339; 1906, People *v.* Kent, 10 P. R. 325, § 45.

§ 527. **Same: Witness retracting Former Perjured Testimony.** The argument was often urged, during the 1600s and 1700s, and appears to have been generally accepted by the judges, that one who came to the stand to testify that upon a former oath he had sworn falsely was as a self-confessed perjurer incapable of trust:[1]

1685, *Oates' Trial*, 10 How. St. Tr. 1079, 1185. *Attorney-General:* "Pray acquaint my lord and the jury how you came to swear at the former trial, by whom you were persuaded, and how you varied from the truth." L. C. J. JEFFREYS: "I tell you truly, Mr. Attorney, it looks rank and fulsome. If he did forswear himself, why should he ever be a witness again?" *Attorney-General:* "'T is not the first time by twenty that such evidences have been given." L. C. J. JEFFREYS: "I hate such precedents in all times, let it be done never so often. Shall I believe a villain one word he says, when he owns that he forswore himself? . . . What good will the admitting him to be a witness do? For either what he swore then or what he swears now is false; and if he once swears false, can you say he is to be believed? . . . We are all of another opinion, that it is not evidence fit to be given."

It is noticeable that this same argument of L. C. J. Jeffreys appears again in another doctrine (*post*, § 530). But there, as here, it is unsound; the witness *may* be telling the truth now; whether he is doing so can best be left to the jury to consider under all the circumstances affecting his credit. To exclude one who now admits a former perjury, much more to exclude one who merely contradicts his former oath, is to shut out a possible source of truth; and to admit him can hardly serve to mislead, since the testimony is of itself open to suspicion. The doctrine by the 1800s came to be entirely repudiated:[2]

§ 527. [1] *Accord:* 1754, Canning's Trial, 19 How. St. Tr. 283, 450, 609, 632 (one Virtue Hall, who had recanted her testimony given at the trial of the supposed abductor Squires, was not now called on Canning's trial for perjury at the first trial, because the defendant's counsel, on the authority of Oates' Trial, thought her incompetent, and the trial judges agreed to this; Legge, B.: "I will never admit or suffer a person that will say they have been perjured in another affair"; but he conceded that the custom was contrary in trials for perjury-subornation).

[2] *Accord: England:* 1809, R. *v.* Teal, 9 East 307, 309 (conspiracy to make a false charge of paternity of a bastard; objected against the mother's testimony that she had before sworn to the prosecutor as father, but now was swearing the contrary, and "consequently she was to prove herself forsworn," so that "not only was she incompetent to contradict the fact she had before sworn to", but "she was incompetent witness for any purpose, on the ground of her acknowledged perjury and infamy" and that "it made no difference whether the infamy were found by verdict, or by the confession of the party tendered as a witness"; objection overruled; see quotation *supra*); 1816, Rands *v.* Thomas, 5 M. & S. 244 (assumpsit for goods furnished to a ship; defendant claimed not to have been owner, and called C. as the real owner to testify that C. had inserted the defendant's name on the register as part owner without the defendant's consent; objected that C. could not "contradict the oath which he had taken at the time of the registry"; held, that C. was competent, following R. *v.* Teal; repudiating the 'nisi prius' ruling on the same facts in Nickerson *v.* Thomas, 1 Stark. 85).

United States: 1887, U. S. *v.* Thompson, 31 Fed. 331 (subornation of perjury; disapproving People *v.* Evans, N. Y., *infra*); 1903, Stone *v.* State, 118 Ga. 705, 45 S. E. 630 (subornation of perjury; the perjurers' admission that they had committed perjury does not disqualify them); 1905, Chandler *v.* State, 124 Ga. 821, 53 S. E. 91 (retracting a self-confessed perjury); 1847, Aiken *v.* Kilburne, 14 Shepl. Me. 252, 261 (a debtor who had on oath in a petition of bankruptcy averred the contrary, admitted; see quotation *supra*); 1809, Amory *v.* Fellows, 5 Mass. 219, 228 (modern principle applied to will-witnesses; their false attestation does not make them not "credible"); 1875, Fitzcox *v.* State, 52 Miss. 923, 930 (maxim repudiated); 1906, Trafton *v.* Osgood, 74 N. H. 98, 65 Atl. 397 (a witness admitting prior perjury on the same point is not excluded); 1864, Dunn *v.* People, 29 N. Y.

1809, ELLENBOROUGH, L. C. J., in *R.* v. *Teal*, 9 East 307: "Though a person may be proved on his own showing, or by other evidence, to have forsworn himself as to a particular fact, it does not follow that he can never afterwards feel the obligation of an oath; though it may be a good reason for the jury, if satisfied that he had sworn falsely on the particular point, to discredit his evidence altogether. But still that would not warrant the rejection of the evidence by the judge; it only goes to the credit of the witness, on which the jury are to decide."

1847, SHEPLEY, J., in *Aiken* v. *Kilburne*, 14 Shepl. 252, 261: "In the course of judicial investigations, witnesses are found to testify differently on different occasions and at different times; sometimes [it is] because they have ascertained that they had made a mistake in their former testimony; at other times they exhibit a disposition to suit their testimony to the exigencies of the case; and on other occasions they acknowledge that they were induced to testify falsely at a former time. In no such case can the question of the competency of the witness to testify properly arise, for it cannot be judicially known how far his testimony may conform to or differ from his former testimony. If it could be known, so that the objection to his competency could be presented, it must be overruled, for it is the peculiar province of the jury in an action at law to decide whether the testimony of a witness should be entitled to any and if so to what credit under the circumstances in which it is presented to them."

§ 528. **Same: Attesting Witness contradicting his Attestation.** The general notion that a person cannot be heard to repudiate his own formal assertion made on a former occasion was responsible for the attempt, often made during the 1600s and 1700s, to *forbid an attesting witness to repudiate his attestation* by swearing that, though he did attest the execution, yet in fact he attested falsely. But this doctrine, though repeatedly urged by counsel and though apparently in harmony with popular notions of the time, was as constantly repudiated by the judges.[1]

523. 529 (abortion; the principal witness, the woman, admitted that she had sworn falsely before the magistrates; held that an instruction to disregard her testimony entirely was not proper; explaining Dunlop *v.* Patterson, 5 Cow. N. Y. 243); 1878, Deering *v.* Metcalf, 74 N. Y. 501, 504 (preceding case approved); 1888, People *v.* O'Neil, 109 N. Y. 251, 266, 16 N. E. 68 (same); 1905, State *v.* Pearson 37 Wash. 405, 79 Pac. 985 (witness admitting perjury at a former trial of himself, held competent); 1879, Mack *v.* State, 48 Wis. 271, 286, 4 N. W. 449 (rule repudiated).

Contra: 1869, People *v.* Evans, 40 N. Y. 1, 6 (subornation, following Dunlop *v.* Patterson; *supra*, and ignoring Dunn *v.* People).

Distinguish the doctrine of *impeachment*, 'falsus in uno, falsus in omnibus' (*post*, 1008).

Distinguish the following, resting on the principle of *judicial admissions* (*post*, § 2593): 1896, Marvin *v.* Sager, 145 Ind. 261, 44 N. E. 310 (agreement to use a deposition and not call the witness; the witness cannot be called after using the deposition).

§ 528. [1] *England:* 1683, Hudson's Case, Skinner 79 (two of the three swore that the testator was incapable and that his hand had been guided); 1694, Dayrell *v.* Glascock, ib. 413 (one of them would not testify that he saw the testator execute); 1696, Blurton *v.* Toon, ib. 639 (one of the witnesses denied seeing the execution, though admitting his hand; proof by the other's signature was opposed, but allowed); 1700 (?), Austin *v.* Willes, Buller N. P. 264 ("notwithstanding the three witnesses all swore to its not being duly executed, the devisee obtained a verdict"); 1762, Lowe *v.* Jolliffe, 2 W. Bl. 365 ("the three subscribing witnesses to the testator's will, and the two surviving ones to a codicil made four years subsequent . . . all unanimously swore him to be utterly incapable of making a will", etc.); 1768, Goodtitle *v.* Clayton, 4 Burr. 2224 (a new trial was granted, because the witnesses had "been admitted to give evidence against their own attestation"; Yates, J., thought this erroneous; Lord Mansfield, C. J., thought that "it is of terrible consequence that witnesses to wills should be tampered with to deny their own attestation"; but it does not appear that such evidence was understood to be prohibited, but merely untrustworthy); 1798, Lord Kenyon, C. J., in Jordaine *v.* Lashbrook, 7 T. R. 599, 604 (approving Lowe *v.* Jolliffe); 1812, Howard *v.* Braithwaite, 1

That the propounder of the will may, in spite of the attesting witnesses' denials, *prove otherwise* the genuineness of execution, involves a different principle, elsewhere considered (*post*, § 1302).

§ 529. **Same: Invalidating one's Own Instrument; Rule in Walton *v.* Shelly.** Closely related to the attesting-witness notion, and almost including it, is the thought that one who by his signature as party has *acknowledged an instrument to be valid* should not be heard to testify to facts destroying its validity. This notion, involving in part some idea of estoppel as applied to a witness, seems first to have been advanced against the obligor of an usurious bond attempting to prove the usury;[1] though here the controlling objection was afterwards accepted to be the doctrine of disqualification by interest (*post*, § 575), and from this point of view the propriety of such testimony was finally established.[2] The general maxim, however, had long before been given currency by that prolific maker of maxims, Lord Coke;[3] and in the first half of the 1700s there are other indications of a tendency to concede the impropriety of allowing a man to swear against his own deed;[4] the instances being complicated, however, like that of the usurious contract, by the rule as to disqualification by interest. But, finally, the doctrine appeared in a quarter where no objection based on interest could prevail; and the general principle was advanced (in one of those rulings in which Lord Mansfield exhibited his great power of persuading his colleagues into novelties) that a person should not be allowed by his testimony to invalidate any instrument to which he had given credit by his signature as a party:

1786, *Walton* v. *Shelly*, 1 T. R. 296; the objection was, when an indorser of notes was offered in defence to prove the usurious consideration of the notes, and thus of a bond given

Ves. & B. 202, 208 (Lord Eldon, L. C.: "their testimony is to be received with all the jealousy necessarily for the safety of mankind attaching to a man who upon his oath asserts that to be false which he has by his solemn act attested as true").

Ireland: Goodisson *v.* Goodisson, Ir. R. 1913, I, 31, 218 (witness to a will; testimony not to be rejected because contradictory of his attestation and a prior affidavit).

United States: 1905, Theriot's Succession, 114 La. 611, 38 So. 488 (notary and attesting witnesses allowed to testify to non-observance of formalities); 1895, Johnson *v.* Johnson, 44 S. C. 364, 22 S. E. 423 (witness who attests delivery, etc., may testify to the contrary); 1903, Ward *v.* Brown, 53 W. Va. 227, 44 S. E. 488.

Contra: 1795, Currie *v.* Donald, 2 Wash. Va. 58 (attesting witness to a deed cannot contradict its delivery).

§ 529. [1] 1628, Coke upon Littleton, 6 *b* ("It was also agreed by the whole Court [citing Smith's Case] that in an information upon the statute of usury, the partie to the usurious contract shall not be admitted to be a witness against the usurer, for in effect he should be 'testis in propria causa' and should avoid his own bonds and assurances and discharge himself of the money borrowed; and though he commonly raise up an informer to exhibit the information, yet 'in rei veritate' he is the partie"); 1670, Lassels *v.* Chatterton, T. Raym. 190, per Twisden, J. (to the same effect); 1702, R. *v.* Sewel, 7 Mod. 118 (obligor may testify to a fact "to invalidate or set aside" an obligation obtained by duress, "where the nature of the thing allows him no other evidence").

[2] 1768, Abrahams *v.* Bunn, 4 Burr. 2251.

[3] 1634, Coke, Fourth Institute, 279 (maxim cited). Coke, in Professor Thayer's epigram, "seems to have spawned Latin maxims freely."

[4] 1704, Title *v.* Grevett, 2 Ld. Raym. 1008 ("a man that conveys lands may be a witness to prove he had no title, because that is swearing against himself"); 1741, L. C. Hardwicke, in Man *v.* Ward, 2 Atk. 228 (the deposition of a grantor, covenanting against incumbrances, was offered against the grantee to prove that the grantor had fraudulently pretended a title; it was admitted, though regarded inadmissible "by the strict rules of law").

for them, "that he was called to invalidate a security which he had given, and that an indorser of a note, independently of any question of interest", could not do this. MANSFIELD, L. C. J.: "In this case, it seems to me that the witness had no interest in the present question, for either way he is discharged; . . . therefore, in point of interest, I think there is no objection to his competency. But what strikes me is the rule of law founded on public policy, which I take to be this: That no party who has signed a paper or a deed shall ever be permitted to give testimony to invalidate that instrument which he hath so signed. And there is a sound reason for it; because every man who is a party to an instrument gives a credit to it. It is of consequence to mankind that no person should hang out false colors to deceive them, by first affixing his signature to a paper, and then afterwards giving testimony to invalidate it. . . . The civil law says, 'Nemo allegans suam turpitudinem est audiendus.' Now apply this general maxim to the present case. . . . The obligee of this bond trusted to the notes; he gave them up as a consideration for the bond; he trusted to the name of the indorser, and that he knew of no objection to the notes; and yet this same person was afterwards called to say that they were given for an usurious and illegal consideration; therefore, on that ground, I am of opinion that he was an incompetent witness." WILLES, J.: "The present question falls within the general rule that no man shall be permitted to allege his own turpitude in having given credit to a false and illegal security." BULLER, J.: "I have always understood it to be a settled principle that no man shall be permitted to invalidate his own act."

The immense influence of Lord Mansfield's name may be seen from the vogue which was thus given in this country to the doctrine of *Walton* v. *Shelly;*[5] for in almost every American jurisdiction, and for the ensuing fifty years, this doctrine became the subject of repeated judicial discussion and was by many Courts accepted, — although it had been in England doubted and limited almost as soon as it was published[6] and was within a short dozen years completely repudiated. This came about in 1798:

KENYON, L. C. J., in *Jordaine* v. *Lashbrook*, 7 T. R. 603: "The proposition attempted to be established by the plaintiff is this, that for some technical reason, or for some reason of policy, a court of justice must shut its eyes and not suffer facts to be disclosed which may be laid before them by a witness who is not infamous in his character and who has no interest in the cause. If the law be so, there is some novelty in it. . . . The rule contended for by the plaintiff is this, that 'however infamously you (the defendant) have been used, whatever fraud may have been committed on you, whatever may be the rights of others, if I (the plaintiff) the party to the fraud can get on the instrument the name of the person who may be the only witness to the transaction, I will stand entrenched within the forms of law, and impose silence on that only witness, though he be a person of unimpeachable character and not interested in the cause.' But I cannot conceive on what ground such a proposition can be established. It is contradicted by every hour's experience. It would

[5] Compare the effect of his influence in fathering the unsound rules about parents "bastardizing their children" (*post*, § 2063), jurors impeaching their verdict (*post*, § 2352), and proof of "marriage in fact" (*post*, § 2085).

[6] 1789, Bent *v.* Baker, 3 T. R. 27 (assumpsit on a policy of insurance; for the defendant was called, to disprove liability, a broker who had been employed by the plaintiff to get the policy and had also underwritten it himself after the defendant had underwritten it; besides the objection of interest, it was urged against him that "a party shall not be permitted to give testimony to avoid an instrument which he himself has executed", citing Walton *v.* Shelly; Lord Kenyon, C. J., noticed this as follows: "Then it has been said that a person cannot be permitted to give evidence to invalidate an instrument which he himself has executed; but I cannot assent to that as a general proposition", citing Lowe *v.* Jolliffe, *supra*, § 527; Buller, J., noticing the same objection, said: "The ground of that objection is that it is holding out false credit to the world, and must be confined to negotiable instruments"; to which Lord Kenyon agreed).

tend to show that a party to an instrument shall not be permitted to contest the validity of it in a court of law, not only by his own evidence, but by any evidence whatever. . . . [It was contended] that policy required that the evidence offered by the defendant should be excluded; but it appears to me that there is at least as much policy in admitting it; for the consequence of admitting such evidence may be only to disappoint a remedy in a civil action, while the consequence of excluding it will be to encourage fraud and to authorize the person who has committed it to rely on his own fraud in a court of justice." GROSE, J.: "Before the case of *Walton* v. *Shelly* I never read of this ground of incompetency. The ground is that a man shall not disclose any fact that may invalidate an instrument which he has signed. And why may he not disclose a fact which, if true, it is his duty to the public to disclose? Because, it is said, he has given currency to the bill by putting his name upon it; and he shall not be permitted to impeach his own title. If he has done so, he has done a very illegal and improper act, and committed a fraud upon the public; [yet] if by his assistance the law has been violated and the revenue defrauded, he owes to the public, by way of retribution, a disclosure of the circumstances and the parties, that the scheme to rob the revenue may be frustrated. . . . But it is said: 'Homo allegans turpitudinem suam non est audiendus.' This, as a maxim applied to parties in a cause, may in some cases be true; but there, if both are 'particeps criminis', the rule applies, 'Potior est conditio defendentis.' A man shall not sustain an action upon a ground which proves him guilty of a breach of the law; so a man shall not recover money due upon an illegal consideration, such as usury, gaming, smuggling, or the like. But this rule does not extend to shut the mouths of witnesses guilty of criminal actions; it if did, witnesses daily received in courts of justice, and whom the policy of the law invites to come forward, must be rejected, — such as accomplices, and others concerned in illegal transactions. This class of men, as I said before, the policy of the law invites to disclose all they know, leaving their credit to the wisdom and discretion of the jury."

This ended the suggested doctrine in England.[7] Perhaps its end would not have been so speedy had not Lord Mansfield's successor been a man determined to overthrow the (to him) pernicious innovations of his great predecessor and intellectual antipathist.[8]

But in the United States Lord Mansfield's rule obtained for a time considerable vogue. Several Courts retracted, however, after its utter repudiation in England was pressed upon their notice; and even those retaining it were content to confine it to persons appearing as indorsers (or the like) of negotiable instruments, and to decline applying it to obligors of other contracts or grantors of deeds.[9] Almost

[7] 1798, Jordaine *v.* Lashbrooke, 7 T. R. 599 (indorsee of a bill against the acceptor; the latter allowed to call the payee to prove that the bill, though dated at Hamburg, was in fact drawn in London, and therefore inadmissible for lack of a stamp); 1812, Jones *v.* Brooke, 4 Taunt. 464 (preceding case accepted as law).

[8] For another instance (there less creditable) of the influence upon the law of Lord Kenyon's succession to Lord Mansfield's place, see *post*, § 1858.

[9] The rulings in the various American jurisdictions are as follows: *Federal:* 1832, Bank of U. S. *v.* Dunn, 6 Pet. 51, 57 (Walton *v.* Shelly approved; intermediate indorser not admitted to prove a note given "under any circumstances which would destroy its validity"); 1834, Bank of the Metropolis *v.* Jones, 8 Pet. 12, 16 (drawer not admitted to prove fraud discharging indorser); 1835, Taylor *v.* Luther, 2 Sumn. 228, 235, per Story, J. (rule held not applicable to deeds); 1837, U. S. *v.* Leffler, 11 Pet. 86, 94 (rule not applicable to exclude official from proving his surety's bond to have been delivered in escrow); 1838, Scott *v.* Lloyd, 12 Pet. 145, 149 (rule assumed to be in force); 1845, Henderson *v.* Anderson, 3 How. 73, 80 (rule adhered to); 1851, Saltmarsh *v.* Tuthill, 13 How. 229 (same); 1876, Davis *v.* Brown, 94 U. S. 423 (action by second indorsee against first indorsees; one of the latter admitted to prove agreement with plaintiff not to hold defendants liable; Walton *v.* Shelly discredited; Bank *v.* Dunn qualified to the

nothing has been heard of the doctrine in the last seventy-five years, even in those jurisdictions where it was preserved as law. This, however,

above extent); 1901, Metropolitan Nat'l Bank *v.* Jansen, 47 C. C. A. 497, 108 Fed. 572 (Davis *v.* Brown followed); *Alabama:* 1827, Todd *v.* Stafford, 1 Stew. 199 (payee competent to impeach note's consideration; Walton *v.* Shelly repudiated; White, J., diss.); *Arkansas:* 1847, Tucker *v.* Wilamowicz, 8 Ark. 157, *semble* (Walton *v.* Shelly not accepted); 1852, Caldwell *v.* McVicar, 12 Ala. 746, 750, *semble* (same); 1856, Arnold *v.* McNeil, 17 Ala. 179, 187 (grantor of deed of trust, admissible to disprove execution; rule of Walton *v.* Shelly repudiated); *Connecticut:* 1802, Allen *v.* Holkins, 1 Day 17 (defendant, a subsequent lessee, offered the lessor to prove plaintiff's prior lease void; excluded, on the authority of Walton *v.* Shelly, because "no man should be admitted to swear against his own deed"), 1804, Webb *v.* Danforth, 1 Day 301 (point argued, but not decided); 1814, Townsend *v.* Bush, 1 Conn. 260 (drawer of usurious bill competent in action by payee, who has paid indorsee, against acceptor; Walton *v.* Shelly repudiated; the opinion of Swift, J., is the best of all the learned and sensible opinions on this subject with reference to the application of the doctrine to negotiable instruments); 1839, Jackson *v.* Packer, 13 Conn. 342, 359 (preceding case approved); *Georgia:* 1832, Slack *v.* Moss, Dudley 161 (payee of first note, competent to prove, in action on renewal note, that consideration of first note was gaming; Walton *v.* Shelly repudiated in an excellent opinion); 1881, McBride *v.* Bryan, 67 Ga. 584 (attorney confessing a judgment without authority for his client, held "incompetent to invalidate it", because "he committed a crime as a lawyer"); *Illinois:* 1840, Webster *v.* Vickers, 3 Ill. 295 (payee-indorser of note competent to prove breach of warranty of goods paid by note); 1841, Bradley *v.* Morris, 4 Ill. 182 (indorser of note competent to prove discharge, "although it had been held" that he would be incompetent to prove it void *ab initio*, except where he indorses without recourse); *Iowa:* 1840, Strang *v.* Wilson, 1 Morris 84 (indorser of note competent to prove holder's purchase for value, but, *semble*, not to "invalidate the instrument"); *Kentucky:* 1823, Gorman *v.* Carroll, 3 Litt. 221 (payee of note assigning without recourse competent to prove usury); *Louisiana:* 1821, Shamburgh *v.* Commagere, 10 Mart. 18 (indorser admissible to prove alteration after indorsement, but, *semble*, not to invalidate by prior facts); 1826, Cox *v.* Williams, 5 Mart. N. S. 139 (rule referred to as "not yet perfectly settled"); *Maine:* 1826, Deering *v.* Sawtel, 4 Greenl. 191 (mortgagor not admitted to prove note's usurious consideration, in writ of entry by mortgagee's assignee against mortgagor's grantee; Walton *v.* Shelly approved; rule confined to negotiable instruments); 1828, Chandler *v.* Moulton, 5 Greenl. 374 (maker of accommodation note for defendant's benefit, not admitted to prove usury in action by indorsee); 1837, Puck *v.* Appleton, 2 Shepl. 284 (indorser of note admissible to prove that waiver of notice was written on note after defendant's indorsement, a fact not affecting the note's validity at inception); 1841, Abbott *v.* Mitchell, 6 Greenl. 354 (indorser without recourse admissible to prove alteration before delivery); 1856, Lincoln *v.* Fitch, 42 Me. 456, 466 (indorser of acceptance, held not admissible to prove fraud in its inception); *Maryland:* 1810, Ringgold *v.* Tyson, 3 H. & J. 172 (indorser of note competent to prove payment, in action by indorsee against maker; Walton *v.* Shelly repudiated; see quotation *post*, § 531; Earle and Gantt, JJ., diss.); *Massachusetts:* 1795, Parker *v.* Lovejoy, 3 Mass. 565 (payee of note not admitted to prove usury, in action by indorsee against maker; approving Walton *v.* Shelly); 1807, Warren *v.* Merry, 3 Mass. 27 (indorsee of note against indorser; maker admitted to prove payment, but Walton *v.* Shelly approved); 1808, Churchill *v.* Suter, 4 Mass. 156 (like Parker *v.* Lovejoy; rule reaffirmed as good policy); 1813, Manning *v.* Wheatland, 10 Mass. 502 (rule reapproved); 1814, Stowell *v.* Flagg, 11 Mass. 368, 375 (like the next case); 1814, Loker *v.* Haynes, 11 Mass. 498 (grantor of deed admitted to prove fraud in deed, in action by grantor's creditor; rule confined "to negotiable instruments alone"); 1819, Fox *v.* Whitney, 16 Mass. 118 (rule not applicable to non-negotiable or non-negotiated paper); 1821, Hartford Bank *v.* Barry, 17 Mass. 94 (maker of note not admitted to prove usury in action by indorsee against indorser); 1821, Packard *v.* Richardson, 17 Mass. 122, 127 (rule applied to one signing as agent for maker); 1834, Hudson *v.* Hulbert, 15 Pick. 423, 426 (like Loker *v.* Haynes); 1840, Thayer *v.* Crossman, 1 Metc. 416 ("supposing the rule settled", it does not affect testimony to prove payment of a note indorsed after maturity); 1845, Dickinson *v.* Dickinson, 9 Metc. 471 (rule not applicable to vendor of colt warranting title, in action by true owner against vendee); *Michigan:* 1846, Orr *v.* Lacey, 2 Doug. 230, 238 (indorsee against indorser; accommodation acceptor admitted to prove bill void; Walton *v.* Shelly repudiated in an excellent opinion by Whipple, J.); *Mississippi:* 1832, Drake *v.* Henly, Walk. 541 (first indorsee admitted to prove facts occurring after indorsement); 1842, Routh *v.* Helm, 6 How. 127 (undecided; but rule held not applicable to a maker called for an indorser to prove payment); 1848, Williams *v.* Miller, 10 Sm. & M. 139 (same; rule not applicable to payee called for maker

seems to be due to the belief that the general statutory abolition of disqualification by interest (*post*, § 776), which went on from 1850 to 1870,

to prove payment); 1852, Watts *v.* Smith, 24 Miss. 77, 79 (same; payee suing as nominal plaintiff admitted to prove a note void on behalf of the maker, the title being still legally in the payee); 1870, Partee *v.* Silliman, 44 Miss. 272, 280 (undecided; but rule not applicable to an indorser not impeaching the paper "in its origin or at the time it was indorsed"); *Missouri:* 1841, Bank *v.* Hull, 7 Mo. 273, 276 (indorsee against indorser; maker competent; Walton *v.* Shelly repudiated); 1853, St. John *v.* McConnell, 19 Mo. 38 (Walton *v.* Shelly repudiated); *New Hampshire:* 1817, Houghton *v.* Page, 1 N. H. 60 (cc maker of note not admitted to prove usury in action by indorsee against maker); 1820, Bryant *v.* Ritterbush, 2 N. H. 212 (indorser admitted to prove payment before indorsement; rule confined to defences which affect purchasers for value without notice); 1830, Hadduck *v.* Wilmarth, 5 N. H. 181, 187 (grantor admitted against grantee to prove deed void; rule confined to "negotiable securities"); 1840, Haines *v.* Dennett, 11 N. H. 180 (indorsee of note against surety; maker admissible to prove alteration after execution and without defendant's knowledge; Walton *v.* Shelly and Houghton *v.* Page repudiated, in the best opinion on the subject, next to Mr. J. Swift's); *New Jersey:* 1811, Rosevelt *v.* Gardner, Penningt. 791 (Walton *v.* Shelly discussed; no decision); 1818, Ferris *v.* Saxton, 1 South. 1, 14 (Walton *v.* Shelly assumed to be law); 1839, Freeman *v.* Brittin, 2 Harrison 191, 194, 219, 229, 235, 238 (indorser of note, admitted to prove usury in action of indorsee against maker; Walton *v.* Shelly repudiated, by three judges against two; Ford, J., diss., says the most that has ever been said for the rule); *New York:* 1802, Winton *v.* Saidler, 3 Johns. Cas. 185 (payee of note not admissible to prove usury in action by one indorsee against another; by three judges against two including Kent, J.); 1807, Coleman *v.* Wise, 2 Johns. 165 (Walton *v.* Shelly approved, following Winton *v.* Saidler); 1813, Woodhull *v.* Holmes, 10 Johns. 231 (rule not applicable to proof of facts subsequent to execution); 1818, Skilding *v.* Warren, 15 Johns. 270 (preceding case followed); 1819, Powell *v.* Waters, 17 Johns. 176 (same); 1822, Tuthill *v.* Davis, 20 Johns. 285 (Winton *v.* Saidler doubted); 1825, Stafford *v.* Rice, 5 Cow. 23 ("Winton *v.* Saidler is not law"); 1825, Bank of Utica *v.* Hillard, Johns. 153, 159 (Winton *v.* Saidler deliberately overruled); 1829, Williams *v.* Walbridge, 3 Wend. 415 (same); *North Carolina:* 1819, Guy *v.* Hall, 3 Murph. 150 (Walton *v.* Shelly repudiated); *Ohio:* 1833, Stone *v.* Vance, 6 Oh. 246, 248 (payee admitted to prove facts of assignment, in action between assignee and maker); 1846, Treon *v.* Brown, 14 Oh. 483 (indorser not admitted to prove note void, in action between indorsee and maker; Walton *v.* Shelly followed); 1849, Rohrer *v.* Morningstar, 18 Oh. 579, 587 (rule not applied in action by indorsee taking after maturity); *Pennsylvania:* 1791, Clyde *v.* Clyde, 1 Yeates 92 (contract to divide land bought; one of the parties not allowed to "invalidate or disaffirm his own contract"); 1792, Stille *v.* Lynch, 2 Dall. 194 (payee excluded, in action between indorsee and maker; Walton *v.* Shelly cited); 1793, Pleasants *v.* Pemberton, 2 Dall. 196 (rule confined to negotiable instruments; not applied to a receipt); 1802, Balliot *v.* Bowman, 2 Binn. 162 (Jordaine *v.* Lashbrooke cited with approval); 1809, Baring *v.* Shippen, 2 Binn. 154, 165 (assignor of bond admitted to prove it fraudulently obtained; Pleasants *v.* Pemberton approved); 1818, Baird *v.* Cochran, 4 S. & R. 397 (rule not applied in action by indorsee taking after maturity); 1820, Hepburn *v.* Cassel, 6 S. & R. 113 (rule not applied to non-negotiable paper or paper not negotiated in regular course); 1839, Harrisburg Bank *v.* Forster, 8 Watts 304, 309 (rule recognized; intervening decisions cited); 1842, Davenport *v.* Freeman, 3 W. & S. 557 (maker inadmissible in action between indorsee and indorser); 1842, Parke *v.* Smith, 4 W. & S. 287 (like Baird *v.* Cochran); 1879, State Bank *v.* Rhoads, 89 Pa. 353, 357 (rule of Walton *v.* Shelly, the ground of which was "policy of law, not interest", held to have been abolished by St. 1869, *ante*, § 488, that "no interest nor policy of law" shall exclude a witness); *South Carolina:* 1796, Payne *v.* Trezevant, 2 Bay 23, 33 (payee of note allowed to prove usury, in action by indorsee against maker; Walton *v.* Shelly cited in argument); 1797, Canty *v.* Sumter, 2 Bay 93 (obligee of bond not admitted to impeach it in action by assignee; Walton *v.* Shelly cited); 1811, Croft *v.* Arthur, 3 Desauss. 223 (vendee of chattels admitted to invalidate the sale; Walton *v.* Shelly, if law, confined to negotiable instruments); 1817, Haig *v.* Newton, 1 McCord 423, 429, 433 (Walton *v.* Shelly treated as law; Cheves, J., diss.); 1825, Knight *v.* Packard, 3 McCord 72 (Walton *v.* Shelly definitely repudiated as not law); 1828, Simmons *v.* Parsons, 1 Bail. 62, 64 (Walton *v.* Shelly is "entirely exploded"); 1891, Reeves *v.* Brayton, 36 S. C. 384, 394, 401, 15 S. E. 658 (grantor of deed, not a party, allowed to prove defective execution); 1909, Merck *v.* Merck, 83 S. C. 329, 65 S. E. 347 (a grantee who afterwards conveys may in a suit between his grantee and a third person testify that the deed to himself was never duly executed; the contrary statement in Garrett *v.* Weinberg, 54 S. C. 127, 31 S. E. 341, distinguished); *Tennessee:* 1821, Stump *v.* Napier, 2 Yerg.

carried away with it the rule of *Walton* v. *Shelly*.[10] But this supposition is certainly erroneous; and Lord Mansfield himself (as seen above) expressly pointed out that the interest-objection was not involved. It is proper that a Court in which the rule once prevailed should expressly disown it, first, because the maxim 'allegans turpitudinem suam', on which it rests, has no place in our law,[11] and, secondly, because, so far as the policy of the law of negotiable instruments is involved, that policy makes decidedly against the rule and not for it.[12] It may safely be assumed that the rule of *Walton* v. *Shelly* would not to-day be sustained in any jurisdiction.

§ 530. **Same: Official Contradicting his Own Certificate.** A notion almost identical with that underlying the rule of *Walton* v. *Shelly* has led to the argument that an official who has certified to a specific fact as known to him to have occurred will not be allowed to testify, in *contradiction to his certificate*, that the facts were otherwise than as certified:

1839, BULLARD, J., in *Briggs* v. *Stafford*, 14 La. o. s. 381: "A public officer who has given a solemn certificate in his official character and under his seal cannot be listened to as a witness to prove it false. There is a degree of turpitude in certifying as to what the officer does not know to be true, as well as in certifying what he knows to be false. In either case, whatever may be the palliating circumstances 'in foro conscientiæ', we think the falsity of the certificate ought not to be shown by the testimony of the officer himself. 'Allegans turpitudinem suam non audiendus.'"

The notion has no better grounds for support here than elsewhere. If the certificate is not absolutely conclusive (*post*, §§ 1345–1352) and may be otherwise shown to be incorrect, then the official should be equally competent. The official doubtless should be punished, but not the party needing his testimony. The official is clearly capable of falsification, but the value of his testimony should be left to the jury:

1862, PECK, C. J., in *Truman* v. *Lore*, 14 Oh. St. 144, 151: "[The counsel admits that the certificate may be shown to state the facts incorrectly, because it was not made as a judicial act after a judicial investigation], but insists that public policy prohibits a magistrate from disproving a fact to which he has certified. But the argument loses much if not all of its force, when we consider he is not required to certify to any such thing or empowered to make any such investigation. The reasons which would close the lips of the magistrate also apply to the subscribing witnesses. . . . If all were excluded, public policy would be violated rather than promoted by the exclusion."

35 (Walton *v.* Shelly, and the whole principle of *nemo allegans*, etc., repudiated; excellent opinion by Whyte, J.); 1853, Smithwick *v.* Anderson, 2 Swan 573, 577 (Walton *v.* Shelly treated as law; but not applicable to paper negotiated after maturity); *Texas*: 1849, Parsons *v.* Phipps, 4 Tex. 341, 350 (Walton *v.* Shelly repudiated); *Vermont*: 1826, Nichols *v.* Holgate, 2 Aik. 138 (Walton *v.* Shelly repudiated); 1829, Chandler *v.* Mason, 2 Vt. 193, 197 (Walton *v.* Shelly approved, but the preceding case held to be a precedent); 1852, Pecker *v.* Sawyer, 24 Vt. 459, 462 (Nichols *v.* Holgate approved; Walton *v.* Shelly definitely repudiated); *Virginia*: 1825, Taylor *v.* Beck, 3 Rand. 316, 317, 340, 346 (Walton *v.* Shelly repudiated in excellent opinions by Carr, Green, and Coalter, JJ.).

[10] It was partly on this ground that it was abandoned in Pennsylvania.

[11] See § 531, *post*.

[12] For masterly expositions of this policy, see the opinions of Swift, J., in Townsend *v.* Bush, 1 Conn. 260; Gilchrist, J., in Haines *v.* Dennett, 11 N. H. 180; and Carr and Green, JJ., in Taylor *v.* Beck, 3 Rand. 316.

That such testimony is properly admissible ought not to be doubted, in view of the general denial on modern times of the analogous doctrines already examined, and of the total repudiation in our law of the maxim 'allegans suam turpitudinem' (as noted in § 531). Yet the contrary view finds occasional support.[1]

The question whether such an official certificate can be *contradicted by any evidence whatever* is a different one, involving the principle of conclusive testimony (*post*, § 1352).

§ 531. **Same: 'Allegans suam turpitudinem', as a general Maxim.** It is thus apparent that, of the specific instances in which the supposed doctrine of 'allegans suam turpitudinem' has been put forward or for a time accepted, none (except the last) have to-day any recognition as valid doctrines of the law of evidence. The truth is that the whole notion underlying that maxim is un-

§ 530 [1] The cases on both sides are as follows: *Alabama:* 1916, Qualls *v.* Qualls, 196 Ala. 524, 72 So. 76 (notary may impeach his own certificate of acknowledgment); *Colorado:* 1895, Shapleigh *v.* Hull, 21 Colo. 419, 41 Pac. 1108 (notary public not allowed to impeach his certificate of acknowledgment); *Idaho:* 1904, First Nat'l Bank *v.* Glenn, 10 Ida. 224, 77 Pac. 623 (acknowledgment of a mortgage by an Indian married woman; the notary not allowed to deny the taking of the acknowledgment; placed on the ground of vested rights); *Illinois:* 1902, Parlin & Orendorff Co. *v.* Hutson, 198 Ill. 389, 65 N. E. 93 (notary may impeach his certificate of acknowledgment); 1921, Union Colliery Co. *v.* Fishback, 299 Ill. 165, 132 N. E. 492 (contract signed and acknowledged by mistake; notary's testimony to mistake in text of instrument, admitted; Parlin & O. Co. *v.* Hutson not cited); *Indiana:* 1858, Wright *v.* Bundy, 11 Ind. 398, 406 (that a notary may impeach his own certificate, apparently assumed); *Louisiana:* 1839, Briggs *v.* Stafford, 14 La. o. s. 381 (notary not admitted to prove that the acts certified in protest were done by his clerk; see quotation *supra*); 1841, Oakey *v.* Bank, 17 La. 386 (notary not admitted to "contradict or strengthen" certificate of protest); 1843, Mathews *v.* Boland, 5 Rob. La. 200 (same); 1844, Peet *v.* Dougherty, 7 Rob. La. 85 (notary not allowed to testify in contradiction of express statement in certificate of protest); 1845, Follain *v.* Dupré, 11 Rob. La. 154 (principle conceded; but notary allowed to prove orally facts not provable by defective certificate); *Maryland:* 1862, Central Bank *v.* Copeland, 18 Md. 305 (magistrate not allowed to impeach his own certificate; citing Harkins *v.* Forsyth, *infra*); 1863, Matthews *v.* Dare, 20 Md. 270 (a justice of the peace taking a married woman's acknowledgment of a deed, which recited that he had "fully explained" it to her, was not allowed to show by any evidence that he had not read it over to her; but in this case he was a party and his knowledge of the contents of the deed was material); 1903, Nicholson *v.* Snyder, 97 Md. 415, 55 Atl. 484 (notary not allowed to impeach his certificate of a bankrupt's oath); *Mississippi:* 1843, Wood *v.* Trust Co., 7 How. Miss. 609, 632 (justice certifying a notarial act may not "falsify his own certificate", but may testify to facts rendering it illegal); 1858, Stone *v.* Montgomery, 35 Miss. 83 (an offer certifying to a married woman's acknowledgment cannot be admitted to impeach the correctness of the certificate); *Ohio:* 1862, Truman *v.* Lore, 14 Oh. St. 144, 151 (certificate of acknowledgment by justice of the peace; the magistrate's testimony to the acknowledger's feeble state of mind admitted; see quotation *supra*); *Oklahoma:* 1916, Effenberger *v.* Durant, 57 Okl. 445, 156 Pac. 212 (notary may impeach his own certificate of acknowledgment); *Pennsylvania:* 1821, Stewart *v.* Allison, 6 S. & R. 324 (notary may impeach his certificate of acknowledgment); 1898, Davis *v.* Monroe, 187 Pa. 212, 41 Atl. 44 (justice of the peace allowed to impeach his certificate of acknowledgment); *Vermont:* Carpenter *v.* Sawyer, 17 Vt. 121, 123 (town-clerk allowed to show that a record of advertisements by him was not properly made); *Virginia:* 1806, Baring *v.* Reeder, 1 Hen. & M. 154, 166, 175 (maxim repudiated by one judge, approved by another); 1840, Harkins *v.* Forsyth, 11 Leigh 294, 308 (justice or clerk cannot deny facts certified by "testifying to their own official perfidy"; but here no testimony at all was admissible); 1890, Hockman *v.* McClanahan, 87 Va. 33, 39, 12 S. E. 230 (approving Hawkins *v.* Forsyth, *supra*); *Wisconsin:* 1861, Adams *v.* Wright, 14 Wis. 408, 413 (notary may impeach his certificate); 1905, Wina *v.* Itzel, 125 Wis. 19, 103 N. W. 220 (notary allowed to impeach his certificate of acknowledgment of an aged woman's deed).

suited to support rules of Evidence.[1] That so many Courts have in so many distinct lines of precedents repulsed the attempts to establish it in one form or another has been due to a general perception that the entire notion has no place in our system. That this is the fundamental reason for the failure of those attempts, and that it is not a question of the unsoundness of a particular set of precedents but of the fallacy of the whole idea, may be seen from the following passages, in which by the most weighty judicial names the maxim is broadly repudiated from the domain of evidence:

1802, KENT, J., in *Winton* v. *Saidler*, 3 Johns. Cas. 185, 192: "The maxim 'nemo allegans', etc., is applicable to parties rather than to witnesses, and it goes no more to the exclusion of witnesses in civil than in criminal cases."

1810, CHASE, C. J., in *Ringgold* v. *Tyson*, 3 H. & J. 172, 176: "[The rule of *Walton* v. *Shelly*] is acknowledged to be a rule of policy, and adopted by the Court in that case in conformity to a maxim of the civil law, 'Nemo allegans suam turpitudinem est audiendus.' This as a rule of evidence was unknown in the common-law Courts in England prior to that case. . . . Unquestionably the rule in *Walton* v. *Shelly* cannot prevail as a general rule, because, in the cases of wills, deeds, and bonds, the witnesses to them may be examined to impeach their validity, — in the first case, to prove the insanity of the testator; in the second case, to prove the deed was not sealed or delivered; and in the third case, to prove the bond was given on an usurious consideration, or that the obligor was unlettered and that the bond was not read or was misread to him. The witnesses in these cases by their attestations held out there was no legal objection to them and that they will prove those requisites which are essential to their validity. . . . An accomplice is a legal and competent witness against the principal, and in giving testimony must declare his own turpitude and participation in the crime, which is a circumstance that [only] impeaches his credit. The maxim of the civil law, when considered with reference to the common law, may be understood as affecting the credit of the witness and declaring that he stands in that predicament which renders his testimony suspicious and that he ought to be heard with caution."

1814, TRUMBULL, J., in *Townsend* v. *Bush*, 1 Conn. 260, 267: "The maxim of the civil law that no man is to be heard who alleges his own turpitude or crime was never by any Court or judge before Lord Mansfield applied to the inadmissibility of a witness, but only to the rights of the parties in a suit or action. No suitor can support a claim in which the ground or consideration is an unlawful act of his own, nor can any defendant be heard on a defence grounded on his own unlawful act. But an accomplice in a crime, fraud, or any illegal transaction was always an admissible witness, unless immediately interested in the suit." SWIFT, J.: "Lord Mansfield, who had borrowed many valuable principles from the civil law and incorporated them with the common law, attempts to support his decision by what he says is a maxim of the civil law, 'Nemo allegans suam turpitudinem est audiendus.' But there is no such rule to be found in the civil law as applicable to witnesses; and it is the daily practice in the common law courts to admit witnesses to testify to facts which show they have been parties to trespasses, frauds, and crimes."

1817, NOTT, J., in *Knight* v. *Packard*, 3 McCord 71, 77: "The great objection that a person shall not be allowed to develop his own shame appears to me to be founded on mistaken principles. It is not a question whether a party shall be permitted to take advantage of his own wrong, but whether a witness may not be required or permitted to disclose a fraud although he may have been a party to it. How far such a circumstance may go to affect the credit of the witness is a distinct question. I am not aware of any rule or law which

§ 531. [1] For a discussion of the maxim in its proper application to *estoppels* in substantive law, see Baker *v.* Preston, Gilmer 235 (1821); Laurenson *v.* State, 7 H. & J. 339 (1826).

renders a witness incompetent on account of his having committed a fraud, unless he has been convicted in a court of justice of perjury or some infamous crime."

1825, GREEN, J., in *Taylor* v. *Beck*, 3 Rand. 316, 341, 344: "The meaning of the maxim is that a man alleging his own turpitude impairs his own credit more or less, according to the degree and nature of the turpitude; and in this sense it is universally true, as a sensible rule for testing the degree of credit to which a witness is entitled; but has no application to the question of competency or incompetency. . . . The rule as to exclusion for infamy never, until the case of *Walton* v. *Shelly*, varied or was doubted. It was confined to cases of conviction for an infamous crime. Before that case, a witness was not rendered incompetent in any case, civil or criminal, by giving evidence of his own fraud, embezzlement, perjury, or felony."

1876, FIELD, J., in *Davis* v. *Brown*, 94 U. S. 423: "The maxim was plainly misapplied here by the great Chief Justice [Mansfield]; for it is not a rule of evidence, but a rule applicable to parties seeking to enforce rights founded upon illegal or criminal considerations. The meaning of the maxim is that no one shall be heard in a court of justice to allege his own turpitude as a foundation of a claim or right; it does not import that a man shall not be heard who testifies to his own turpitude or crimininality, however much his testimony may be discredited by his character."

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

TOPIC II: EXPERIENTIAL CAPACITY

CHAPTER XXII.

1. General Principles

2. Rules for Particular Subjects of Experience

1. General Principles

§ 555. **General Theory of Experiential Capacity; Expertness is Relative to the Particular Topic.** That sort of capacity which involves, not the organic powers, moral and mental, requisite for all testimony, nor yet the emotional power of unbiassed observation and statement, but the *skill to acquire accurate conceptions*, may be termed Experiential Capacity. The person possessing it is commonly termed Expert.

Since upon some matters accurate understanding can never be attained without special preparation or familiarity, the rules of Evidence must recognize this, and must see to it that the testimonial statements offered as representing knowledge are not offered by persons who on the subject in hand are not fitted to acquire knowledge. Such fitness or skill to acquire accurate impressions comes from circumstances which may broadly be summed up in the term "experience." If, at the one extreme, be imagined the babe in arms, practically lacking in any such skill or fitness, and, at the other extreme, the trained professional student of a department of science, in whom the fitness exists in the highest degree, it is seen that this attribution of the source of the fitness to "experience" is sufficiently accurate for purposes of nomenclature.

In experience, then, are included all the processes — the continual use of the faculties, the habit and practice of an occupation, special study, professional training, and the rest — which contribute to produce a fitness to acquire accurate knowledge upon a given subject.

Three fundamental principles, involved in the very nature of this sort of capacity, are to be noted:

(1) The capacity is *in every case a relative one, i.e.* relative *to the topic about which the person is asked to make his statement.* The object is to be sure that the question to the witness will be answered by a person who is fitted to answer it. His fitness, then, is a fitness to answer on that point. He may be fitted to answer about countless other matters, but that does not justify accepting his views in the matter in hand. Conversely, if he is skilled enough to acquire knowledge on the matters in hand, it is immaterial that he is not skilled upon any or every other matter.

(2) It follows that *there are no fixed classes of expert persons,* in which a witness finds himself and remains permanently. A person may be sufficiently skilled upon one question, and totally unskilled upon the next. He may be competent to say whether the deceased had gray hair, and incompetent to say what killed the deceased; competent to say whether the deceased was asphyxiated, and incompetent to distinguish between coal-gas and water-gas; competent to say whether a hatchet was sharp, and incompetent to say whether a stain upon it was human blood. Since experiential capacity is always relative to the matter in hand, the witness may, from question to question, enter or leave the class of persons fitted to answer, and the distinction depends on the kind of subject primarily, not on the kind of person. It is thus, a mistake to think of experiential qualifications as sharply marked off into defined classes.[1] Since the change of a trifling feature in the general fact asked about may render the competent witness now incompetent, it is obvious that an accurate classification of topics with reference to experiential qualifications would involve divisions and subdivisions too numerous to conceive, and not of practical use.

(3) Again, it is *misleading to think of some witnesses as experts and others as non-experts.* In a strict sense, every witness whosoever is an expert. In other words, the very fact that he is allowed to speak at all assumes that he is fitted to have knowledge on the subject; though in the vast majority of matters no demonstration of his fitness is needed. It is common and not unnatural to confine the term "experts" to witnesses whose fitness, by reason of the subject-matter, needs to be first shown; but while there is, as will be seen, a practical distinction between the instances in which the fitness must be expressly shown and the instances in which it need not be, that is no reason for ignoring the fundamental principle that every witness whosoever is and must be, by hypothesis, fitted or "expert" in the matter about which he

§ 555. [1] This principle is expressly approved by Powers, J., in Conley *v.* Portland G. L. Co., 99 Me. 57, 58 Atl. 61 (1904).

is allowed to give his supposed knowledge. In particular, it is a mistake to suppose that an " expert " must be a person professionally occupied upon the matter to be testified to. This is a mistake having its special origin in the doctrine of Opinion evidence, and can there better be considered (*post*, § 1923). It is sufficient here to note that the only requirement is that the witness must be fitted to acquire knowledge on the matter he speaks about; and, if he is thus fitted, that it is entirely immaterial whether he acquired his fitness by being professionally concerned in such matters.

§ 556. **Different Kinds of Expert Capacity.** Although (as just noted) there is no difference in principle between what may be termed the highest and the lowest expert, and though the single and uniform principle is that every witness must be sufficiently experienced for the matter in hand, yet it is possible and necessary in practice to distinguish two broad groups of matters with reference to experiential capacity. Between these two the distinction constantly becomes a question of law, because of reasons of practical convenience.

First, there is that class of matters as to which a sufficient experience is possessed by *every person of ordinary fortunes in life*, — the kind of skill in the ordinary use of the senses which is developed necessarily, in the course of the daily doings, for every mature member of society. To every one who is intelligent enough to take the witness stand at all is attributed a sufficient kind and degree of skill upon these matters. Hence, as the important practical consequence, *no express preliminary evidence of the possession of skill* in these matters is necessary. The opponent may by cross-examination expose its meagre quantity or poor quality; but that it exists in a sufficient degree in every one upon such matters is taken for granted.

Secondly, there is that class of matters as to which it is only by means of some *special and peculiar experience*, more than is the common possession, that a person becomes competent to acquire knowledge. Hence, the possession of this cannot be assumed, for an individual witness, but *must be expressly shown beforehand.*

This special and peculiar experience may have been attained, so far as legal rules go, in any way whatever; all the law requires is that it should have been attained. Yet it is possible here to group roughly two classes of experience which are usually, though not necessarily, found separately. (*a*) There is, first, an "occupational" experience, — the kind which is obtained casually and incidentally, yet steadily and adequately, in the course of some occupation or livelihood. From the advertising-agent to the woodchopper there is a long list of occupations in any one of which, and perhaps in that alone, the fitness will be obtained to acquire knowledge on a particular topic. (*b*) There is, secondly, a systematic training, directed deliberately to the acquisition of fitness and involving the study of a body of knowledge forming a branch of some science or art. This may be termed "scientific" experience. Now the line, if any can be drawn, between these two has no general legal significance. In truth no accurate line can be drawn. Each shades into the other imper-

ceptibly. In some instances the witness will need both; in some instances he may have both, though he does not need both. Neither is generally favored above the other by the Courts. The question in each instance is whether the particular witness is fitted as to the matter in hand. On many points the nature of the subject is such that a scientific training is indispensable; but rulings requiring it made no general discrimination between the two sources of fitness; they simply apply the general principle and require the particular sort of experience which fits the witness to acquire knowledge on the particular matter: [1]

1888, CAMPBELL, J., in *Kelley* v. *Richardson*, 69 Mich. 436, 37 N. W. 514: "The phrase 'expert testimony' is not entirely fortunate as designed to cover all cases where a witness may give his opinions. . . . [First, as to impressions of cold or heat, and the like,] any person can give such impressions without special experience or special intelligence. Beyond these every-day matters, known to all men, are things which most, if not all persons can become qualified to judge by more or less opportunities of observation, local or habitual, but which require no peculiar intelligence. [Secondly,] then, there are branches of business or occupations where some intelligence is requisite for judgment, but opportunities and habits of observation must be combined with some practical experience. This seems to be the beginning or lower grade of what may properly be termed 'experts', — a word meaning only the acquisition of certain habits of judgment, based on experience or special observation. And the scale rises as the qualifications become nicer and require greater capacity or knowledge and experience, until it reaches scientific observers and practitioners in arts and sciences requiring peculiar and thorough special training."

The fundamental principle, that every witness whatsoever must be expert in the matter he speaks about, is not violated by the recognition of these two broad classes above. That principle is invariable. But the distinction between the two classes stands upon the practical consideration that, in matters of the first class, the skill or capacity, being that which the ordinary course of life furnishes, may be assumed to be possessed by every person offered as a witness and need not be shown beforehand; while in matters of the second class, the skill or capacity required being attainable only by an experience special, peculiar, and out of the ordinary, the possession of that experience by any person who is to speak on that point must first be expressly shown. The distinction is entirely practical, and is in principle sound and simple.

It thus comes about that the rulings of Courts applying the requirements of Admissibility for experiential capacity are broadly of two general sorts, answering the questions:

1. *On what matters* is that *general experience*, common to every member of the community, a sufficient qualification?

2. When something more than this general experience is necessary, what shall the requirements be, as to such *special experience*, for the particular matter to be testified to?

§ 556. [1] Approved in the following cases: 1916, Brantly, C. J., in De Sandro *v.* Missoula L. & W. Co. 52 Mont. 333, 157 Pac. 641 (caving of a ditch); 1907, Crosby *v.* Wells, 73 N. J. L. 790, 67 Atl. 295 (an oil-driller); 1909, Crosby *v.* Portland R. Co., 53 Or. 496, 100 Pac. 300.

More briefly put: 1. *On a particular topic, is general experience sufficient?* 2. *If not, what sort of special experience is necessary?*

The rules of law under these two topics form the legitimate subject of the present principle.[2] But before examining these rules, it is desirable to discriminate two other principles which have no bearing on the present subject, but are apt to be improperly associated with it.

§ 557. **Opinion Rule, distinguished.** There is a rule of Evidence (*post*, § 1918) which excludes, on the ground of superfluity, testimony which speaks to the jury on matters for which all the materials for judgment are already before the jury. This testimony is excluded simply because, being useless, it involves an unnecessary consumption of time and a cumbersome addition to the mass of testimony. In the majority of instances the testimony thus excluded will consist of an " opinion " by the witness, *i.e.* a judgment or inference from other facts, as premises, and it will be excluded because the other facts are already or may be brought sufficiently before the tribunal. If they are not or cannot be, then the witness' judgment or inference will be listened to. Thus, it will often depend on the special qualifications of the witness whether he can add anything valuable which the jury have not already for themselves. When, for example, the size and appearance of a skull-fracture has been testified to, the witness, if he is a person of only ordinary experience, cannot tell any better than the jury can whether the fracture is such as to have necessarily caused death; while, if he is a medical man, he is capable of adding considerably to the jury's information on that point. In the former case, his judgment, or "opinion", would be excluded; in the latter case, it would be listened to.

Thus, in applying this rule about the superfluity of opinions, the experiential Qualifications of the witness will be material; and it is because for that rule of law as well as for the present one the question of experiential qualifications is important, that there has often been a confusion of the two subjects. That there are two distinct subjects involved is not always seen. That they are distinct is certain. It is easy to see how in practice the result of the ruling upon the evidence may be very different according to the principle which is being applied. For example, suppose it is desired to show that certain stains on a garment are blood-stains. In applying the principle of testimonial expert qualifications, all that is asked is whether the witness, as a person of general experience only, is competent to distinguish blood-stains from other marks. Assume it to be decided that he is; then there comes to be applied the other principle as to the superfluity of opinions which the jury themselves have the material for forming. Here, if the garment is before the jury, the witness' opinion, as a layman, is superfluous (unless perhaps he saw it when the stains were fresher), and will be excluded. Yet, if the witness is specially

[2] From the point of view of logic and psychology as applicable to argument before the jury (not the rules of Admissibility), see the materials collected in the present author's "Principles of Judicial Proof, as given by Logic, Psychology, and General Experience, and illustrated in Judicial Trials" (1913), §§ 220–231.

experienced in such matters, he may be able to add something to the jury's information, even with the garment before their eyes; and he will therefore be listened to. Again, suppose it is a question whether the distance between two points is a rod or a mile. If the jury have seen the place, no help from any one, however expert a surveyor, is needed; and if they have not seen it and cannot, a person of ordinary experience is as useful as a surveyor. But if the issue is whether the distance is eighty rods or seventy-nine rods, then even if the jury cannot see it, and help is needed, the principle of experiential qualifications would perhaps make it necessary to call a surveyor.

Thus, it is essential that the doctrine of Experiential Qualifications should not be confounded with the doctrine of superfluous Opinion evidence. Each has its legitimate rules, and both often may come into doubt with reference to the same piece of evidence; but they must be kept separate. The whole law of "opinion evidence", so called, may be and might well be modified or abolished; but that would not affect in the slightest the sound doctrine of experiential qualifications. Practically, the best plan for the advocate is to test each piece of evidence (if it seems to involve these doctrines) by asking himself the two distinct questions: first, Is this a matter upon which this witness is sufficiently qualified by experience? and, if it is, next, Is this a matter upon which the jury are or may be so well furnished with information that this witness cannot help them appreciably?

§ 558. **Experience, and Observation or Knowledge, distinguished.** It has been seen (*ante*, § 478), that Observation, or Knowledge, of the matter to be testified to is one of the essential elements of testimonial qualifications; its rules are examined elsewhere in detail (*post*, § 650). Here it is to be noted that, in practice, the line between Experience and Observation may sometimes be indistinguishable. It is not that there is any doubt about either being indispensable; that cannot be. It is merely that the circumstances which supply the one often supply the other also; and so the rule which requires or permits a witness of a certain sort to be accepted cannot in such a case be classified as belonging exclusively or certainly under the one or the other principle. This situation arises often with reference to value-witnesses. A ruling, for instance, that knowledge of sales in the vicinity is sufficient to qualify a value-witness, — is it a ruling as to experience or as to knowledge? The uncertainty arises from the fact that observation or knowledge of a thing involves, in these instances, two elements: acquaintance with the object or article itself, and acquaintance with the class of things into which it is desired to put the object. For example, knowledge of the value of a horse involves, first, a knowledge of the values of the different grades of horses, and, secondly, knowledge of the appearance and qualities of the particular horse, and the operation of estimating its value consists in comparing it with the several possible classes or grades and then placing it in one of them. It follows that the observation or knowledge necessary in such cases is twofold, — knowledge of values generally or the conditions affecting values, and knowledge of

the thing to be valued. The same twofold process is necessary also in witnesses to identity or resemblance; for the witness must be acquainted with both the thing to be identified and the thing with which the identification is to be made or denied.

Now in this twofold qualification as to knowledge there is in itself involved nothing as to experiential qualifications. But the question may arise whether or not special experiential qualifications are not necessary for acquiring this knowledge of a class of things; and it is here that the practical difficulty of treatment begins. Suppose, for example, a witness is called to the identification of handwriting. Here, as has been already noted (*ante*, § 99), the process consists in first determining the generic features of a given person's handwriting and then affirming or denying that the piece of writing in issue belongs within that type of writing. Now suppose that testimony to the genuineness of bank-notes is offered on this point from a bank-cashier and a merchant. It will certainly be necessary to show the witness' knowledge of the class, *i.e.* the genuine notes, by evidence that he has handled and is familiar with the genuine notes; this is purely a question of his opportunities for knowledge of the class. But the further question may arise whether, in spite of such frequent opportunities by handling the notes, the merchant has sufficient skill to form a trustworthy opinion about the genuineness of notes as a class; and here a Court might insist on the witness possessing the peculiar skill which, for example, a cashier would have. Again, suppose a ruling that in order to testify to the value of real property it is or is not necessary that the witness should be a dealer in real estate; is this a ruling as to experiential capacity? It may be looked upon in that way, as holding that special experience is or is not necessary in order to be capable of acquiring intelligent knowledge about such values. On the other hand, it may be looked upon merely as determining that a full and accurate knowledge of such values (*i.e.* the classes or grades into one of which the property is to be placed) can or cannot be obtained exclusively by one whose occupation gives him a full survey of the field. In the former view, we are establishing a special experiential capacity as necessary; in the latter view, we require no special capacity, but insist on full opportunities for observing the class of things in question. Now the Court may in its opinion reveal which of these views it had in mind; but so seldom is this done and so commonly does the decision furnish merely the rule of thumb, without the principle, that it is practically out of the question to distinguish the two topics in the rulings. So, too, the rulings that (for example) a merchant who has handled genuine bank-notes may be a witness to genuineness are so closely connected in their practical bearings with the rulings about experts' qualifications that it is difficult to treat them separately.

In dealing, then, with the subject of expert qualifications as to values, and a few other topics, it will be desirable to examine all the rulings under the head of Knowledge or Observation (*post*, §§ 687–722), without attempting to dis-

tinguish sharply between principles which have not been expressly discriminated by the Courts.

§ 559. **First Question: Is General or Ordinary Experience sufficient?** The first of the two questions (*ante*, § 556) to be asked in applying the present principle is, whether, for a particular subject of testimony, the *general or ordinary experience* of a layman is sufficient. Here a warning needs to be sounded, at the outset, against the too noticeable tendency to be over-strict, and to insist upon special accomplishments, where justice would be better served by a laxer attitude. The witness is not the juror. He does not decide the issue; he merely furnishes a small contribution to the material for decision. He should not be required to qualify as if he were a final arbiter of facts. A stand must be taken, sooner or later, against the undue extension of the topics upon which special experience is to be required for testifying:

1866, PORTER, J., in *People* v. *Gonzalez*, 35 N. Y. 62: "The affairs of life are too pressing and manifold to have everything reduced to absolute certainty, even in the administration of justice. Some reliance must be placed in the intelligence and good faith of witnesses and the judgment and discrimination of jurors. Microscopes, chemists, and men of science are not always at hand; and criminals are neither anxious to court observation nor careful to preserve the evidences of their guilt."

Can any general canon be employed, in determining whether the topic is one upon which special experience shall be required? The following may be suggested: No special experience shall be required unless the matter to be testified to is one upon which it would clearly be presumptuous, under the circumstances of the case, for a person of only ordinary experience to assume to trust his senses, for the purposes of his own action in the ordinary serious affairs of life.[1]

§ 560. **Second Question: What Special Experience is Necessary?** (1) **Qualification must be Expressly Shown.** If for a particular topic the foregoing question is answered in the negative, and special experience is held to be necessary, the second question then presents itself: What sort of special experience is necessary? This will sometimes permit of a general rule, — as when it is laid down that a medical practitioner need not be a specialist in insanity to form an opinion on that subject. Whatever general rules of this sort have been vouchsafed are dealt with under the various topics of testimony (*post*, §§ 564–571). But commonly there can be no such general propositions for the topic at large. The decision must be a concrete one, *i.e.* upon the fitness of the individual witness, as shown by the circumstances of his experience.

Here two rules of method come into application: (1) The *possession of the required qualifications* by a particular person offered as a witness, *must be*

§ 559. [1] Compare the following: 1875, Endicott, J., in Com. v. Sturtivant, 117 Mass. 122: "[The condition is that] the facts upon which the witness is called on to express his opinion are such as men in general are capable of comprehending and understanding"; La. C. Pa. 1870, § 442 ("Experts may be appointed whenever the Court deems them necessary in order to obtain information or at the request of the parties to the suit").

expressly shown by the party offering him. This follows from the nature of the situation (*ante*, § 556), and is universally conceded.[1] It marks a contrast between this and the foregoing sorts of testimonial capacity (*ante*, § 484).

§ 561. **Same**: (2) **Discretion of the Trial Court.** (2) Secondly, and emphatically, the *trial Court must be left to determine*, absolutely and without review, the fact of possession of the required qualification by a particular witness. In most jurisdictions it is repeatedly declared that the decision upon the experiential qualifications of witnesses should be left to the determination of the trial Court.[1]

§ 560. [1] It is therefore seldom expressly ruled upon: 1879, State *v.* Secrest, 80 N. C. 450, 457; 1867, State *v.* Ward, 39 Vt. 225, 236; and the cases cited *post*, § 654, n. 1 (knowledge qualifications).

This was not allowed to be insisted on in Bishop Atterbury's Trial, 16 How. St. Tr. 494 (1723), but merely because the interest of the State demanded the preservation of the secrecy of such methods (*post*, § 2367).

§ 561. [1] CANADA: 1888, Preeper *v.* R., 15 Can. Sup. 401, 408, 410.

UNITED STATES: *Federal:* 1888, Stillwell Mfg. Co. *v.* Phelps, 130 U. S. 527, 9 Sup. 601; 1894, Union P. R. Co. *v.* Novak, 15 U. S. App. 400, 414, 9 C. C. A. 629, 61 Fed. 573; 1902, Bradford Glycerine Co. *v.* Kizer, 51 C. C. A. 524, 113 Fed. 895; 1908, Inland & S. C. Co. *v.* Tolson, 139 U. S. 551, 559, 11 Sup. 653; 1891, Chateaugay O. & I. Co. *v.* Blake, 144 U. S. 476, 484, 12 Sup. 731; 1913, Matheson *v.* U. S., 227 U. S. 540, 33 Sup. 355 (trial judge's discretion); 1916, Chautauqua Institution *v.* Zimmerman, 6th C. C. A., 233 Fed. 371 (magazine subscription lists);
Alabama: 1900, Louisville & N. R. Co. *v.* Sandlin, 125 Ala. 585, 28 So. 40; 1902, White *v.* State, 133 Ala. 122, 32 So. 139; 1905, Braham *v.* State, 143 Ala. 28, 38 So. 919; 1910, Stewart *v.* Sloss-Sheffield S. & I. Co., 170 Ala. 544, 54 So. 48; 1918, Hamilton *v.* Cranford Mercantile Co., 201 Ala. 403, 78 So. 401 (building destroyed by fire);
Arkansas: 1882, Hunnicutt *v.* Kirkpatrick, 39 Ark. 172;
California: 1880, Sowden *v.* Quartz Mining Co., 55 Cal. 451;
Columbia (Dist.): 1895, Lansburgh *v.* Wimsott, 7 D. C. App. 271, 274; 1905, Hamilton *v.* U. S., 26 D. C. App. 382, 391 (medical men); 1917, Washington R. & E. Co. *v.* Clark, 46 D. C. App. 89, 98;
Connecticut: 1897, State *v.* Main, 69 Conn. 123, 37 Atl. 80; 1898, Hygeia D. W. Co. *v.* Hygeia I. Co., 70 Conn. 516, 40 Atl. 534; 1900, Barber *v.* Manchester, 72 Conn. 675, 45 Atl. 1014; 1915, Coffin *v.* Laskan, 89 Conn. 325, 94 Atl. 370 (value); 1921, Richmond *v.* Norwich, 96 Conn. 582, 115 Atl. 11 (sound of gunshots);
Delaware: 1916, Manda, Inc. *v.* Delaware L. & W. R. Co., 89 N. J. L. 327, 98 Atl. 467 (land condemnation);
Florida: 1902, Davis *v.* State, 44 Fla. 32, 32 So. 822; 1904, Schley *v.* State, 48 Fla. 53, 37 So. 518;
Hawaii: 1919, Kamahalo *v.* Coelho, 24 Haw. 689, 695;
Illinois: 1921, People *v.* Sawhill, 299 Ill. 393, 132 N. E. 477 (accountant);
Indiana: 1886, Fort Wayne *v.* Coombs, 107 Ind. 85, 7 N. E. 743 (conclusive, unless there is no evidence at all of qualifications, or a palpable abuse of discretion); 1895, Jenney Electric Co. *v.* Branham, 145 Ind. 314, 41 N. E. 448; 1915, Eckman *v.* Funderberg, 183 Ind. 208, 108 N. E. 577 (insanity);
Maine: 1883, Higgins *v.* Higgins, 75 Me. 346; 1885, Fayette *v.* Chesterville, 77 Me. 33 ("in extreme cases, where a serious mistake has been committed through some accident, inadvertence, or misconception, his action may be reviewed"); 1888, State *v.* Thompson, 80 Me. 200, 13 Atl. 892; 1896, Marston *v.* Dingley, 88 Me. 546, 34 Atl. 414 ("unless it is made clearly to appear from the evidence that it was not justified or that it was based upon some error in law"); 1904, Conley *v.* Portland G. L. Co., 99 Me. 57, 58 Atl. 61;
Maryland: 1909, State *v.* Flanigan, 111 Md. 481, 74 Atl. 818; 1919, Newkirk *v.* State, 134 Md. 310, 106 Atl. 694 (murder: qualifications of witness to experiments with a gun);
Massachusetts: 1850, Lincoln *v.* Barre, 5 Cush. 591; 1858, Quinsigamond Bank *v.* Hobbs, 11 Gray 257; 1860, Marcy *v.* Barnes, 16 Gray 164; 1869, Swan *v.* Middlesex, 101 Mass. 177; 1869, Gossler *v.* Refinery, 103 Mass. 335; 1870, Com. *v.* Williams, 105 Mass. 68; 1874, Tucker *v.* Railroad, 118 Mass. 548; 1875, Lawrence *v.* Boston, 119 Mass. 132; 1882, Perkins *v.* Stickney, 132 Mass. 217 ("conclusive, unless it appears upon the evidence to be erroneous or to have been founded upon some error in law"); 1883, Com. *v.* Nefus, 135 Mass. 554; 1885, Campbell *v.* Russell, 139 Mass. 279, 1 N. E. 345; 1887, Warren *v.* Water Co., 143 Mass. 164, 9 N. E. 527; 1880, Hill *v.* Home Ins. Co., 129 Mass. 349; 1888, Lowell *v.* Com'rs, 146 Mass. 412, 16 N. E. 8; 1895, Amory *v.* Melrose, 162 Mass. 556, 39 N. E. 276; 1895, Com. *v.* Hall, 164 Mass. 152, 41 N. E. 133; 1901, Toland *v.* Paine F. Co., 179 Mass. 501, 61 N. E. 52; 1901, Bowen *v.* R. Co., 179 Mass. 524, 61 N. E. 141; 1903, White *v.* McPherson, 183 Mass. 533, 67 N. E. 643; 1904, Muskeget Island Club *v.*

Just how far this extends in each jurisdiction is difficult to say. In some, the ruling is not reviewable at all; in others, it is reviewable on certain con-

Nantucket, 185 Mass. 303, 70 N. E. 61 (conclusive unless "erroneous in law"); 1910, Martin *v.* Boston & N. St. R. Co., 205 Mass. 16, 91 N. E. 159 (but where the qualifying facts are undisputed, the upper Court may review); 1909, Carroll *v.* Boston Elev. R. Co., 200 Mass. 527, 86 N. E. 793; 1912, Com. *v.* Spencer, 212 Mass. 438, 99 N. E. 266 (physician); 1917, Boutlier *v.* Malden, 226 Mass. 479, 116 N. E. 251 (time of death); 1921, Cook *v.* Fall River, Mass., 131 N. E. 346 (hospital site);
Michigan: 1879, McEwen *v.* Bigelow, 40 Mich. 217; 1883, Ives *v.* Leonard, 50 Mich. 299, 15 N. W. 463, *semble;*
Minnesota: 1896, Blondel *v.* R. Co., 66 Minn. 284, 66 N. W. 1079; 1897, Beckett *v.* Aid Assoc., 67 Minn. 298, 69 N. W. 923; 1900, Backus *v.* Ames, 79 Minn. 145, 81 N. W. 766; 1901, Yorks *v.* Mooberg, 84 Minn. 502, 87 N. W. 115; 1905, Corse & Co. *v.* Minnesota Grain Co., 94 Minn. 331, 102 N. W. 728; 1905, Paterson *v.* Chicago, M. & St. P. R. Co., 95 Minn. 57, 103 N. W. 621; 1916, Olthoff *v.* Great Northern R. Co., 135 Minn. 73, 160 N. W. 206 (speed of a train);
Missouri: 1896, Helfenstein *v.* Medart, 136 Mo. 595, 36 S. W. 863;
Nebraska: 1900, Missouri P. R. Co. *v.* Fox, 60 Nebr. 531, 83 N. W. 744; 1901, Omaha L. & T. Co. *v.* Douglas Co., 62 id. 1, 86 N. W. 936; 1903, Schmuck *v.* Hill, — Nebr. —, 96 N. W. 158; 1915, Meyers *v.* Western Union Tel. Co., 98 Nebr. 471, 153 N. W. 558 (value of cattle);
New Hampshire: 1860, Jones *v.* Tucker, 41 N. H. 549 (Doe, J.: "whether a witness has a special and peculiar knowledge is as much a question of fact as the question whether a search is diligent and thorough"); 1870, Dole *v.* Johnson, 50 N. H. 459; 1872, Ellingwood *v.* Bragg, 52 N. H. 490; 1881, Goodwin *v.* Scott, 61 N. H. 114; 1888, Carpenter *v.* Hatch, 64 N. H. 576, 15 Atl. 219; 1919, State *v.* Killeen, 79 N. H. 201, 107 Atl. 601 (handwriting);
New Jersey: 1896, New Jersey Z. & I. Co. *v.* L. Z. & I. Co., 59 N. J. L. 189, 35 Atl. 915; 1904, State *v.* Arthur, 70 N. J. L. 425, 57 Atl. 156; 1904, Burns *v.* Del. & A. T. & T. Co., 70 N. J. L. 745, 59 Atl. 220; 1906, State *v.* Monich, 74 N. J. L. 522, 64 Atl. 1016 ("if there be any legal evidence to support the finding" of admissibility, this suffices); 1916, State *v.* Mandelville, 88 N. J. L. 418, 96 Atl. 398 (analytical chemist, testifying on a charge of giving drugs to cause miscarriage); 1920, Leonard *v.* Standard Aero Co., 95 N. J. L. 235, 112 Atl. 252;
New York: 1877, Nelson *v.* Ins. Co., 71 N. Y. 460, *semble;* 1888, Slocovich *v.* Ins. Co., 108 N. Y. 62, 14 N. E. 802;
North Carolina: 1879, Flynt *v.* Bodenhamer, 80 N. C. 205; 1886, State *v.* Cole, 94 N. C. 964 (explaining State *v.* Parish, Busbee 239; State *v.* Secrest, 80 N. C. 450); 1895, Blue *v.* R. Co., 117 N. C. 644, 23 S. E. 275 (collecting previous rulings); 1900, Geer *v.* Durham W. Co., 127 N. C. 439, 37 S. E. 474; 1903, State *v.* Wilcox, 132 N. C. 1120, 44 S. E. 625; 1920, State *v.* Gray, 180 N. C. 697, 104 S. E. 647 (speed of automobile);
Oklahoma: 1913, Atchison T. & S. F. R. Co. *v.* Baker, 37 Okl. 48, 130 Pac. 577 (emergency brakes);
Oregon: 1900, Farmers' & T. N. Bank *v.* Woodell, 38 Or. 294, 61 Pac. 837; 1902, Ruckman *v.* Lumber Co., 42 Or. 231, 70 Pac. 811; 1906, State *v.* White, 48 Or. 416, 87 Pac. 137; 1909, Crosby *v.* Portland R. Co., 53 Or. 496, 100 Pac. 300;
Pennsylvania: 1869, Ardesco Oil Co. *v.* Gilson, 63 Pa. 152; Sorg *v.* Congregation, 63 Pa. 161; 1871, Delaware & C. Towboat Co. *v.* Starrs, 69 Pa. 41; 1884, First Nat'l Bank *v.* Wirebach's Ex'r, 106 Pa. 44; 1902, Stevenson *v.* Ebervale Coal Co., 203 Pa. 316, 52 Atl. 201;
Rhode Island: 1860, Howard *v.* Providence, 6 R. I. 514; 1863, Sarle *v.* Arnold, 7 id. 586; 1903, Ennis *v.* Little, 25 R. I. 342, 55 Atl. 884; 1912, Eastman *v.* Dunn, 34 R. I. 416, 83 Atl. 1057 (value witness);
South Dakota: 1905, Borneman *v.* Chicago, St. P. M. & O. R. Co., 19 S. D. 459, 104 N. W. 208;
Tennessee: 1891, Powers *v.* McKenzie, 90 Tenn. 181, 16 S. W. 559; 1897, Bruce *v.* Beall, 99 Tenn. 303, 41 S. W. 445;
Utah: 1897, Wright *v.* S. P. Co., 15 Utah, 421, 49 Pac. 309; 1899, State *v.* Webb, 18 Utah, 441, 56 Pac. 159; 1901, Budd *v.* R. Co., 23 Utah 515, 65 Pac. 486; 1902, Garr *v.* Craney, 25 Utah 193, 70 Pac. 853;
Vermont: 1874, Wright *v.* Williams' Estate, 47 Vt. 232 ("so long as the evidence or facts do not constitute or conclusively show skill, and such skill is matter of fact to be inferred from such evidence or facts, the finding of the Court is not revisable in that respect as being error in law"); 1885, Lamoille Valley R. Co. *v.* Bixby, 57 Vt. 563; Carpenter *v.* Corinth, 58 Vt. 216, 2 Atl. 170; 1886, Bemis *v.* R. Co., 58 Vt. 641, 3 Atl. 531; 1901, Watriss *v.* Trendall, 74 Vt. 54, 52 Atl. 118;
Virginia: 1897, Richmond L. & M. W. *v.* Ford, 94 Va. 616, 27 S. E. 509; 1905, Virginia I. C. & C. Co. *v.* Tomlinson, 104 Va. 249, 51 S. E. 362; 1909, Hot Springs L. M. Co. *v.* Revercomb, 110 Va. 240, 65 S. E. 557;
Washington: 1902, Czarecki *v.* R. & N. Co., 30 Wash. 288, 70 Pac. 750; 1913, Bogart *v.* Pitchless L. Co., 72 Wash. 417, 130 Pac. 490 (lumbering).

Whether on voir dire *cross-examination* should be allowed is for the trial Court in its discretion to decide: 1916, People *v.* Kimbrough, 193 Mich. 330, 159 N. W. 533.

ditions; in others, the matter is left "largely" to the trial Court's discretion. But the language of the principle varies in different opinions; and, in practice, the rulings below are constantly reconsidered above, under the guise of ascertaining whether the "discretion" has been "abused." But the reform of the future will find in this principle the nucleus for a beneficent extension of the doctrine of judicial discretion (*ante*, § 16). Looking at the complication of facts often entering into a witness' competency and best understood by the trial judge alone, — looking at the comparatively trifling character (in relation to all the issues of a trial) of the topics over which controversy arises, — looking at the ample and sure safeguard of cross-examination to reveal the witness' real qualifications, — looking at the injustice of requiring the busy judges of the Supreme Courts to investigate such trifles, — in view of all these considerations, it cannot be doubted that the rule of the future ought to be: *The experiential qualifications of a particular witness are invariably determined by the trial judge, and will not be reviewed on appeal.*

§ 562. **Sundry Principles**: (1) **Expert Witness Stating his Grounds of Opinion**; (2) **One Expert testifying to Another's Competency.** (1) An expert witness, like any other witness, may be asked on the direct examination, or may be required, to state the *grounds of his opinion*, *i.e.* the general data which form the basis of his judgment upon the specific data observed by him. This is merely an application of the general principle of the knowledge-qualification (*post*, § 655). Distinguish from this the questions whether a *hypothetical question* may or must be employed (*post*, § 672); whether an expert witness may be *cross-examined* or *contradicted* as to the grounds of his opinion (*post*, §§ 938, 972, 992); and whether the statements of a *patient* to a *physician* may be offered in evidence under the exception to the Hearsay rule (*post*, § 1720).

(2) The *experiential qualifications* of a witness are usually established by his own testimony reciting the facts of his career and special experience.[1] But in impeachment of his qualifications (*post*, § 938), or in support of them when impeached (*post*, § 1104), the general character of the witness as to experiential competency may be testified to. Here the proof may be made by means of reputation (*post*, § 1621) or by means of another expert witness' personal opinion (*post*, § 1984), — methods which raise the distinct questions of the Hearsay rule and the Opinion rule.

§ 563. **Method of Securing Unbiassed Experts. Judge's Selection of Experts.** (1) Much has been declaimed about the *partisanship* and consequent untrustworthiness of the usual professional man as an expert witness. But it does not appear that the professional man is more biassed or more corrupt than the ordinary lay witness. It is merely that his bias or pecuniary subserviency, when it is discovered, is in a more marked and unpleasant con-

§ 562. [1] Cases cited *post*, § 655; which include also rulings on experiential qualifications.

Of course, the *witness* is not to decide his own qualifications: 1907, Glover *v.* State, 129 Ga. 717, 59 S. E. 816 (even where, as in this extraordinary case, he disclaims being an expert).

trast with that ideal of impartiality and trustworthiness which is naturally associated with abstract scientific truth.[1] So, too, the frequent inconclusiveness, uncertainty, and contradiction of expert testimony are not more radical than the same baffling features in testimony founded on ordinary observation by the layman's senses. They merely disappoint more sharply our usual conceptions of the accuracy of scientific knowledge. It is a question whether either of these popular (and natural) ideals is attainable. But if they may be in any degree approached, it certainly is desirable to improve upon the present method.

There are indeed serious difficulties to be met with by any other method, — in particular, the expense, the impracticability of classifying experts, the impropriety of interfering with the parties' voluntary choice, and the difficulty of adopting a fixed rule for all classes of cases and all communities. But the practice under the present method has for years exhibited shortcomings which are lamentable. Extreme cases, of frequent occurrence, [illegible] haken the faith of juries in expert witnesses. Professional men of [illegible] instincts and high scientific standards look upon the witness box as [illegible]lgotha, and disclaim all respect for the law's methods of investigation. By any standard of efficiency, the present method registers itself as a failure, in cases where the slightest pressure is put upon it. The situation being obvious on all hands, there is an extensive literature about it, mostly developed in the medical field.[2]

§ 563. [1] For the psychological elements of strength and of weakness in expert testimony as such, see the materials collected in the present author's "Principles of Judicial Proof" (1913), §§ 220–231.

[2] The literature was partly collected by the author in a list published in Bulletin No. 5, vol. XV, Northwestern University, "List of References on Problems of Contemporary Legislation", 1914, and Supplement, 1920; the following are the principal articles:

J. F. Stephen, "Expert Testimony" (Juridical Society Papers, II, 236).

Willard Bartlett, "Medical Expert Evidence: The Obstacles to Radical Change in the Present System" (American L. Rev., XXXIV, 1).

G. A. Endlich, "Proposed Changes in the Law of Expert Testimony" (Amer. L. Rev., XXXII, 851).

W. L. Foster, "Expert Testimony — Prevalent Complaints and Proposed Remedies" (Harvard L. R., XI, 169).

Learned Hand, "Historical and Practical Considerations Regarding Expert Testimony" (Harv. L. R., XV, 40).

L. A. Emery, "Medical Expert Evidence" (Amer. Law Rev., XXXIX, 481).

S. S. Cohen, "The Proper Scope of Scientific (So-Called Expert) Testimony in Trials Involving Pharmacologic Questions" (*id.*, XXXIX, 187).

Medico-Legal Society, Journal (New York; various articles).

H. N. Somerville, and others (American Lawyer, XV, 309).

Massachusetts Legislature, 1908, Hearing before the Judiciary Committee on Bill of Massachusetts Medical Society.

Michigan Bar Association, Report of Committee (Proceedings of 1905; Judge W. B. Perkins, chairman; containing a bibliography, including articles in medical journals).

Maryland Bar Association, Report of Committee (Proceedings of 1909; containing a summary of arguments, with the text of the laws and proposed bills to date; C. W. Sams, Chairman of Committee).

Persifor Frazer, "Expert Testimony: Its Abuses and Uses" (American Law Register, 1902, XLI, N. S., L. O. S., 87).

Lee M. Friedman, "Expert Testimony: Its Abuses and Reformation" (Yale L. J., XIX, 247).

Journal of Criminal Law and Criminology (Northwestern University Building, Chicago). Vol. 1 and later (various articles).

Edward J. McDermott, "Expert Testimony" (Amer. L. Rev., XLVII, 35).

American Institute of Criminal Law and Criminology, Committee on Insanity and Crime, Edwin R. Keedy, Chairman, Reports of 1913, 1914 (Journal of Crim. Law, V, 643, VI, 672).

American Medical Association, Committee on Expert Testimony, Report of 1914.

Wisconsin Branch of the American Institute of Criminal Law and Criminology, Report of

The problem, however, is much the same in all fields of applied science, some of them merely being more common than others in ordinary trials. Most of the literature is critical and destructive. Few constructive proposals, that are at all feasible, have been made.

(2) The principal feature of the breakdown seems to be the *distrust* of the expert witness, as one whose testimony is shaped by his *bias for the party calling him*. That bias itself is due, partly to the special fee which has been paid or promised him, and partly to his prior consultation, with the party and his self-committal to a particular view. His candid scientific opinion thus has had no fair opportunity of expression, or even of formation, swerved as he is by this partisan committal.

The remedy therefore seems to lie in *removing this partisan feature, i.e.* by bringing him into court free from any committal to either party. Such a status for the expert would indeed not secure perfection. But it can be asserted that no measure can be effective which does not secure such a status for the expert witness.

How can this be done? The essential features, in the abstract, are that the State, not the party, shall be the one to pay his fee, and that the Court, not the party, shall be the one to select and summon him.

(3) The various concrete proposals, based on the foregoing essentials, reduce to three types: (A) One expedient is to substitute an *official jury of experts* where a scientific fact is in issue. Scientific men, not lawyers, are often found favoring this. But this proposal is wholly impracticable in our country, first, because the jury system constitutionally cannot thus be interfered with;[3] and, secondly, because in virtually all litigation the scientific fact is seldom more than a part of the issue, and therefore cannot be easily segregated for the purpose of being committed to a second and subsidiary jury.

(B) The second type of expedient is the appointment of *only official experts as witnesses* to take the place of paid partisan experts as witnesses, the latter being abolished. This is equally futile; first, because it interferes with the traditional right of the parties to adduce such evidence as they think useful; and secondly, because it would commit the fate of such issues completely to a body of men who, under certain local political conditions, would be wholly unreliable, and the new state of things would often be worse than the old.

Committee on Procedure, 3d Annual Meeting, 1911 (Journal of Criminal Law, etc., II, 724).

F. L. Ransome, "Geologists as Expert Witnesses" (Economic Geology, XV, 339, 1920).

John H. Gray, "Expert or Opinion Testimony in Rate Valuation Cases" (Utilities Magazine, I, No. 3, Jan. 1916).

[3] It is true that in the *Admiralty* practice, where skilled assessors are summoned to form a part of the tribunal, special expert nautical witnesses are not permitted to be used by the parties: 1842, The Gazelle, 1 W. Rob. 471; 1907, Bryce *v.* Canadian Pacific R. Co., 13 N. Br. 96, 108 (citing other cases). But the Court of Admiralty affords no precedent which would be of value for jury trials.

On the other hand, in *patent practice*, the expert witnesses, nominally so-called, are virtually the retained partisan assistants of counsel, and yet no movement of complaint is made against this method. The reason is the same though converse, viz. that, in the absence of juries, the abuse is not felt.

In short, a method employed in a court without juries is of little value as a precedent, either practically or constitutionally.

(C) The third type of expedient consists in authorizing the Court to call, on any such issue, an *expert selected by the judge* himself; this expert being merely additional to such experts as the parties may choose to call on their sides.[4] Modest as it seems, this expedient would remove most of the present

[4] The following three drafts of statutes may be taken as typical of the different species based on the above principle:

(1) The first attempt at legislative reform was made in Michigan, by St. 1905, No. 175: Sect. 1, Comp. L. 1915, § 12557: No expert shall receive a sum "in excess of the ordinary witness fees", unless by court order; and to pay or receive such a fee is made a misdemeanor; Sect. 2, § 12558: "No more than three experts shall be allowed to testify on either side as to the same issue in any given case", unless the trial Court permits additional ones; Sect. 3: "In criminal cases for homicide where the issues involve expert knowledge or opinion, the Court shall appoint one or more suitable disinterested persons, not exceeding three, to investigate such issues and testify to the trial"; the compensation is to be paid by the county, "and the fact that such witness or witnesses have been so appointed shall be made known to the jury"; but "this provision shall not preclude either prosecution or defence from using other expert witnesses at the trial"; Sect. 4, § 12559: "This act shall not be applicable to witnesses testifying to the established facts or deductions of science, nor to any other specific facts, but only to witnesses testifying to matters of opinion"). But Section 3 of this statute was held unconstitutional in People *v.* Dickerson, 164 Mich. 148, 129 N. W. 189; the absurdity of this decision is commented on in § 2484, *post* (judge's power to summon witnesses).

(2) The Medico-Legal Society of New York, at its March and May meetings (1907), discussed the subject, and the March, June, and September numbers (1907) of the Society's Journal published contributions. A Committee was appointed, under the chairmanship of Chief Justice Emery, of the Maine Supreme Court, to prepare a memorial to the Legislatures of the various States. The following bill was drawn under his advice, and was introduced in the Legislature of Maine: "Section 1. In any case, civil or criminal, in the supreme judicial court, or any superior court, when it appears that questions may arise therein upon which expert or opinion evidence would be admissible, the court, or any justice thereof in vacation, may appoint as examiner one or more disinterested persons qualified as experts upon the questions. The examiner, at the request of either party, or of the court or justice appointing him, shall make such examination and study of the subject matter of the questions as he deems necessary for a full understanding thereof, and such further reasonable pertinent examination as either party shall request. Reasonable notice shall be given each party of physical examination of persons, things and places, and each party may be represented at such examinations. Section 2. At the trial of the case either party or the court may call the examiner as a witness, and if so called he shall be subject to examination and cross-examination as other witnesses. For his time and expenses incurred in the examination and in attending court as a witness he shall be allowed by the court a reasonable sum, to be paid from the county treasury as a part of the court expenses. The court may limit the witnesses to be examined as experts to such number on each side as it shall adjudge sufficient for an understanding of the contention of the parties on the question. Section 3. When upon the trial of any case in either of said courts questions arise upon which expert or opinion evidence is offered, the court may continue the case and appoint an examiner for such questions as provided in Section 1. Section 4. In all cases in said courts where a view by the jury may be allowed, the court, instead thereof, may appoint one or more disinterested persons to make the desired inspection in the manner and under the same rules and restrictions as in the case of a view by the jury. The viewer thus appointed may be called as a witness by either party or by the court, and shall be subject to examination and cross-examination like other witnesses. He shall be allowed by the court a reasonable sum for time and expenses incurred, to be paid by the party asking for the view and taxed in his costs, or to be paid by the county as a part of the court expenses, at the discretion of the court."

(3) The committee on Crime and Insanity, of the American Institute of Criminal Law and Criminology, has prepared the following bill, which offers a platform that should unite general support: "Section 1. Where the existence of mental disease or derangement on the part of any person becomes an issue in the trial of a case, the judge of the trial court may summon one or more disinterested qualified experts, not exceeding three, to testify at the trial. In case the judge shall issue the summons before the trial is begun, he shall notify counsel for both parties of the witnesses so summoned. Upon the trial of the case, the witnesses summoned by the court may be cross-examined by counsel for both parties in the case. Such summoning of witnesses by the court shall not preclude either party from using other expert witnesses at the trial. Section 2. In criminal cases, no testimony regarding the mental condition of the accused shall be received from witnesses summoned by the ac-

abuses. As soon as a clash of opinion appeared between the partisan experts, paid by the parties, the jury would turn for its real guidance to the impartial one selected and summoned by the judge, and his conclusions would have an almost decisive weight with the jury. At the same time, there would be no risk of suppressing possible truth by excluding the parties' experts; and the experts called by the parties would in fact be of service in exposing occasionally the errors of the official expert. There are, of course, a few details which would assist this whole process, but are not all essential to it:

(*a*) The judge's power should be exercised after *notice* by him *to the parties*, so as to encourage an agreement upon a selected name;[5] (*b*) The official expert should be allowed to draw up his statements in the form of a report, and to read this in the first instance as his testimony;[6] (*c*) The judge should be authorized to require a conference before trial between the Court expert and all the other experts intended to be summoned, so as to reconcile beforehand needless misunderstandings which give to the jury a groundless impression of scientific uncertainty and contradiction; these misunderstandings now develop through the keeping apart of the experts and their open baiting by the opposing counsel on the trial; (*d*) The official expert should of course be subject to cross-examination, if desired, by the parties (*post*, § 1371); (*e*) The State should pay the expert's special fee, where one is demandable (*post*, § 2203).

How successful can be this type of measure when intelligently and conscientiously administered is demonstrated in one field where it is already in use:

cused until the expert witnesses summoned by the prosecution have been given an opportunity to examine the accused. Section 3. Whenever in the trial of a criminal case the existence of mental disease on the part of the accused, either at the time of the trial or at the time of the commission of the alleged wrongful act, becomes an issue in the case, the judge of the court before which the accused is to be tried or is being tried shall commit the accused to the State Hospital for the Insane, to be detained there for purposes of observation until further order of court. The court shall direct the superintendent of the hospital to permit all the expert witnesses summoned in the case to have free access to the accused for purposes of observation. The court may also direct the chief physician of the hospital to prepare a report regarding the mental condition of the accused. This report may be introduced in evidence at the trial under the oath of said chief physician, who may be cross-examined regarding the report by counsel for both sides. Section 4. Each expert witness may prepare a written report upon the mental condition of the person in question, and such report may be read by the witness at the trial. If the witness presenting the report was called by one of the opposing parties, he may be cross-examined regarding his report by counsel for the other party. If the witness was summoned by the court, he may be cross-examined regarding his report by counsel for both parties. Section 5. Where expert witnesses have examined the person whose mental condition is an element in the case, they may consult with or without the direction of the court, and may prepare a joint report to be introduced at the trial." The Committee's Report has been approved by the Institute (see the citation *supra*, n. 2).

[5] That the judge has the *power to summon a witness*, even without express statutory authority, is noted *post*, § 2484 (judge's power to seek evidence).

[6] Such a report, made in the course of duty, might have been made admissible without calling the witness (*post*, § 1630), and would have been constitutionally not open to objection (*post*, § 1389). But here it would be impolitic to dispense with the opportunity for cross-examination.

Assuming therefore that the witness attends and is subject to cross-examination, no principle is violated by permitting him (or them) to *read the report*, as representing his testimony. This is done in all ordinary cases of a memorandum of past recollection (*post*, § 734), and the proposed practice is not essentially different. The authorities to this effect are noted *post*, § 1385.

1920, Dr. *Francis D. Donoghue*, Medical Adviser to the Massachusetts Industrial Accident Board (Proceedings of the Seventh Annual Meeting of the International Association of Industrial Accident Boards, U. S. Bureau of Labor Statistics, Bulletin No. 281, p. 277): "The medical sections of the law have been amended to provide that the written report of the impartial physician shall be admitted in evidence as a part of the record upon which a board member may base his decision. . . . The following are the sections of the law governing the medical features: 'Examination of employee by physician for board (Part III, section 8). — The industrial accident board or any member thereof may appoint a duly qualified impartial physician to examine the injured employee and to report. . . . The report of the physician shall be admissible in evidence . . . provided that the employer and the insurer have seasonably been furnished with copies thereof.' . . . The work of advising the board on the appointment of impartial physicians is a duty of the [Board's] medical adviser, for the purpose of having a uniform system based on expert knowledge of the requirements of the different cases that arise, and permitting of the selection and training of physicians in a manner that will insure impartial examinations and reports according to the technical requirements of the compensation law. . . . In all cases the aim in selecting physicians is to provide a man whose training and experience fit him to examine and report expertly according to the special features involved in the case, not only as to past disability but as to future treatment. In connection with the assignment of impartial physicians, according to the nature of the case and location, some interest may be attached to a brief statement of the process by which the impartial reports are handled at the office. Upon receipt of impartial reports these are in all cases first read by the medical adviser to make certain that the report properly covers the necessary points involved in the case. Copies are then made and sent to the employee, insurance company, and, in some instances, to other persons who have a direct interest in the case. The impartial examination is not related in any way to the examinations which the insurance company is permitted by law to have performed in its own behalf, by a physician appointed outside the jurisdiction of the board. The impartial examination is to assist the board and the interested parties in obtaining reliable medical opinions which under the law have the weight of being entirely separated from any direct interest in behalf either of the employee or the insurance company . . Probably the greatest factor in the satisfactory carrying out of the Massachusetts law has been its intelligent development along medical lines.

"Eliminating the professional witness. — The old form of controversy, by presenting witnesses for and against the claimant, so that the man's rights depended upon the weight of the evidence presented at a hearing, has been materially modified by the naming of so-called impartial physicians. . . . In the early days of the act, insurance companies and employees did not avail themselves to any large extent of the section in the law providing for the appointment of impartial physicians. This was due chiefly to the fact that the medical policy of the board had not been determined. With the appointment of a medical adviser, in 1914, and the adoption of a medical program providing, in part, for the appointment of specialists as impartial physicians, there was a great increase in the demand for impartial examinations. . . . The great success of the accident board has come from the utilization of the best medical brains in the Commonwealth. Members of the medical profession consider it an honor to serve as impartial examiners and are willing to make some sacrifice fully to preserve this feature of the law."

Legislative progress in the adoption of this type of measure has been slow.[7] But it is inevitably the way of the future.

[7] Compare with the following the statutes admitting *certificates of analysis*, etc., by *experts* (*post*, § 1674): CANADA: *Ontario*, Rules of Court 1913, No. 268 ("The Court may obtain the assistance of accountants, merchants, engineers, actuaries, and other 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 person"), and

similar provisions for the other provinces, cited *post*, § 1674.

UNITED STATES: *Arizona:* St. 1921, c. 131 (personal injuries; like S. D. St. 1921, c. 179); *Rhode Island:* Gen. L. 1909, c. 292, § 18 ("Any justice of the superior court may, in any cause, civil or criminal, on motion of any party therein, at any time before the trial thereof, appoint one or more disinterested skilled persons, whether they be residents or non-residents, to serve as expert witnesses therein: Provided, that the reasonable fees of such experts, according to the character of the service to be performed, as fixed by such justice, shall be paid by the party moving for such appointment, to the clerk of the court at such time as the justice shall prescribe; and the amount so paid shall form part of the costs in the cause. In criminal cases in the discretion of the court, on request of the defendant, expert witnesses may be furnished for the defendant at the expense of the state, on such terms and conditions as may be prescribed by the court"); § 19 ("Such experts, being first duly sworn before a justice or clerk of the court to make a faithful and impartial examination into the matters and things committed to them, and true report thereon to make according to the best of their knowledge, belief, and understanding, shall thereupon proceed to view and examine such persons, matters, and things, to read and hear such evidence, and in such manner, times, and places, whether by attendance at the trial of such cause or otherwise, and to report their findings, views, and opinions thereon, jointly or severally, orally or in writing, to the court where such cause shall be pending, before or at the trial thereof, in such manner as the justice appointing them, or any justice of the court sitting in the cause, shall prescribe; and such report, if in writing, shall form part of the record of the cause, and shall be produced in evidence at the trial thereof, and such experts shall attend to such trial until excused by the court: Provided, that any party to the cause may call and examine, or cross-examine, any such expert at the trial as to the matters, persons, things, views, findings, and opinions contained, mentioned, or referred to in any such report, without further summons");

South Dakota: St. 1921, c. 179 (in personal injury cases, the Court may direct a physical examination by a competent physician, etc.; but this shall not prevent "any other person or physician from being called and examined");

Vermont: Gen. L. 1917, § 2620 (quoted *post*, § 1837; authorizes courts to "order an examination to be made by an expert . . . in the investigation of a crime");

Wisconsin: St. 1921, c. 126, adding to Stats. § 4066 a new § 4066–1 ("Whenever, in any criminal case, expert opinion evidence becomes necessary or desirable the judge of the trial court may after notice to the parties and a hearing, appoint one or more disinterested qualified experts, not exceeding three, to testify at the trial. Before entering upon such investigation such experts shall take and subscribe the following oath, before the judge making the appointment or some officer designated by him: 'I do solemnly swear that I will make a faithful and impartial examination of the matters to be investigated by me and that I will make a true report thereon according to the best of my knowledge, belief and understanding. So help me God.' The compensation of such expert witnesses shall be fixed by the court and paid by the county upon the order of the court as a part of the costs of the action. The receipt by any expert witness summoned under this section of any other compensation than so fixed by the court and paid by the county, or the offer or promise by any person to pay such other compensation shall be unlawful and punishable as contempt of court. The fact that such expert witnesses have been appointed by the court shall be made known to the jury, but they shall be subject to cross-examination by both parties, who may also summon other expert witnesses at the trial, but the court may impose reasonable limitations upon the number of witnesses who may give opinion evidence on the same subject"); § 4066–2 ("No testimony regarding the mental condition of the accused shall be received from witnesses summoned by the accused until the expert witnesses summoned by the prosecution have been given an opportunity to examine and observe the accused, if such opportunity shall have been seasonably demanded"); § 4066–3 ("Whenever the existence of mental disease on the part of the accused, at the time of the trial, is suggested or becomes the subject of inquiry, the presiding judge of the court before which the accused is to be tried or is being tried may, after reasonable notice and opportunity for hearing, commit the accused to a state or county hospital or asylum for the insane to be detained there for a reasonable time, to be fixed by the court, for the purpose of observation, but the court may proceed under section 4700. In case of commitment to a hospital the court shall direct the superintendent of the hospital to permit all the expert witnesses summoned in the case to have free access to the accused for the purpose of observation. The court may also direct the chief physician of the hospital to prepare a report regarding the mental condition of the accused. This report may be introduced in evidence at the trial under the oath of the said chief physician who may be cross-examined regarding the report by counsel for both parties"); § 4066–4 ("Each expert witness appointed by the court may be required by the court to prepare a written brief report under oath upon the mental condition of the person in question and such report shall be filed with the clerk at such time as may be fixed by the court. Such report may with the permission of the court be read by the witness at the trial").

2. Rules for Particular Subjects of Experience

§ 564. **Foreign Law.** (1) In answering the first question (*ante*, § 559), as applied to this topic, the main controversy is whether a witness to foreign law must be by profession an advocate, attorney, or judge, or whether a layman, if he claims the knowledge, may be trusted to speak as to the state of the law. The earlier practice in England seems to have been often very liberal,[1] though Lord Ellenborough is reported as having insisted on the necessity of a professional character in the witness.[2] But in the leading cases of Vander Donckt *v.* Thelusson and the Sussex Peerage it was settled that, besides professional persons, persons of any occupation which makes it necessary for them to give special attention to legal topics may be listened to upon those topics; the application of this test being left for decision to individual cases:

> 1844, Lord LANGDALE, M. R. in *Sussex Peerage Case*, 11 Cl. & F. 117–134; (a Roman Catholic bishop, exercising certain judicial functions over marriages, was permitted to testify to the Catholic law of marriage): "The witness is in a situation of importance; he is engaged in the performance of important and responsible public duties; and, connected with them and in order to discharge them properly, he is bound to make himself acquainted with this subject of the law of marriage. That being so, his evidence is of the nature of that of a judge."
>
> 1849, MAULE, J., in *Vander Donckt* v. *Thelusson*, 8 C. B. 812, 824 (a witness to prove Belgian law had been a merchant and a commissioner in stocks and bills of exchange in Brussels, but was now an hotel-keeper in London; the question being as to the legal place of presentation of a note): "The question is whether he is a person having special and peculiar means of knowledge of the law of Belgium with regard to bills of exchange and promissory notes, one whose business it was to attend to and make himself acquainted with the subject. I think that, inasmuch as he had been carrying on a business which made it his interest to take cognizance of the foreign law, he does fall within the description of an expert. Applying one's common sense to the matter, why should not persons who may be reasonably supposed to be acquainted with the subject — though they have not filled any official appointment, such as judge or advocate or solicitor — be deemed competent to speak upon it? . . . All persons, I think, who practise a business or profession which requires them to possess a certain knowledge of the matter in hand are experts, so far as experts are required."

As to *English* law, then, these limits will not be transcended, *i.e.* there must be an occupation, making necessary a familiarity with law.[3] In the *United*

§ 564. [1] Cases cited *infra*.

[2] 1807, Richardson *v.* Anderson, 1 Camp. 66 ("there ought strictly to be some witness professionally acquainted with it").

[3] *England:* 1844, Sussex Peerage Case, 11 Cl. & F. 134 (repudiating the ruling of Wightman, J., in R. *v.* Dent, 1 C. & K. 97 (1843); followed with some hesitation in 1849, Vander Donckt *v.* Thelusson, 8 C. B. 824); 1903, Wilson *v.* Wilson, P. 157 (law of Malta proved by a doctor of civil law who has never practised there, but who had made professional researches into that law); 1916, R. *v.* Naguib, 1 K. B. 359 (bigamy of an Egyptian Mahomedan with an Englishwoman; to prove the validity of a former Egyptian marriage, the defendant's own testimony held not sufficient; he must "adduce expert evidence to prove the validity of the marriage"; prior cases commented on); 1918, Barford *v.* Barford and McLeod, Prob. 140 (marriage in Uruguay; a resident lawyer, admitted to the bar of Mexico, Madrid, Bolivia, Peru, and England, familiar with the law of Spanish-speaking countries, allowed to testify, no lawyer practising in Uruguay being available); *Canada:* 1912, The King *v.* Bleiler, 4 Alta. 321, 1 D. L. R. 878 (Wisconsin clergyman, acting there for seven years, admitted to testify to Wisconsin marriage law; following Sussex Peerage Case); 1911, R. *v.* Naoum,

States no such special limitation has been laid down; an even more liberal policy has generally been followed. In some Courts it has been distinctly said that the experiential competence is independent of the witness' profession and will depend upon the circumstances of each case.[4] In other Courts special circumstances have led to special rules admitting particular classes of laymen.[5] Further than this, generalization seems impracticable.

(2) In answering the second question (*ante*, § 560), a number of rulings have passed upon the qualifications of particular witnesses; but they have little or no value as precedents.[6]

§ 565. **Same: Custom as equivalent to Law.** It has sometimes been necessary to point out that a custom of merchants, or the like, may in effect raise a question of law, and that therefore the witness' qualifications must be examined from that specific point of view.[1]

24 Ont. L. R. 306 (bigamy; marriage in Macedonia; one who had studied in a Greek school and Servian college (ecclesiastic?) held not sufficient).

Compare the following early cases: 1795, Lindo *v.* Belisario, 1 Hagg. Cons. 216 (Hebrew witnesses to the Hebrew marriage law were freely consulted who did not appear to fulfil the above limitations); 1791, Ganer *v.* Lady Lanesborough, Peake N. P. 18 (admitting a Jewess, as to the divorce custom of Hebrews on the continent).

By St. 1859, 22–23 Vict., c. 63, § 1, an opinion may be obtained from another British court in a region where a different law prevails, and by St. 1861, 24–5 Vict., c. 11, § 1, from any foreign court of a country with which a convention has been made for the purpose; see *post*, § 1675.

[4] 1852, Pickard *v.* Bailey, 26 N. H. 170 (a lawyer is not necessary, if the necessary experience otherwise appears); 1806, Kenny *v.* Clarkson, 1 Johns. N. Y. 394 (some intelligent person of the country in question suffices); 1829, Chanoine *v.* Fowler, 3 Wend. N. Y. 177; 1875, American Life Ins. & Trust Co. *v.* Rosenagle, 77 Pa. 515 (any one "who is or has been in a position to render it probable that he would make himself acquainted with it"; here a Catholic dean in Germany, who had the legal custody of the local marriage records, testified as to the law about them); 1871, Bird's Case, 21 Gratt. Va. 801, 808 (a priest or minister may testify to marriage law); W. Va. Code 1914, c. 13, § 4 (a judge may "consider any testimony, information, or argument that is offered on the subject").

[5] 1877, Wottrich *v.* Freeman, 71 N. Y. 601 ("all residents of a country, of a marriageable age and ordinary understanding, are familiar with the usual and customary forms of marriage"; here it was apparently enough if the customary form was followed); 1840, Phillips *v.* Gregg, 10 Watts Pa. 161, 170 (here the difficulty of obtaining lawyers acquainted with the early Louisiana Territory laws, and the general notoriety of marriage laws, was regarded as allowing a relaxation); 1877, State *v.* Cuellar, 47 Tex. 304 ("the practice has long prevailed in our courts of receiving the evidence of intelligent Mexicans who were not lawyers, in reference to the laws of Spain and Mexico in litigation pertaining to lands").

[6] 1867, McKenzie *v.* Gordon, 7 N. Sc. 153 (American consul, held not qualified to testify to the validity of a note without a revenue stamp); 1870, Armstrong *v.* U. S., 6 Ct. Cl. 226; Molina *v.* U. S., ib. 272; 1849, Layton *v.* Chaylon, 43 La. An. 319; 1895, Jackson *v.* Jackson, 82 Md. 17, 33 Atl. 317; 1858, People *v.* Lambert, 5 Mich. 349, 362 (excluding a constable, who had had some litigation involving the law in question); 1834, Marguerite *v.* Chouteau, 3 Mo. 540, 562 (early Spanish military official's opinion as to law of slavery of Indians, rejected); 1898, State *v.* Davis, 69 N. H. 350, 41 Atl. 267 (what "R. L. D." on the U. S. internal revenue office records meant; one who had consulted a circular of the Department held not incompetent); 1870, Barrows *v.* Downs, 9 R. I. 453.

§ 565. [1] But in most of the rulings the custom does not involve any matter of law: 1878, Third National Bank *v.* Cosby, 43 U. C. Q. B. 58 (American bank president admitted to testify to the legal currency of the U. S.; "any person, be he a practising lawyer or not, who comes within the description of a person 'peritus virtute officii'" is admissible); 1875, Wilson *v.* Bauman, 80 Ill. 493 (custom of employing an architect to superintend construction; "anybody who had any experience in the matter was competent"; here, building contractors); 1863, Kermott *v.* Ayer, 11 Mich. 181 (coinage; admitted); 1866, Phelps *v.* Town, 14 Mich. 379 (similar; excluded); 1870, Comstock *v.* Smith, 20 Mich. 342 (similar; admitted); 1859, Evans *v.* Ins. Co., 6 R. I. 47, 53 (meaning of "bar-iron"; "any person connected with the trade" so as "reasonably to be presumed to know the meaning", admissible).

Distinguish, however, the question whether usage may be evidenced by specific instances in *other trades or places* (*ante*, § 379); whether a *single witness* suffices to prove a usage (*post*, § 2053); and whether such testimony is obnoxious to the *Opinion rule* (*post*, § 1955).

§ 566. **Same: Other Principles, distinguished.** In the proof of foreign law, certain other principles, usually involved in practice, are here to be distinguished:

(1) Whether the professional witness may have acquired his knowledge by reading only, *without practice*, and whether he must be a resident of the country whose law is in issue, are questions of the adequacy of his knowledge, rather than of his skilled capacity (*post*, § 690);

(2) Whether, when statutory law is involved, the law may be testified to by an expert witness, instead of by the *production of the text* is a question of the rule for producing originals (*post*, § 1271);

(3) Whether the Opinion rule affects the testimony of a witness is still another important question (*post*, § 1953);

(4) Whether the foreign law may be evidenced by certified or printed *copies of the statutes*, or by *legal treatises*, or by *printed reports* of decisions, depends upon various exceptions to the Hearsay rule (*post*, §§ 1684, 1697, 1703).

§ 567. **Value.** It has been already noted (*ante*, § 558) that, since knowledge of the value of a thing involves knowledge also of the classes of value to which the thing may belong, it is impracticable to distinguish invariably the rulings upon Experiential qualification from the rulings upon Knowledge; and it is therefore more convenient to examine the law of the subject under the latter head (*post*, § 711–722).

§ 568. **Medical and Chemical Matters (Health, Sanity, Poison, Blood, etc.); (1) Whether a Lay Witness suffices.** Following the double division already noted (*ante*, § 559), it may be first inquired what topics there are upon which laymen in their ordinary experience are incapable of acquiring knowledge and forming opinions; and, next, what special training is required or is sufficient for the particular professional witness.

(1) *When does ordinary experience suffice?* The key to the various questions that here arise seems to be this: While on matters strictly involving medical science, as such, some special skill is needed, yet there are numerous related matters, involving health and bodily soundness, upon which the ordinary experience of everyday life is entirely sufficient. The line may sometimes be difficult to draw; but there can be no difficulty in determining that a layman may be received to state (for example) that a person was or was not apparently ill. Great liberality should be shown by the Courts in applying this principle, so that the cause of justice may not be obstructed by narrow and finical rulings. The correct doctrine has nowhere been better set forth than in the following passage:

1858, CAMPBELL, J., in *Evans* v. *People*, 12 Mich. 36: "The greatest difficulty encountered, in determining questions of competency of testimony on subjects connected more or less

with medical science, is in ascertaining how far it is safe to suppose unprofessional observers are able to form a reliable judgment. There are some simple disorders which all persons are familiar with. Others require the very highest degree of medical skill to distinguish them from disorders having some resembling appearances or symptoms. . . . In the view of evidence now entertained by the best authorities, it is settled that a jury should be allowed to have placed before them all the means of knowledge which can be had without involving the danger of leading them to form conclusions not based on solid truth and not reliable as reasonably certain. . . . Circumstances may make whole communities familiar with diseases not known elsewhere, . . . and it often happens that persons having no general skill become very familiar with particular subjects. It would be very unwise to exclude such evidence merely because the range of the witness' knowledge is limited. There are as many grades of knowledge and ignorance in the professions as out of them. The only safe rule in any of these cases is to ascertain the extent of the witness' qualifications, and within their range to permit him to speak. Cross-examination and the testimony of others will here, as in all other cases, furnish the best means of testing his value."

To the modern reluctance of the English bar to dispute over trifling points of evidence must be attributed the absence of English rulings on this doctrine. In our own country, on the whole, narrow objections, though constantly made, are discountenanced, and a policy of considerable liberality is enforced.[1]

§ 568. [1] *Laymen held admissible: England:* 1916, R. *v.* Noakes, 1 K. B. 581 (illness preventing a deponent's attendance under § 1406, *post;* testimony of a medical man held not necessary); *Federal:* 1893, Baltimore & O. R. Co. *v.* Rambo, 16 U. S. App. 277, 280, 8 C. C. A. 6, 59 Fed. 75 (appearance of suffering); 1896, Grayson *v.* Lynch, 163 U. S. 468, 16 Sup. 1064 (whether cattle had symptoms of a disease commonly called Texas fever); 1885, Knight *v.* Smythe, 57 Vt. 530 (general health appearance); 1906, Semet-Solway Co. *v.* Wilcox, 143 Fed. 839, C. C. A. (plaintiff's ability to work, as affected by his health); 1920, Pennachio *v.* U. S., 2d C. C. A., 263 Fed. 66 (opium);
Alabama: 1847, Milton *v.* Rowland, 11 Ala. 737 (the fact of disease, as externally apparent); 1855, Bennett *v.* Fail, 26 Ala. 610 (that a person was sick); 1857, Wilkinson *v.* Moseley, 30 Ala. 562 (same); 1859, Blackman *v.* Johnson, 35 Ala. 255 (same); 1859, Barker *v.* Coleman, 35 Ala. 225 (same); 1861, Fountain *v.* Brown, 38 Ala. 75 (same); 1861, Stone *v.* Watson, 37 Ala. 288 ("looked sick"); 1900, Dominick *v.* Randolph, 124 Ala. 557, 27 So. 481 (that a person is sick, allowable, but not that he has paralysis); 1919, Birmingham & A. R. Co. *v.* Campbell, 203 Ala. 296, 82 So. 546 (by a wife, as to a husband injured by defendant's locomotive, that between this injury and his death "he didn't have any other trouble", allowed);
Arkansas: 1916, Pfeiffer Stone Co. *v.* Shirley, 125 Ark. 186, 187 S. W. 930 (by a farmer, as to a person having appendicitis);
California: 1882, People *v.* Hong ah Duck, 61 Cal. 390 (kind of wound inflicted); 1895, People *v.* Gibson, 106 Cal. 458, 39 Pac. 864 (same); 1894, Robinson *v.* Fire Co., 103 Cal. 1, 4, 36 Pac. 955 (a person's healthy appearance); 1896, People *v.* Barney, 114 Cal. 554, 47 Pac. 41 (whether there was a hymen; a woman admitted);
Columbia (Dist.): 1894, District of Col. *v.* Haller, 4 D. C. App. 405, 411 (that the plaintiff was a "strong, able-bodied man" before the injury);
Florida: 1898, Edwards *v.* State, 39 Fla. 753, 23 So. 537 (where medical experts are not accessible, a layman may testify what would probably cause death);
Georgia: 1906, Green *v.* State, 125 Ga. 742, 54 S. E. 724 (smell of carbolic acid);
Illinois: 1876, Shawneetown *v.* Mason, 82 Ill. 339 (whether a juror was sick); 1892, Chicago C. R. Co. *v.* Van Vleck, 143 Ill. 480, 485, 32 N. E. 262 (ability to work; state of health); 1904, Chicago City R. Co. *v.* Bundy, 210 Ill. 39, 71 N. E. 28 (that the plaintiff was "in a nervous condition");
Indiana: 1897, Cleveland C. C. & St. L. R. Co. *v.* Gray, 148 Ind. 266, 46 N. E. 675 (a wife, as to the condition of her husband's health); 1907, Cleveland, C. C. & St. L. R. Co. *v.* Hadley, 170 Ind. 204, 82 N. E. 1025 (corporal injury; sundry questions allowed);
Iowa: 1903, Suddeth *v.* Boone, 121 Ia. 258, 96 N. W. 853 (that the smell of certain gas made him sick); 1914, Langdon *v.* Abrends, 166 Ia. 636, 147 N. W. 940 (physical ability);
Kansas: 1908, Federal Betterment Co. *v.* Reeves, 77 Kan. 111, 93 Pac. 627 (a person's appearance as to health and strength, before and after injuries, layman allowed);
Louisiana: 1904, State *v.* Lyons, 113 La. 959,

37 So. 890 (coroner's clerk allowed to identify the organs struck by the bullet);
Maryland: 1886, Baltimore & L. T. Co. *v.* Cassell, 66 Md. 432, 7 Atl. 805 (general healthy appearance);
Massachusetts: 1869, Com. *v.* Dorsey, 103 Mass. 413, 419 (whether hairs were human, and whose they were); 1896, Com. *v.* Flynn, 165 Mass. 153, 42 N. E. 562 (apparent physical condition of a person robbed);
Michigan: 1863, Evans *v.* People, 12 Mich. 33 (excluded as to whether a particular epidemic disease prevailed; but admitted as to whether sickness, in general, prevailed); 1874, People *v.* Olmstead, 30 Mich. 433 (cause of an illness); 1884, Peer *v.* Ryan, 54 Mich. 224, 19 N. W. 961 (veterinary surgery); 1889, Harris *v.* R. Co., 76 Mich. 229, 42 N. W. 1111 (ability of sick person to work and to use limbs); 1906, Krapp *v.* Metrop. L. Ins. Co., 143 Mich. 369, 106 N. W. 1107 (whether certain persons had died of consumption); 1915, Foster *v.* Krause, 187 Mich. 630, 153 N. W. 1066 (whether the plaintiff was able to work, allowed);
Missouri: 1912, Norris *v.* St. Louis I. M. & S. R. Co., 239 Mo. 695, 144 S. W. 783 (appearance as to health, allowed);
Nebraska: 1907, Souchek *v.* Karr, 78 Nebr. 488, 111 N. W. 150 (a professional nurse, as to the development of a child at birth, etc.; allowed);
New York: 1875, Lindsay *v.* People, 63 N. Y. 152 (freshness of a wound);
Oregon: 1907, State *v.* Megorden, 49 Or. 259, 88 Pac. 306 (effect of a blow); 1909, Crosby *v.* Portland R. Co., 53 Or. 496, 100 Pac. 300 (that the plaintiff's apparent health and physical condition had changed since the accident, allowed);
Pennsylvania: 1881, Allen's Appeal, 99 Pa. 198 (a woman who had borne four children was allowed to testify that a child at its birth was fully developed); 1888, United B. Mut. Aid Soc. *v.* O'Hara, 120 Pa. 265, 13 Atl. 932 (that a person had shortness of breath, allowed, but not that he had asthma);
South Dakota: 1919, Gartner *v.* Mohan, 41 S. D. 406, 170 N. W. 640 (ability to perform manual labor);
Tennessee: 1916, Roper *v.* Memphis St. R. Co., 136 Tenn. 23, 188 S. W. 588 (earning capacity of an injured person);
Texas: 1874, Wilson *v.* State, 41 Tex. 321 (sex of a skeleton);
Utah: 1906, Davis *v.* Oregon S. L. R. Co., 31 Utah 307, 88 Pac. 2 (ability to work, etc.);
West Virginia: 1892, Lawson *v.* Conaway, 37 W. Va. 159, 162, 16 S. E. 564 (physical ability); 1917, Ward *v.* Liverpool Salt & Coal Co., 79 W. Va. 371, 92 S. E. 92 (by a plaintiff, whether his injury was permanent, not allowed);
Wisconsin: 1874, Montgomery *v.* Scott, 34 Wis. 343 (whether a leg was broken); 1884, Wright *v.* Howard, 60 Wis. 122, 18 N. W. 750 (nature of present suffering; asked of the injured person on the stand); 1885, Baker *v.* Madison, 62 Wis. 143, 22 N. W. 141, 583 (capacity to work, etc.); 1887, Smalley *v.* Appleton, 70 Wis. 344, 35 N. W. 729 (general health); 1888, Bridge *v.* Oshkosh, 71 Wis. 365, 37 N. W. 409 (physical and mental condition as outwardly apparent).

Laymen held inadmissible: Federal: 1886, Dushane *v.* Benedict, 120 U. S. 647, 7 Sup. 696 (infected rags as a cause of illness);
Alabama: 1849, McLean *v.* State, 16 Ala. 679 (nature of a disease consisting in "fits"); 1903, White *v.* State, 136 Ala. 58, 34 So. 177 (how long a man had been dead when his body was seen); 1910, Clemmons *v.* State, 167 Ala. 20, 52 So. 467 (time of blood-coagulation after death; layman excluded);
Arkansas: 1860, Tatum *v.* Mohr, 21 Ark. 354, *semble* (nature of disease); 1861, Thompson *v.* Bertrand, 23 Ark. 733 (same); 1897, Redd *v.* State, 63 Ark. 457, 40 S. W. 374 (relaxation of muscles after death);
Georgia: 1895, Atlanta St. R. Co. *v.* Walker, 93 Ga. 462, 21 S. E. 48 (by the plaintiff, that his injury would be permanent); 1899, Atlanta C. S. R. Co. *v.* Bagwell, 107 Ga. 157, 33 S. E. 191 (whether dancing would injure a woman having "female trouble");
Iowa: 1906, State *v.* Nowells, 135 Ia. 53, 109 N. W. 1016 (whether a dying declarant was "delirious", excluded, but whether he was "wild" or "incoherent", allowable; this is indeed a valuable morsel of quibbling, — a veritable ensample of Carlyle's "owl-eyed Pedantry");
Kentucky: 1896, American Accident Co. *v.* Fidler, — Ky. —, 35 S. W. 905, 36 id. 528 (whether the deceased had typhoid fever; amputation of limb);
Maine: 1835, Boies *v.* McAllister, 12 Me. 308 (existence of pregnancy);
Massachusetts: 1868, Ashland *v.* Marlborough, 99 Mass. 47 (disease); 1894, Zimm *v.* Rice, 161 Mass. 571, 576, 37 N. E. 747 (by a plaintiff, that his pneumonia was due to taking a journey in consequence of an attachment);
Michigan: 1896, Lewis *v.* Bell, 109 Mich. 189, 66 N. W. 1091 (disease of horses; employee in a stable, excluded);
New York: 1903, Gray *v.* Brooklyn H. R. Co., 175 N. Y. 448, 67 N. E. 899 (by women, that their miscarriages were like the plaintiff's, excluded);
Pennsylvania: 1889, Lombard R. Co. *v.* Christian, 124 Pa. 123, 16 Atl. 628 (various answers permitted and excluded);
Utah: 1898, Murray *v.* R. Co., 16 Utah 356, 52 Pac. 596 (whether a jolt of a car would hurt a pregnant woman);
West Virginia: 1915, Mulvay *v.* Hanes, 76 W. Va. 721, 86 S. E. 758 (plaintiff not allowed to state the cause of her own miscarriage); 1922, Cook *v.* Coleman, — W. Va. —, 111 S. E. 751 (malpractice; plaintiff's testimony to her own barrenness, excluded).

On all the foregoing topics of testimony,

Of the particular topics most frequently arising for decision, it has been generally held that special qualification is not required upon the question whether a stain is of *blood*.[2]

Whether a lay witness may testify to *sanity* is a question which always occurs in conjunction with the question whether the rule against Opinion evidence should exclude such testimony, and the former question has played but a small part in the settlement of the rule of law in the different jurisdictions. It is conceivable that a Court might regard such testimony as proper under the former principle but improper under the latter. In fact, however, if a Court has excluded it on the former ground it has also excluded it on the latter. putting the chief emphasis on the latter, and if it has received it, has done so on both grounds; so that practically the rule of law stands or falls according to the determination of the latter question. The state of the law on that point is examined under the Opinion rule (*post*, §§ 1933–1938). The incompetency of the layman to form an opinion has nevertheless entered in part into the grounds of decision for the few jurisdictions which reject such testimony:

1879, Colt, J., in *May* v. *Bradlee*, 127 Mass. 421: "That question [of testamentary capacity], as it arises in the courts, is not often presented in a form in which it can be wisely determined by the opinions of unskilled observers, however numerous. There are forms of partial delusion, the influence of which can be detected only by persons of uncommon skill and experience, which defeat a will executed as the result of such a delusion. All forms of sanity and insanity, whether partial or general, are mental conditions which run into each other by insensible gradations, not easily separated and defined. The Courts do not deal with the plain cases only; those which come near the line, or where the disease is partial and limited, are those which most commonly occupy attention and require the application of skill and science."

But the propriety of accepting lay opinions, for what they may be worth, has been defended in the following sensible opinion, which represents the doctrine in all but a few jurisdictions:[3]

compare the application of the *Opinion rule* (*post*, §§ 1974–1976), as to a person's appearance, etc.; it is not always possible to discover which rule the Court has in mind.

[2] 1898, Gantling *v.* State, 40 Fla. 237, 23 So. 857 (that stains of a certain color were found); 1901, State *v.* Rice, 7 Ida. 762, 66 Pac. 87; 1875, Com. *v.* Sturtivant, 117 Mass. 122 (direction of a stain); 1880, Dillard *v.* State, 58 Miss. 368; 1893, State *v.* Robinson, 117 Mo. 649, 23 S. W. 769 (that stains looked like blood); 1866, People *v.* Gonzalez, 35 N. Y. 62; 1881, Greenfield *v.* People, 85 N. Y. 83; 1888, People *v.* Deacons, 109 N. Y. 382, 16 N. E. 676; 1897, People *v.* Burgess, 153 N. Y. 561, 47 N. E. 889; 1885, People *v.* Thiede, 11 Utah 241, 39 Pac. 837; 1902, State *v.* Henry, 51 W. Va. 283, 41 S. E. 439.

[3] Compare with the following cases, which agree with the opinion quoted, the citations under § 689, *post* (qualifications as to *Knowledge of the person* said to be insane) and § 1938, *post* (application of the *Opinion rule* to sanity), all the admitting cases on the latter point being also authorities for admission on the present point: 1896, Mutual Life Ins. Co. *v.* Leubrie, 18 C.C.A. 332, 71 Fed. 843; 1882, Smith *v.* Hickenbottom, 57 Ia. 737, 11 N. W. 664; 1871, State *v.* Reddick, 7 Kan. 149; 1881, Wood *v.* State, 58 Miss. 742; 1843, Clark *v.* State, 12 Oh. 487; 1897, Kaufman *v.* Caughman, 49 S. C. 159, 27 S. E. 16; 1901, Johnson *v.* State, 42 Tex. Cr. 618, 62 S. W. 756.

The only rulings taking the contrary view on this point have apparently been the following, with May *v.* Bradlee, *supra*: 1858, U. S. *v.* Holmes, 1 Cliff. 104, 106 (yet the court allowed it at p. 114); 1853, Dewitt *v.* Barley, 9 N. Y. 384.

The following ruling falls under the principle of § 505, *ante*: 1902, Collins *v.* People, 194 Ill. 506, 62 N. E. 902 (child of 13, held incompetent on the facts to testify to her father's mental condition).

1884, HARLAN, J., in *Connecticut M. Life Ins. Co.* v. *Lathrop*, 111 U. S. 612, 4 Sup. 533: "This position [that an ordinary observer may not state his judgment as to the sanity of one he knows] cannot be sustained consistently with the weight of authority, nor without closing an important avenue of truth in many, if not in every, case, civil and criminal, which involves the question of insanity. Whether an individual is insane is not always best solved by abstruse metaphysical speculations expressed in the technical language of medical science. The common sense and, we may add, the natural instincts of mankind, reject the supposition that only experts can approximate certainty upon such a subject. There are matters of which all men have more or less knowledge, according to their mental capacity and habits of observation, — matters about which they may and do form opinions sufficiently satisfactory to constitute the basis of action. While the mere opinion of a non-professional witness predicated upon facts detailed by others is incompetent as evidence upon an issue of insanity, his judgment based upon personal knowledge of the circumstances involved in such an inquiry certainly is of value; because the natural and ordinary operations of the human intellect, and the appearance and conduct of insane persons, as contrasted with the appearance and conduct of persons of sound mind, are more or less understood and recognized by every one of ordinary intelligence who comes in contact with his species. The extent to which such opinions should influence or control the judgment of the Court or jury must depend upon the intelligence of the witness as manifested by his examination, and upon his opportunities to ascertain all the circumstances that should properly affect any conclusion reached."

Whether an expert witness is *required*, in *addition to* any lay witnesses (*e.g.* in actions, for malpractice) involves a different principle, and is considered *post*, § 2090.

§ 569. **Same**: (2) **What Special Experience is Necessary.** (2) When on a medical topic ordinary experience does not suffice, *what are to be the requirements of special experience?* The chief question that here occurs is whether a *general practitioner* may testify on matters of a particular department of the science wherein specialists may presumably be had. Here the Courts seem not to have taken a sufficiently firm stand against the narrow objections frequently raised. It is not that the rulings themselves are illiberal, but that narrow doctrines are not repudiated with sufficient positiveness. The liberal doctrine should be insisted on that the law does not require the best possible kind of a witness, but only persons of such qualifications as the community daily and reasonably relies upon in seeking medical advice. Specialists are in most communities few and far between; the ordinary medical practitioner should be received on all matters as to which a regular medical training necessarily involves some general knowledge. This rule has been applied for sundry subjects, chiefly that of *poisons*,[1] and also for *in-*

§ 569. [1]*Admitting a general practitioner: Federal:* 1885, Kelly *v.* U. S., 27 Fed. 618 (need not be a specialist); *Colo.* 1897, Germania L. Ins. Co. *v.* Ross-Lewin, 24 Colo. 43, 51 Pac. 488 (toxicologist-physician, who had no personal experience with cases of cyanide of potassium poisoning); *Fla.* 1909, Copeland *v.* State, 58 Fla. 26, 50 So. 621 (strychnine poisoning); *Ga.* 1909, Towaliga Falls P. Co. *v.* Sims, 6 Ga. App. 749, 65 S. E. 844 (malarial fever from mosquitoes); *Ill.* 1888, Siebert *v.* People, 143 Ill. 579, 32 N. E. 431 (arsenic-poisoning; though the witness never had a case of it); *Ia.* 1858, State *v.* Hinkle, 6 Ia. 385 (chemical analysis); 1883, State *v.* Cole, 63 Ia. 698, 17 N. W. 183 (post-mortem examination for poison); *Mass.* 1869, Young *v.* Makepeace, 103 Mass. 53 (child-birth); 1894, Hardiman *v.* Brown, 162 Mass. 585, 39 N. E. 192 (brain-tumor as a source of disease; witness not familiar with such tumors in practice); *Mich.* 1896, People *v.* Thacker, 108 Mich. 652, 66

sanity.[2] In various rulings, also, the qualifications of particular physicians are determined, but without laying down general rules.[3]

N. W. 562 (a physician having a medical degree and a general practice, held competent to speak of symptoms of arsenic-poisoning in a patient treated by him, though he had had no personal experience in such cases, but has studied the subject); *Mo.* 1895, Seckinger *v.* M'f'g. Co., 129 Mo. 590, 31 S. W. 957 (need not be a specialist); *N. Y.* 1891, People *v.* Benham, 160 N. Y. 402, 55 N. E. 11 (poison, murder; general practitioner need not be a specialist in toxicology); *N. C.* 1870, Horton *v.* Green, 64 N. C. 67 (glanders, and animal diseases generally); *S. Car.* 1859, State *v.* Terrell, 12 Rich. L. 327 (strychnia-poisoning); *S. Dak.* 1909, State *v.* Kannuel, 23 S. D. 465, 122 N. W. 420 (arsenic poisoning); *Tex.* 1906, Rice *v.* State, 49 Tex. Cr. 569, 94 S. W. 1024 (medical experts who had had no personal experience in cases of strychnine poison, allowed to testify to its symptoms); *Vt.* 1875, Hathaway's Adm'r *v.* Ins. Co., 48 Vt. 351 (need not be a specialist).

Rejecting a general practitioner: 1863, Emerson Gaslight Co., 6 All. 146 (effects of gas on health); 1901, State *v.* Simonis, 39 Or. 111, 65 Pac. 595 (licensed physician, not allowed to testify to symptoms of arsenious poisoning).

A person expert in some other special department only was held incompetent in Fairchild *v.* Bascomb, 35 Vt. 409 (1862).

Compare the cases cited under § 687, *post* (medical knowledge founded on reading, without practice).

[2] 1911, Odom *v.* State, 172 Ala. 683, 55 So. 820; 174 Ala. 4, 56 So. 913 (an officer in charge of the transfer of insane persons, held not an expert); 1880, Estate of Toomes, 54 Cal. 515 (specialist not necessary); 1906, Dolbeer's Estate, 149 Cal. 227, 86 Pac. 695 (like Toomes' Estate); 1871, Davis *v.* State, 35 Ind. 497 (ordinary practice, plus some reading on insanity, sufficient); 1895, Phelps *v.* Com., — Ky. —, 32 S. W. 470 (not making a specialty of insanity, but having had cases of it); 1900, Abbott *v.* Com., 107 Ky. 624, 55 S. W. 196 (specialist not necessary); 1913, *In re* Whiting, 110 Me. 232, 85 Atl. 79 (specialist not needed); 1909, United R. & E. Co. *v.* Corbin, 109 Md. 442, 72 Atl. 606 (specialist not needed).

Contra: 1884, Reed *v.* State, 62 Miss. 409 (special study or practice necessary).

In Massachusetts the odd rule obtains that a general practitioner may testify if his opinion is based on personal observation, but not if it is based on a hypothetical question: 1856, Baxter *v.* Abbott, 7 Gray 78; 1859, Com. *v.* Rich, 14 Gray 336; 1868, Hastings *v.* Rider, 99 Mass. 624.

Compare the citations under § 687, *post* (physician's knowledge based on books).

[3] *Federal:* 1855, Allen *v.* Hunter, 6 McL. U. S. 307 (chemical subject); *Ala.* 1847, Tullis *v.* Kidd, 12 Ala. 648 (admitting a witness who had received a license as a physician, practised one year, then became a lawyer, and for sixteen years had not practised medicine but continued to keep up his medical reading); 1877, Mitchell *v.* State, 58 Ala. 419; 1878, Rash *v.* State, 61 Ala. 92, 95 (wounds); *Ark.* 1898, Green *v.* State, 64 Ark. 523, 43 S. W. 973 (physician, as to insanity; one admitted, another rejected); *Cal.* 1909, Kimic *v.* San Jose L. G. I. R. Co., 156 Cal. 379, 104 Pac. 986 (graduate nurse, allowed to testify as to reasons for giving a dose); *D. C.* 1905, Hamilton *v.* U. S., 26 D. C. App. 382, 391 (medical student excluded); *Ill.* 1921, Voight *v.* Ind. Com., 297 Ill. 109, 130 N. E. 479 (injury to spinal vertebra; graduate of chiropractic school, admitted); *Ind.* 1881, Noblesville E. G. R. Co. *v.* Gause, 76 Ind. 144; 1901, Isenhour *v.* State, 157 Ind. 517, 62 N. E. 40 (adulteration of milk); *Kan.* 1877, State *v.* Cook, 17 Kan. 395 (poison); 1887, Broquet *v.* Tripp, 36 Kan. 704, 14 Pac. 227 (sheep disease); 1888, Missouri Pac. R. Co. *v.* Finley, 38 Kan. 560, 16 Pac. 951 (cattle disease); *Ky.* 1897, Dugan *v.* Com., 102 Ky. 241, 43 S. W. 418 (reduction of weight of fired bullet); *Md.* 1896, Dashiell *v.* Griffith, 84 Md. 363, 35 Atl. 1094 (a professional nurse, who had nursed in 20 or 30 cases of bone felon, but not a student of surgery, not allowed to speak as to whether a felon was cut to the bone; a good example of petty and unfruitful interference with the discretion of a trial Court); *Mich.* 1880, People *v.* Niles, 44 Mich. 609, 7 N. W. 192 (wound of a horse); *Miss.* 1859, New Orleans J. & G. N. R. Co. *v.* Allbritton, 38 Miss. 246, 273; *N. Y.* 1897, People *v.* Koerner, 154 N. Y. 355, 48 N. E. 730; *N. Car.* 1883, State *v.* Sheets, 89 N. C. 549 (poisoning of an animal); *Pa.* 1882, Olmsted *v.* Gere, 100 Pa. 131; 1898, Com. *v.* Farrell, 187 Pa. 408, 41 Atl. 382 (when rigor mortis sets in); *Vt.* 1872, Masons *v.* Fuller, 45 Vt. 31 (whether a birth was premature; a professional nurse was allowed to testify); *Va.* 1828, Mendum *v.* Com., 6 Rand. 709, 721; *Wash.* 1918, Swanson *v.* Hood, 99 Wash. 506, 170 Pac. 135 (argument that a physician of one school is not competent to testify in a suit for malpractice against a physician of another school, repudiated); *Wis.* 1884, Vates *v.* Cornelius, 59 Wis. 617, 18 N. W. 474 (diseases of horses); 1902, Allen *v.* Voje, 114 Wis. 1, 89 N. W. 924 (whether a trained nurse is qualified to speak as to the dangerous significance of a certain temperature, not decided; yet it is difficult to see why such a question should cause protracted doubt).

The common law, it may be added, does not require that the expert witness on a medical subject shall be a person *duly licensed to practise medicine;*[4] but in at least three jurisdictions this requirement has been introduced by statute.[5] Except as an indirect stimulus to obtain a license, such a rule is ill-advised, first, because the line between chemistry, biology, and medicine is too indefinite to admit of a practicable separation of topics and witnesses, and, secondly, because some of the most capable investigators have probably not needed or cared to obtain a license to practise medicine.

§ 570. **Handwriting and Paper Money.** For the reasons already noted (*ante*, § 558), it is not always possible to distinguish the application of the present principle from that of the principle of Knowledge (*post*, § 693). Nevertheless the present one has a real place among the qualifications of a witness to handwriting.

(1) For *handwriting* in manuscript, the fundamental proposition of our law is that the general experience of the ordinary person is sufficient; in other words, *any person able to read and write is competent to form and to express a judgment as to the genuineness of handwriting.*[1] So often does the

[4] 1905, Macon R. & L. Co. *v.* Mason, 123 Ga. 773, 51 S. E. 569 (personal injury; a graduated but unlicensed osteopath, admitted to testify to the nature of the injury); 1897, Golder *v.* Lund, 50 Nebr. 867, 70 N. W. 379; 1899, People *v.* Rice, 159 N. Y. 400, 54 N. E. 48 (admissible if expert, though not licensed to practise or actually not practising); 1886, State *v.* Speaks, 94 N. C. 874 (the State Board examination required before practising is not necessary for testifying); 1905, People *v.* Rivera, 9 P. R. 454, 465 (murder; a 'praticante' who was not "a regularly qualified physician", held admissible to testify to an autopsy).

[5] *Colorado:* Comp. L. 1921, § 8927 (no physician may testify to insanity, in committal proceedings, unless he is reputable, a graduate of an incorporated medical college, etc., etc., in futile detail); *Louisiana:* Acts 1914, No. 56, p. 55, § 17 (no practitioner of medicine who has not obtained a certificate from the State Board of Medical Examiners shall "be allowed to testify as a medical or surgical expert in any court in this State"); 1907, State *v.* Howard, 120 La. 311, 45 So. 260 (statute applied to exclude a witness to bullet-wounds); *Wisconsin:* Wis. Stats. 1898, § 1436, as amended in Stats. 1919, § 1435 *i*, 1435 *j* (no person practising medicine etc. without a license or certificate shall testify "in a professional capacity" or "as an insanity expert", with exceptions for criminal cases and for extra-State licensees, etc.); 1874, Montgomery *v.* Scott, 34 Wis. 339, 343 (the plaintiff was taken to the house of H., after her injury, and the fracture reduced and dressed; held, that H. might testify whether the leg was broken, though he possessed no diploma; "the question whether a leg is broken is one of fact"); 1890, McDonald *v.* Ashland, 78 Wis. 25, 47 N. W. 434 (the diploma and the incorporation of the college may be proved orally by the witness himself, without producing the diploma or a copy of the charter); 1901, McCann *v.* Ullman, 109 Wis. 574, 85 N. W. 493 (under St. 1899, c. 82, providing that no person shall be "competent to testify as an expert witness" upon animal diseases unless registered as a veterinary surgeon, an unregistered person was excluded); 1902, Allen *v.* Voje, 114 Wis. 1, 89 N. W. 924 (whether the prohibition of the statute applies to those only who require a license for practice, or to all persons called as medical experts, for example a trained nurse, not decided); 1903, Lowe *v.* State, 118 Wis. 641 96 N. W. 417 (Rev. St. 1898, § 585, does not affect the testimonial qualifications of physicians); 1907, Hocking *v.* Windsor S. Co., 131 Wis. 532, 111 N. W. 685 (St. 1903, c. 426 held not applicable to a physician not testifying as an expert); 1912, State *v.* Law, 150 Wis. 313, 136 N. W. 803, 137 N. W. 457 (the statute does not apply to exclude testimony on topics of bacteriology etc. by unlicensed professors in a medical school).

§ 570. [1] 1893, Salazar *v.* Taylor, 18 Colo. 538, 544, 33 Pac. 369.

Whether the witness need even be able to read and write is perhaps doubtful; for many illiterate persons can distinguish signatures and hands without being able to decipher them in detail. Such a witness was rejected in Russell *v.* Brosseau, 65 Cal. 607 (1884). In Com. *v.* Borasky, 214 Mass. 313, 101 N. E. 377 (1913) an illiterate was allowed to identify checks by the picture on them.

subject of expert qualifications in handwriting come before the Courts that this subject is ordinarily thought of as exclusively one for experts. But a little reflection on every day's practice will demonstrate this error of thought. Where the witness is sufficiently qualified as to knowledge, *i.e.* where he has *seen the person* write or the like (*post*, § 693), no dispute is ever raised as to his experiential competency. Proper familiarity with the standard of comparison is all that is asked for, and no special skill in judging of writings is required. It is accepted law that the general experience of the ordinary person is sufficient, so far as experiential competency goes. Why, then, does the question of expert qualifications in handwriting ever arise? Because, when the specimens to be used are themselves before the jury, they may examine them to form an opinion as to the standard or type of writing, and hence the opinion of a person of ordinary experience only, based upon these specimens, being no better than that of the jury themselves, is not needed, and is excluded by the Opinion rule; and hence the only persons whose aid need be asked in studying these standards are those who have some special experience over and above that of the jury. Thus, under the Opinion rule, the question arises whether the person whose aid is offered is such a one as can contribute some skill not possessed by the jury. This is a different question from the present one of the Experiential Qualifications to be required of all witnesses; and is peculiar to the Opinion rule (*post*, § 2012).

The only questions that can here arise concern the skill required for something other than the identity of mere handwriting, for example, the kind or *paper* or *ink*, or the feasibility of an *alteration;* and here it may be proper to require special experience.[2]

(2) *Bank-notes and Paper Money.* Where the genuineness of a bank-note or other paper money involves not merely a signature's identity, but the texture, design, and general appearance of the document, as the basis of an opinion, may any person, having the proper familiarity with the class of notes in question, form and express an opinion as to its genuineness? This question has been little mooted since the issuing of bank-notes has come into the sole control of the Federal Government. An early line of decisions reached the sensible conclusion that a *merchant*, not being specially expert as to detecting counterfeits, could testify about the genuineness of a bank-note, provided he had the requisite familiarity with the class of notes in question.[3] Other Courts have since held that a *bank-officer* may testify to

Where, however, the handwriting is of a *special style*, special experience in reading it would be necessary; 1845, Crawford and Lindsay Peerage Cases, 2 H. L. C. 545 (where only a clerk who was familiar with mediæval Latin handwriting was permitted to testify by a copy to the tenor of an old document).

Compare the cases cited *post*, § 2012 (handwriting).

[2] 1897, Birmingham Nat'l Bank *v.* Bradley, 116 Ala. 142, 23 So. 53 (whether a check could be chemically altered without leaving traces; expert knowledge required); 1854, Otey *v.* Hoyt, 2 Jones L. N. C. 70 (the removal of inks from paper; witness excluded).

[3] *Ky.* 1841, Watson *v.* Cresap, 1 B. Monr. 196; 1918, Bates & Rogers C. Co. *v.* Fluharity's Guardian, 179 Ky. 668, 201 S. W. 10 (personal injury to the eye; an optician admitted); *N. Car.* 1805, U. S. *v.* Holtsclaw, 2 Hayw. 379, *semble;* 1824, State *v.* Candler, 3 Hawks 398, *semble;* 1844, State *v.* Harris,

the genuineness of notes,[4] or of coin,[5] or to the fact of an erasure in a note.[6] The principle of Knowledge (*post*, § 705) is here not always easy to distinguish in its application.

§ 571. **Miscellaneous Instances (Interpretation, Speed of a Train, Strength of a Structure, etc., etc., etc.).** (1) In answer to the first of the two usual questions (*ante*, § 559) under this principle, there are a variety of rulings on miscellaneous topics, holding that a lay witness suffices;[1] the topics that seem to have called for frequent decision being those of the *speed of a train or other vehicle*,[2] and the existence of a condition of *intoxication*.[3]

5 Ired. 291, *semble;* 1851, State *v.* Cheek, 13 Ired. 120 ("who habitually receive and pass the notes of a bank for a long course of time, so as to become thoroughly acquainted with them"); 1877, Yates *v.* Yates, 76 N. C. 149.

On this general subject should always be consulted: *Albert S. Osborn*, "The Problem of Proof" (1922).

[4] 1896, Keating *v.* People, 160 Ill. 480, 43 N. E. 724 (treasury notes, national bank bills, and greenbacks; a paying-teller admitted to speak to their genuineness); 1873, Atwood *v.* Cornwall, 28 Mich. 339.

For the admissibility of bank-officials as expert witnesses to *handwriting*, see *post*, § 2012.

[5] 1913, Cardwell *v.* Breckenridge, Ont., 11 D. L. R. 461 (St. 1909, 1 Geo. V, c. 41, now Rev. St. 1914, c. 165, §§ 3, 25, held not to exclude a surveyor other than an Ontario surveyor); 1860, May *v.* Dorsett, 30 Ga. 118.

[6] 1864, Dubois *v.* Baker, 30 N. Y. 361; 1905, Savage *v.* Bowen, 103 Va. 540, 49 S. E. 668 (bank-officers, and a court-clerk, admitted to testify to the sameness of ink and the relative age of writings).

On the above points, compare the cases cited *post*, § 2024.

§ 571. [1] *Federal:* 1922, Lewinsohn *v.* U. S., 7th C. C. A., 278 Fed. 421 (whisky); *Alabama:* 1863, Barnes *v.* Ingalls, 39 Ala. 200 (admitting members of a family, as able to speak of the likeness of a portrait, but not of its quality of execution); 1897, McDonald *v.* Wood, 118 Ala. 589, 22 So. 489, 24 So. 86 (the location of a survey-line, by the owner of the land); 1903, Rarden *v.* Cunningham, 136 Ala. 263, 34 So. 26 (whether a mule is blind; expert not needed); 1914, Cedar Creek S. Co. *v.* Stedham, 187 Ala. 622, 65 So. 984 (automobile); *Colorado:* 1921, Enyart *v.* People, 70 Colo. 362, 201 Pac. 564 (whisky; "such testimony is not expert testimony, any more than that of one who has tasted salt or sugar"); *Connecticut:* 1845, Porter *v.* Mfg. Co., 17 Conn. 255 (sufficiency of a dam); *Illinois:* 1856, Frink *v.* Potter, 17 Ill. 408 (safety of a road); *Maryland:* 1875, Clagett *v.* Easterday, 42 Md. 629 (existence of a mill-site); 1886, Baltimore & L. T. Co. *v.* Cassell, 66 Md. 430, 7 Atl. 805 (whether a road was safe); *Missouri:* 1888, McPherson *v.* R. Co., 97 Mo. 256, 10 S. W. 846 (draining capacity of culvert); 1896, State *v.* Punshon, 133 Mo. 44, 34 S. W. 25 (experiments with a pistol); *North Carolina:* 1880, State *v.* Reitz, 83 N. C. 635 (identity of foot-prints); 1881, State *v.* Morris, 84 N. C. 761 (same); *South Dakota:* 1894, Vermillion Co. *v.* Vermillion, 6 S. D. 466, 61 N. W. 802 (height of a stream of water observed to be thrown from a water-main); 1898, Ochsenreiter *v.* Elev. Co., 11 S. D. 91, 75 N. W. 822 (condition of crop; layman in grain-growing country, competent).

[2] *Federal:* 1906, Porter *v.* Buckley, 147 Fed. 140, C. C. A. (speed of an automobile); 1919, Denver Omnibus & C. Co. *v.* Krebs, 8th C. C. A., 255 Fed. 543 (taxicab); *Alabama:* 1896, Highland Ave. & B. R. Co. *v.* Sampson, 112 Ala. 425, 20 So. 566; 1901, Louisville & N. R. Co. *v.* Stewart, 128 Ala. 313, 29 So. 562; 1917, Galloway *v.* Perkins, 198 Ala. 658, 73 So. 956 (automobile); 1921, Payne *v.* Roy, 206 Ala. 432, 90 So. 605; 1921, Taylor *v.* Lewis, 206 Ala. 438, 89 So. 581 (automobile); *Arkansas:* 1896, St. Louis & S. F. R. Co. *v.* Brown, 62 Ark. 254, 35 S. W. 225 (how far a train had gone when it stopped); *California:* 1895, Howland *v.* R. Co., 110 Cal. 513, 42 Pac. 983 (whether a car could have been stopped); 1900, Johnsen *v.* Oakland S. L. & H. E. R. Co., 127 Cal. 608, 60 Pac. 170 (regular passengers allowed to testify to speed of cars); *Colorado:* 1906, Colorado & S. R. Co. *v.* Webb, 36 Colo. 224, 85 Pac. 683; *Columbia* (Dist.): 1903, Metropolitan R. Co. *v.* Blick, 92 D. C. App. 194, 213; *Illinois:* 1884, Louisville N. A. & C. R. Co. *v.* Shires, 108 Ill. 628 (undecided); *Iowa:* 1904, Cronk *v.* Wabash R. Co., 123 Ia. 349, 98 N. W. 884; 1904, Gregory *v.* Wabash R. Co., 126 Ia. 230, 101 N. W. 761; 1906, Line *v.* Grand Rapids & I. R. Co., — Ia. —, 106 N. W. 719; 1911, Sayne *v.* Waterloo C. F. & N. R. Co., 153 Ia. 445, 133 N. W. 781; *Kansas:* 1905, Atchison, T. & S. F. R. Co. *v.* Holloway, 71 Kan. 1, 80 Pac. 31; 1909, Johnson *v.* Chicago R. I. & P. R. Co., 80 Kan. 456, 103 Pac. 90; *Maryland:* 1920, Waltring *v.* James, 136 Md. 406, 111 Atl. 125 (rate of speed of an automobile); *Massachusetts:* 1916, Johnston *v.* Bay State St. R. Co., 222 Mass. 583, 111 N. E. 391 (speed of a street-car); *Michigan:* 1868, Detroit & M. R. Co. *v.*

(2) In answer to the second of the two usual questions (*ante*, § 560), there are a variety of rulings determining the qualifications of an individual witness on a particular topic. That of most frequent occurrence is the *interpretation* of a foreigner's or mute's mode of speech.[4] None of the remaining miscellaneous rulings have any real value as precedents.[5] They were a

Van Steinburg, 17 Mich. 99 (but not the speed, in slowing up, necessary to bring to a stop at a given point); 1887, Guggenheim *v.* R. Co., 66 Mich. 154, 33 N. W. 161 ("any intelligent man who had been accustomed to observe moving objects"); 1899, Mott *v.* R. Co., 120 Mich. 127, 79 N. W. 3; 1906, Garran *v.* Michigan C. R. Co., 144 Mich. 26, 107 N. W. 284; *Minnesota:* 1916, Beecroft *v.* Great Northern R. Co., 134 Minn. 86, 158 N. W. 800 (train); *Missouri:* 1906, Stotler *v.* Chicago & A. R. Co., 200 Mo. 107, 98 S. W. 509 (reviewing the cases); *Nebraska:* 1903, Omaha St. R. Co. *v.* Larson, 70 Nebr. 591, 97 N. W. 824; 1920, Schmidbauer *v.* Omaha & C. B. St. R. Co., 104 Nebr. 250, 177 N. W. 336 (trial Court's discretion); *Nevada:* 1910, Sherman *v.* Southern Pacific Co., 33 Nev. 385, 111 Pac. 416; *New Hampshire:* 1881, Nutter *v.* Railroad, 60 N. H. 485; *Oregon:* 1918, Weggandt *v.* Bartle, 88 Or. 310, 171 Pac. 587; *Pennsylvania:* 1911, Dugan *v.* Arthurs, 230 Pa. 299, 79 Atl. 626; *South Dakota:* 1905, Borneman *v.* Chicago St. P. M. & O. R. Co., 19 S. D. 459, 104 N. W. 208 ("any person may become proficient"); *Utah:* 1895, Chipman *v.* R. Co., 12 Utah 68, 41 Pac. 562; *Wisconsin:* 1884, Hoppe *v.* R. Co., 61 Wis. 369, 21 N. W. 227; *West Virginia:* 1899, McVey *v.* R. Co., 46 W. Va. 111, 32 S. E. 1012; 1919, Alford *v.* Kanawha & W. V. R. Co., 84 W. Va. 570, 100 S. E. 402 (witness who had only once seen a passenger train stopped, excluded).

[3] 1887, People *v.* Monteith, 73 Cal. 8; 14 Pac. 373; 1876, Dimick *v.* Downs, 82 Ill. 572; 1887, Gallagher *v.* People, 120 Ill. 182, 11 N. E. 335; 1870, State *v.* Pike, 49 N. H. 407; 1868, Castner *v.* Sliker, 33 N. J. L. 97.

[4] 1900, Central of G. R. Co. *v.* Joseph, 125 Ala. 313, 28 So. 35 (interpreter speaking both languages, but not reading English writing, held competent); 1870, People *v.* Gelabert, 39 Cal. 664 (interpreter must understand the languages); 1874, People *v.* Ah Wee, 48 Cal. 238 (same); 1886, Skaggs *v.* State, 108 Ind. 56, 8 N. E. 695 (fair knowledge suffices); Ky. Stats. 1915, § 1020 (official interpreter must "speak fluently the English and German languages"); 1897, People *v.* Constantino, 153 N. Y. 24, 47 N. E. 37 (interpreter held competent); Pa. St. 1869, Feb. 18, § 3, Dig. 1920, § 12503 (official interpreter for Philadelphia; no person shall be used as interpreter or translator without a certificate of fitness given by the official interpreter); 1893, State *v.* Weldon, 39 S. C. 318, 17 S. E. 688 (any person able to communicate by signs with a mute is competent); 1867, Kuhlman *v.* Medlinka, 29 Tex. 392 (interpreter must understand both languages).

For the question when an interpreter *may* or *must* be called, and what other qualifications he must possess, see *post*, § 811. For the question whether an interpreter must be *sworn* and *cross-examined*, see *post*, §§ 1810, 1824.

[5] CANADA: 1887, Cain *v.* Uhlman, 20 N. Sc. 151 (one who was a mill-builder, and was used to taking levels but did not understand how to do so with a theodolite, was allowed to testify).

UNITED STATES: *Federal:* 1881, Pope *v.* Filley, 3 Fed. 69 (meaning of trade terms); 1894, Missouri Pac. R. Co. *v.* Hall, 14 C. C. A. 153, 66 Fed. 868 (shrinkage of cattle); 1903, U. S. *v.* Hung Chang, 126 Fed. 400, — D. C. — (whether a person was of Chinese race); *Alabama:* 1863, Barnes *v.* Ingalls, 39 Ala. 198 (the execution of photographic paintings); 1877, Campbell *v.* Gilbert, 57 Ala. 568 (qualities and use of a guano); 1877, Mobile & M. R. Co. *v.* Blakely, 59 Ala. 473, 481 (condition of a train, as to means of stopping it); 1878, Nelson *v.* Wood, 62 Ala. 175 (tanning); 1900, Louisville & N. R. Co. *v.* Sandlin, 126 Ala. 585, 28 So. 40 (track construction); 1900, Birmingham N. Bank *v.* Bradley, — Ala. —, 30 So. 546 (effects of Eureka acid on paper); *Arkansas:* 1906, Halliday M. Co. *v.* Louisiana & N. W. R. Co., 80 Ark. 536, 98 S. W. 374 (railroad rates); *California:* 1866, Blood *v.* Light, 31 Cal. 115 (dam); *Colorado:* 1897, Denver T. & F. W. R. Co. *v.* Smock, 23 Colo. 456, 48 Pac. 681 (condition of a freight-car); *Connecticut:* 1897, State *v.* Main, 69 Conn. 123, 37 Atl. 80 (destruction of trees affected by a contagious disease; the capacity of a deputy charged with the duty of investigating, assumed, *semble*, as indicated by his office); *Illinois:* 1897, Webster Mfg. Co. *v.* Mulvanny, 168 Ill. 311, 48 N. E. 168 (cause of an explosion); 1898, St. Louis & S. W. R. Co. *v.* Elgin C. M. Co., 175 Ill. 557, 51 N. E. 911 (transportation of condensed milk); 1916, Supolski *v.* Ferguson & L. Foundry Co., 272 Ill. 82, 111 N. E. 544 (practicability of fencing a drop for breaking scrap iron); *Indiana:* 1837, House *v.* Fort, 4 Blackf. 295 (defects of a horse); 1877, Hinds *v.* Harbon, 58 Ind. 123 (sewers); 1880, Indianapolis *v.* Scott, 72 Ind. 203 (soundness of timber); 1886, Fort Wayne *v.* Coombs, 107 Ind. 86, 7 N. E. 743 (sewers); 1887, Terre Haute *v.* Hudnut, 112 Ind. 549, 13 N. E. 686 (injury to a building); *Iowa:* 1874, Kilbourne *v.* Jennings, 38 Ia. 537 (construction of a house); 1875, Shulte *v.* Hennessey, 40 Ia. 356 (measure-

waste of time for the Supreme Courts, and should have been disposed of under the doctrine of the trial Court's discretion (*ante*, § 561). The application of the Opinion rule (*post*, §§ 1949–1978) should be compared, upon all these topics.

ment of masonry); 1878, Sheldon *v.* Booth, 50 Ia. 210 (machinery); 1895, Kerns *v.* R. Co., 94 Ia. 121, 62 N. W. 692 (mode of coupling cars); 1899, Stomme *v.* Hanford P. Co., 108 Ia. 137, 78 N. W. 841 (fitness of elevator cable); *Kansas:* 1882, Sexton *v.* Lamb, 27 Kan. 429 (ice-handling); 1884, Sandwich Mfg. Co. *v.* Nicholson, 32 Kan. 666, 5 Pac. 164 (machinery); 1885, Missouri Pac. R. Co. *v.* Mackey, 33 Kan. 303, 6 Pac. 291 (duties of a fireman); 1898, Missouri P. R. Co. *v.* Johnson, 59 Kan. 776, 53 Pac. 129 (manner of inspecting car-timbers); *Kentucky:* 1897, U. S. Mail Line Co. *v.* Mfg. Co., 101 Ky. 658, 42 S. W. 342 (manner of breaking of glass); 1898, Williams *v.* R. Co., 103 Ky. 298, 45 S. W. 71 (locomotive's effect in starting train); *Maine:* 1856, Hammond *v.* Woodman, 41 Me. 207 (milling); 1904, Conley *v.* Portland G. L. Co., 58 Me. 61, 58 Atl. 61 (water-gas); *Maryland:* 1856, Baltimore & O. R. Co. *v.* Thompson, 10 Md. 85 (disturbance of cattle by railroads, and the effects on their health); 1886, Baltimore Elev. Co. *v.* Neal, 65 Md. 451, 5 Atl. 338 (handling a tug); 1909, Harris *v.* Consolidation Coal Co., 111 Md. 209, 73 Atl. 805 (defect in mine-pipes); *Massachusetts:* 1847, Vandine *v.* Burpee, 13 Met. 288 (gardens); 1853, Carpenter *v.* Wait, 11 Cush. 257 (cattle-weight); 1870, Moulton *v.* McOwen, 103 Mass. 597 (damage to a building); 1895, Davis *v.* Mills, 163 Mass. 481, 40 N. E. 852 (qualities of flour); 1899, Childs *v.* O'Leary, 174 Mass. 111, 54 N. E. 490 (blasting); *Michigan:* 1866, Sisson *v.* R. Co., 14 Mich. 497 (machinery); 1896, Woods *v.* R. Co., 108 Mich. 396, 66 N. W. 328 (machinery); *Minnesota:* 1871, Clague *v.* Hodgson, 16 Minn. 339 (age of sheep, judged by the teeth); 1884, Kolsti *v.* R. Co., 32 Minn. 134, 19 N. W. 655 (turn-tables); 1885, Davidson *v.* R. Co., 34 Minn. 54, 24 N. W. 324 (sparks from locomotives); 1890, Armstrong *v.* R. Co., 45 Minn. 87, 47 N. W. 459 (care of horses); 1875, Blomquist *v.* R. Co., 60 Minn. 426, 62 N. W. 818 (construction of a derrick); 1899, Aultman Co. *v.* Mosloski, 77 Minn. 27, 79 N. W. 593 (defects in a threshing-machine); *Missouri:* 1896, Helfenstein *v.* Medart, 136 Mo. 595, 36 S. W. 863 (strength and safety-speed of grindstones); 1919, State *v.* Oertel, 280 Mo. 129, 217 S. W. 64 (felonious possession of burglar's tools; policemen held qualified to testify to burglars' style of tools); *Montana:* 1897, Holland *v.* Huston, 20 Mont. 84, 49 Pac. 390 (horse); *Nebraska:* 1884, Sioux City & P. R. Co. *v.* Finlayson, 16 Nebr. 587, 20 N. W. 860 (engine-boilers); 1887, Connelly *v.* Edgerton, 22 Nebr. 87, 34 N. W. 76 (saloon-fixtures); *New Hampshire:* 1845, Woods *v.* Allen, 18 N. H. 31 (ice-block at a mill); 1846, Wallace *v.* Goodall, 18 N. H. 452 (age of marks on trees); 1859, Page *v.* Parker, 40 N. H. 59 (soapstone-quarry); 1860, Blodgett Paper Co. *v.* Farmer, 41 N. H. 404 (machinery); *New York:* 1854, Bearss *v.* Copley, 10 N. Y. 95 (one whose occupation had changed from a tanner to a lawyer, admitted to speak about tanning); 1874, Hoyt *v.* R. Co., 57 N. Y. 678 (cause of railroad accident); 1881, Ward *v.* Kilpatrick, 85 N. Y. 415 (workmanship of furniture); 1886, People *v.* Buddensieck, 103 N. Y. 500, 9 N. E. 44 (photographs); *North Carolina:* 1849, Sikes *v.* Paine, 10 Ired. 280 (ship-repairs); 1859, State *v.* Jacobs, 6 Jones L. 286 (negro descent); *Oregon:* 1902, Duntley *v.* Inman, 42 Or. 334, 70 Pac. 529 (cause of a pulley's breakage); 1900, Farmers' & T. N. Bank *v.* Woodell, 38 Or. 294, 61 Pac. 837 (cultivation of beets); *Pennsylvania:* 1845, Pittsburgh *v.* O'Neill, 1 Pa. St. 342 (mode of summary reckoning in bricklaying); 1849, Detweiler *v.* Groff, 10 Pa. 376 (working a mill with a certain height of water); 1869, Ardesco Oil Co. *v.* Gilson, 63 Pa. 151 (strength of iron); 1889, Shaw *v.* Boom Co., 125 Pa. 327, 17 Atl. 426 (cause of ice-jam); 1895, Fraim *v.* Ins. Co., 170 Pa. 151, 32 Atl. 613 (effect of gasoline in cleansing in silver-plating); 1899, Haley *v.* Flaccus, 193 Pa. 521, 44 Atl. 566 (novelty in a glass-press patent); *Rhode Island:* 1858, Buffum *v.* Harris, 5 R. I. 250 (sufficiency of a drain); 1859, Evans *v.* Ins. Co., 6 R. I. 54 (meaning of trade terms); *Vermont:* 1874, James *v.* Hodsden, 47 Vt. 136 (knitting-machines); 1897, Conway *v.* Fitzgerald, 70 Vt. 103, 39 Atl. 634 (capacity of cars for carrying logs); *Wisconsin:* 1899, Baxter *v.* R. Co., 104 Wis. 307, 80 N. W. 644 (tendency of iron to crystallize).

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

TOPIC III: EMOTIONAL CAPACITY

SUB-TOPIC A: INTEREST AS A TESTIMONIAL DISQUALIFICATION

CHAPTER XXIII.

§ 575. **History of the Rules.** The disqualification of parties and interested persons as witnesses on their own behalf is now practically obsolete throughout our law, except for a single situation. That the history of its origin is obscure and not precisely ascertained is therefore not a matter of such serious consequence to our understanding of the law of to-day. Nevertheless, its origin is so connected with other important traits in the history of the law of evidence that a survey is desirable of so much as is known or can be conjectured.

The main elements in the development are, first, that this disqualification does not appear for any of the ancient kinds of witnesses under the older modes of trial; secondly, that it did not exist for the modern witness, when that type of person began to be important (in the 1500s); and thirdly, that the disqualification does plainly appear, in the stage of incipiency, in the early 1600s; the problem being, therefore, to account for its introduction during the 1500s. In tracing these stages, we may distinguish, for convenience, the progress of the rule in civil trials at common law, in chancery practice, and in criminal trials.

1. *Civil Trials at Common Law.* (1) For the first period, it is to be remembered that under the older modes of trial, forerunning trial by jury and surviving for a time alongside of it, the persons who could be thought of as perhaps liable to disqualification after the manner of modern witnesses were of three chief classes, namely, the complaint-witnesses or ' secta ', the compur-

gators or oath-helpers, who swore in aid of the party's oath or wager of law, and the transaction-witnesses and deed-witnesses, whose oath in certain classes of cases formed a mode of decision. Now for none of these classes does any disqualification appear by reason of partisan interest, dependency, or relationship. On the contrary, these persons were originally and usually taken from none other than the very clansmen, dependents, and other partisans of the plaintiff or defendant. For the 'secta', it is clear that "they might be relatives or dependents of the party for whom they appeared."[1] For the oath-helpers, it is equally clear that they not only might be, but originally (in some tribes) must be, of the party's clansmen.[2] For the transaction-witnesses and deed-witnesses it can hardly be less doubted that partisanship, in any of its forms, was not recognized as a disqualification;[3] in fact, we are told by the judges of the time, more broadly still, that "witnesses cannot be challenged."[4] When jury trial develops and enlarges in scope, and comes down into the 1400s as the dominant mode of trial, this last sort of "witnesses" — those who were sworn to attest the transactions done or deeds executed in their presence — come to play a frequent part in jury-trial itself;[5] that is, their oath ceases (to that extent) to form a distinct sort of trial. Thus the spectacle is presented of a body of jurors, with whom (yet more or less discriminated) are acting this special class of witnesses. As yet there are no other witnesses (in the modern sense) in jury trials. Thus the most important thing to note, in this stage, is that the only class (substantially) of persons, whose required qualities could have served as a type for the modern witness when he came in, were plainly understood to be not challengeable on any ground of partisanship, and perhaps not at all.

(2) The modern witness — *i.e.* any person who happens to know something about the facts in dispute and is summoned to inform the jury, and not

§ 575. [1] Thayer, Preliminary Treatise on Evidence, 12.

[2] Brunner, Deutsche Rechtsgeschichte, II, 379; Thayer, *ubi supra*, 25; Pollock and Maitland, History of English Law, II, 598. It is true that, by the custom of London, a non-partisan character came later to be required of these oath-helpers, in trial by wager of law; "they were not to be chosen by the accused himself, nor to be his kinsmen or bound to him by the tie of marriage or any other": Thayer, *ubi supra*, 27; Pollock and Maitland, *ubi supra*, II, 633. This possibly came about through the pressure of competition of jury-trial and was added to make the wager of law seem a little less one-sided in favor of defendants. It may also later have contributed a suggestion to the modern doctrine, as noted later.

[3] It is not mentioned in Brunner's list, *ubi supra*, II, 396, so also not in Thayer, *ubi supra*, 17–24. Professor Glasson has pointed out (Histoire du droit et des institutions de la France, VI, 547, 1895) that under the earlier feudal system of proof the opponent's right to dispute a witness by judicial combat served as a guaranty against false witnesses, and that only when judicial combat was abolished in 1260, and as a part of the reform of the proof-system, "the challenging of witnesses was replaced by the theory of disqualifications borrowed from the canon law."

[4] Thayer, *ubi supra*, 100, 103; 1339, Anon., 12 Lib. Ass. pl. 11, 12 (one of the witnesses to a deed was challenged because he was named as disseisor in the brief; but the challenge was not allowed, and "the court said that it had never seen witnesses challenged"); 1349, Anon., Lib. Ass. 110, cited in Thayer's Cases on Evidence, 2d ed., 306 (to prove a release, the witnesses named in it were joined to the jury; "one of the witnesses was challenged as being a relative of the plaintiff; but the challenge was not allowed, for witnesses are not challengeable, because the verdict will not be received from them, but from the jury").

[5] Thayer, Preliminary Treatise, 97–104.

as one of the jury — begins to be frequent in the middle of the 1400s; but not until another century does he furnish a substantial or major part of the information on which the jury act ;[6] up to this time the jury's own knowledge and extra-judicial inquiries have taken the place of our modern witness. Now as to this new sort of witness also, it is plain that during the 1400s there was as yet no disqualification on the ground of partisanship,[7] and that, on the contrary, the non-partisan witness was a rare figure and was, in the conception of the time, an unnatural one. This appears most plainly in the discouragements to which such a non-partisan person was subjected by the law of maintenance.[8] That law made it a matter of much risk for a truly indifferent person to give testimony to the jury; for unless he had been requested by the Court or jury (a request by the party only was of doubtful effect), he was liable to a charge of maintenance:

Professor *James Bradley Thayer*, Preliminary Treatise on Evidence, 126: "A writ of maintenance was brought [in 1433] in the King's Bench against one B, charging that in an assize of rent between the plaintiff and C the defendant had 'maintained' C. B answered that long before C had anything in the said rent he himself owned it; and he had granted it to C. When the said assize was brought against C, the latter came to B, the present defendant, and asked him to come to the assizes with him and bring his evidences relating to the rent; and accordingly B came with these and delivered to C certain ancient evidences to plead in bar against the plaintiff in his discharge of his warranty of the rent; this was all the maintenance. In discussing whether this really constituted maintenance, and if so whether it was justifiable, it was insisted that the defendant should not have come voluntarily, but only by way of voucher to warranty. . . . HALS, J., said: 'In a tort of maintenance, it is a good plea to say that he who is charged came and prayed us, since we were an old man of the region and had knowledge of the title of the land of which he was impleaded, that we would be with him to inform the jury about the title; and so we did, etc. So here it is good.' CHEYNE, C. J.: 'It will be adjudged a maintenance in your cases, because he has no cause or privity for maintaining the controversy more than the merest stranger in the world, unless the other had cause of warranty against him. . . . And as to what you say of its being a good plea in maintenance that he is an old man of the region and having better knowledge of the right and title of this rent, and his coming with the defendant to declare his right in the said rent, etc., I say that this is a real maintenance; for on such a ground everybody could justify a maintenance, and that would be against reason. But if he had shown a ground of maintenance on which the law presumes him bound to be with the party, then this would not be adjudged a maintenance, — as, if he were with his relation, or came with one because he was his servant or his tenant; he is bound to be with his servant or tenant; but it is not so in other cases.'"[9]

The underlying conception of the law, then, at this time of the 1400s, was something as follows: "Here are the jurors, indifferent persons, who know

[6] Thayer, *ubi supra*, 120–134.

[7] Fortescue, De Laudibus Legum Angliæ, c. 26 (writing about 1470), makes no note of any limitations; parties may produce "all such witnesses as they please or can get to appear on their behalf."

[8] Thayer, Preliminary Treatise, 122–134.

[9] This is from Y. B. 11 H. VI, 43, 36. Add the following, which carries the idea down a century later: 1535, Y. B. 27 H. VIII, f. 2, pl. 6 (a seneschal of a manor, who showed the jury certain leet-court records, held exonerated of conspiracy, *i.e.* maintenance, because the judges ordered the showing; Englefield, J.: "If a man be present in court, and the justices command him, because he has good knowledge of the jury, to give evidence to the jury, by reason of which he does give evidence to the jury, he is not punishable for conspiracy": Bromley, of counsel opposing, argued that it was otherwise if he were not sworn; Englefield, J.: "It is all one").

already more or less about this case; their oaths are to determine the issue; they are the selected ones for the purpose; no other man's oath is wanted; unless the jurors think that they need it, or the Court calls for it, any other man's oath is merely a meddlesome intrusion upon the carefully selected body of triers. To be sure, the party or his attorney may argue and labor with the jury and produce documents, and so also may his privies in title, vouchers and the like, or his dependents, stewards, tenants, and such other persons as share his interest in the issue. But beyond this no other person has any call to interfere." In short, so far as ordinary witnesses were coming to be used, they were presumably interested partisans. So far from interest being a disqualification, it was rather the disinterested persons who were likely to be treated as improper witnesses. Such is the state of the law as we emerge into the 1500s, with the modern witness becoming a more and more important functionary of jury trial.

(3) Passing over for the moment the dubitable time of the 1500s, and coming to Coke's time, the early 1600s, we find that, in some way or other, ideas have plainly changed in the interval. Interest is now unquestionably recognized as a disqualification. The modern witness is now the chief source of information to the jury;[10] there is a sharp discrimination between witness and jury; the deed-witness, who was formerly nearer to being a juror, is now almost assimilated to the ordinary witness; and for both sorts, without apparent distinction, rules of disqualification are now beginning to be laid down:

1627, Sir EDWARD COKE, Commentary upon Littleton, 6 *a*: "[As to witnesses to a deed] sometimes, though rarely [objections were allowed], which being found true, they were not to be sworne at all, neither to be joined to the jury nor as witnesses; as, if the witness were infamous, . . . or if the witnesse be an infidell, or of non-sane memory, or not of discretion, or a partie interested, or the like. But oftentimes a man may be challenged to be of a jury that cannot be challenged to be a witnesse; and therefore, though the witnesse be of the neerest alliance, or kindred, or of counsell, or tenant, or servant to either partie, or any other exception that maketh him not infamous or to want understanding or discretion or partie in interest, though it be proved true, shall not exclude the witnesse to be sworne, but he shall be sworne and his credit upon the exceptions taken against him left to those of the jury, who are tryers of the fact. . . . And the Courts in some books have said that they have not seene witnesses challenged, which is regularly to be understood with the limitations abovesaid."

Thereafter, from the middle of the 1600s, the rules about interest appear firmly established and begin to develop in fulness. What was the process of thought by which this doctrine was introduced? How comes it to be absent, and even repugnant, in 1500, and yet present and favored in 1650? Such is the problem.

For one thing, the explanation seems not to lie in any process of adaptation or imitation of the rules for jurors. Those persons were, in fundamental principle, indifferent between the parties; while witnesses proper were origi-

[10] Coke, 3 Inst. 26: "Most commonly juries are led by deposition of witnesses."

nally (as above noted) conceived of as naturally partisans. The juror's disqualification had existed from the beginning, and yet for at least one hundred years (in the 1400s) the two classes had gone side by side without any borrowing; so that it is hardly natural that a direct borrowing should take place in such tardy fashion. It is true that after jurors had come to depend for information chiefly on the witnesses in court (say, by 1600), it would be desirable to seek for unprejudiced persons as witnesses; and this later change in the jury's nature must have helped towards the new rule.[11] But that rule could hardly have obtained its beginning in that mode. Moreover, the traditional rules of qualification for jurors were numerous, and it is not easy to suppose that this particular one was picked out for imitation, while others equally appropriate were omitted.[12] For another thing, the explanation seems not to be that the rules of the ecclesiastical law were adopted or imitated. It is true that this particular disqualification is found long established, by adoption from the Roman law,[13] in the ecclesiastical rules as practised in England.[14] It is true also that the epoch in question was one in which great advances towards domination were being made by the ecclesiastical courts and their system, and that in other respects its rules were sought to be introduced into the common law.[15] Nevertheless, the same objections here occur that have been noted for the jurors' rules. Moreover, the sharp conflict between the two jurisdictions, reaching its height in Coke's time, would tend strongly against any such conscious adoption. Finally, there appear in the precedents no allusions to an express borrowing.

[11] The juror's disqualification by infamy was, for example, appealed to in this way by Coke as sanctioning such a rule for witnesses; *ante*, § 519.

[12] Britton, f. 134 (convicts of perjury cannot be jurors; nor "those who have suffered judgment of life and limb or punishment of pillory or tumbrell, nor those who want discretion, nor excommunicated persons, nor lepers removed from society, nor priests or clerks within holy orders, nor women, nor such as dwell away from the neighborhood, nor those who are above 70 years of age, nor allies in blood, nor such as claim any right in the tenement, nor villains, nor persons indicted or appealed of felony, nor those of the household of any of the parties, nor those who are liable to be distrained by either of the parties, nor their lords or counsellors or accountants"); Fortescue, De Laudibus, c. 25 (juror may be challenged "by alleging that the person so impanelled is of kin, either by blood or affinity, to the other party, or in some such particular interest as he can not be deemed an indifferent person to pass between the parties"). The disqualification by affinity or by household dependency never obtained for witnesses (*post*, § 600); if there was any direct imitation, this would almost certainly have been included.

[13] Digest XXII, 5; Codex IV, 20; Heineccius, Elementa Pandectarum, p. IV, c. 140 ("Quum vero censeatur testis idoneus esse in causa ubi interest ejus alterutruun vincere, consequens est ut nemo admittendus est in causa vel propria vel socii. Ut merito repellantur pater in causa filii, filius in causa patris, aliique potestati vel imperio alterius subjective vel domestici; ut patrones, tutores, curatores in causa clientis, pupilli, minorisve sui testimonium dicere non possunt; ut suspecti etiam sint amici et inimici, nec non qui jam ante in eum reum dixerunt testimonium").

[14] Corp. Jur. Eccl., Decret. P. II, Causa III, Qu. V, Causa IV, Qu. II, c. III, § 36 (servants and relations); Decret. Pars II, Causa III, Qu. V ("testes de domo accusatorum producendi non sint", including "consanguinei vel familiares"); Decretal. II, 20, *de testibus*, c. 24; 1726, Ayliffe, Parergon, tit. "Witnesses"; 1738, Oughton, Ordo Judiciorum, c. 99 (the list includes "amici intimi partis producentis, ac inimici capitales partis contra quem producuntur, affectionati, partiales, ac minus indifferentes; infames, criminosi, pauperes, egeni; ac consanguinei, et affines, ac famuli domestici, et de roba ac stipendio partis producentis").

[15] *Post*, § 2032.

What, then, is there to fall back upon as the explanation of the change? Here must be distinguished the two branches of the disqualification, namely, of parties and of other interested persons. The two are no doubt united in principle, in the later law; but they seem to have come into being at different epochs.

(*a*) The exclusion of interested persons not parties does not appear to have begun until after the time of Coke's commentary upon Littleton. This was written by 1627, but was not printed until 1642. From the time of his utterance (above-quoted) there are cases enough, in the reigns of Charles II and James II (1649–1688); but before that time, the Abridgments appear to note none.[16] Coke himself concedes that "the Courts in some books have said that they have not seen witnesses challenged." Moreover, as recently as 1613, a deed-witness, palpably interested in the issue, had been deliberately held competent;[17] and as recently as 1606 a statute had apparently been regarded as indispensable to prescribe non-partisanship for witnesses in trials on the Scotch border.[18] The reports of the State trials do not note a disqualification on this ground before 1640.[19] In civil cases, the only precedents of disqualification before Coke's time, if we rely on the industry of the abridgment-makers, are confined to the parties themselves.[20] Thus everything tends to indicate that the disqualification of interested persons not parties did not appear until the time when Coke wrote; and even then it had not been fully established.

(*b*) On the other hand, the disqualification of parties themselves seems clearly to have come in long before, that is, at least by the time of Elizabeth, as early as 1582, and to have been at that time a thing well understood and accepted.[21] The succeeding rulings between that time and 1650

[16] The only case before 1642 appears to be the following: 1630, Mericke *v.* King, Hetley 137 ("In evidence to the jury, he who had purchased the land in question (it was said by the Court) he shall not be a witness if he claim under the same title"); this is perhaps equivalent to the case of a party. The hitherto existing freedom is shown in the following case: 1535, Y. B. 27 H. VIII, f. 20, pl. 10 (replevin; defendant made conusance as bailiff of Lord Cobham for rent in arrear, and alleged a rent due to the lord; Lord Cobham then "passed out, and gave evidence" as to his seisin of the rent; and no objection to his competency was raised; yet he was an interested person).

[17] 1613, Anon., 1 Bulstr. 202 (witness to a deed of feoffment by livery of seisin, excepted to because afterwards he received an estate at will in the land, "and so by his oath was to make his own estate good"; exception "disallowed by the whole Court, and that he might well be sworn as a lawful witness to prove the executing of a feoffment by livery and seisin, this being in affirmance of the feoffment").

[18] St. 4 James I, c. 1, § 16 (the juries in trials of Englishmen for offences committed in Scotland are authorized "to receive and admit only such good and sufficient lawful witnesses upon their oaths, either for or against the party arraigned, as shall not appear to them or the greater part of them to be unfit and unworthy to be witnesses in that case, either in regard of their hatred or malice, or their favor and affection, either to the party prosecuting or the party arraigned, or of their former evil life and conversation"). On the other hand, seventy years before, in 1535, Parliament had recited, as one of the causes for transferring jurisdiction of piracy from the Admiralty to the common-law courts, the unsatisfactory mode of trial by the civil law in the former court, which required the offence to be either confessed or "directly proved by witnesses indifferent, such as saw their offences committed, which cannot be gotten but by chance at few times." It would seem that a change, or the beginning of it, was marked by the later statute.

[19] *Infra*, note 38.

[20] *Infra*, note 22.

[21] 1582, Dymoke's Case, Savile 34, pl. 81 (joint defendants joined "by covin to take away their testimony"; if this appears on the evidence, "the justices may and must receive their testimony").

seem all to have been instances of the parties themselves being offered as witnesses.[22]

The result, then, on these data, is that the disqualification of parties is recognized at least as early as Elizabeth's time, while that of interested persons at large does not appear till near 1650. From these facts and from Coke's own language (in the passage above quoted), it may be inferred that the latter form of the disqualification came as a development and an expansion of the former. There is little difficulty in accepting this origin of the latter form as the natural and sufficient one. The changed nature of the jury's function, and the contemporary examples, already set, of disqualification by infamy (*ante*, § 519) and by marital relationship (*post*, § 600) might have served to aid the result, but the principle of parties' disqualification would have been the direct root of the disqualification by interest in general. In final corroboration of this, it may be suggested that the imitation of any other of the existing bodies of rules against partisanship — namely, those for jurors and those for ecclesiastical witnesses — would necessarily have included the prohibition of family members as witnesses; whereas the common law from the outset repudiated such a doctrine. Now it would be consistent with the gradual development of the party's disqualification to extend it to persons interested in the issue, *i.e.* quasi-parties, but to fail to extend it to family relationship, which otherwise would have stood upon the same general principle and had been always so treated in other systems. In short, the development indicated by the course of the precedents is precisely that which 'a priori' would have been most natural.[23] Only upon that hypothesis can we plausibly account for the singularity of English law in ad-

[22] 1611 (?), Smith's Case, 12 Co. 69 (resolved, by Coke, C. J., that "the parties to the supposed usurious contract shall not be admitted witnesses, for this, that upon the matter they were 'testes in propria causa', and by their oath shall avoid their bond, etc."); 1617, Howard *v.* Bell, Hob. 91 (persons claiming tenant-right against the lord of the manor, allowed to join in defence, "by my lord Coke and myself", in the Star Chamber, "and the reason was that since the title was one against all, it was in effect but one's defence, . . . and therefore the courts of justice do every day deny them to be witnesses one for another in such general cases; . . . now as they are acknowledged parties to their prejudice in defence, so it is in reason that they be in like manner allowed for their advantage"; but the Lord Chancellor differed, *i.e.* from the conclusion); 1624, Anon., Godb. 326 (one of joint defendants against whom plaintiff discontinued, admitted); 1636, Creswick's Case, Clayt. pl. 64 (joint defendant, against whom no proof was made, admitted).

The Star Chamber followed rules of a hybrid sort, chiefly ecclesiastical in procedure; but where their rule is not from the latter law, it may be supposed to represent the common law; on the qualification of witnesses in the present respect they clearly had not adopted the church-law (they admitted a son for a father, for example); so that we may assume their rule to represent the contemporary one of the common law; it plainly excluded parties: *infra*, note 23.

[23] The following passages show how the rule would amplify: 1612, Dr. Manning's Case, 2 Brownl. 151 (Star-Chamber; bill for extortion; "if a man which is not party grieved exhibits bill for offence made to another person as against whom the offence was committed, he [the latter] shall not be allowed as witness, insomuch as he is party grieved, and by that he should be a witness in his own cause"); *ante* 1635, Hudson, Treatise of the Star Chamber, pt. III, § 21, in Hargr. Collect. Jurid. 205, 203 ("First of all, it is clear that a party can be no witness; . . . but the Court hath lately taken an honorable order to allow the answer and examining of any persons named defendants against whom there is no proof, but only their names put in to take away their testimonies, which is grown exceedingly common"; nothing is said of interested persons not parties).

mitting freely the plainest of partisan witnesses, namely, family members and servants.

There remains, then, but one element to account for, — the parties' disqualification itself, as apparently coming into existence during the 1500s. The explanation of this seems to be near at hand; it is a fruitful one for the rules of evidence, namely, the history of jury-trial as an institution competing with and gradually displacing the other modes of trial. Turning back to the 1400s, we find at that epoch but one of the older modes surviving in any vigor; this was wager of law, the then name for the primitive process of compurgation by the party's oath with oath-helpers. All through the 1400s, and with only gradually decreasing vogue during the 1500s, the defendant could still refuse to be tried by a jury, and demand a decision by his own wager of law, in actions (mainly) of detinue and debt,[24] — almost the commonest of the original civil actions; in London, this privilege of its freemen extended even to charges of felony.[25] For the maintenance of this privilege defendants struggled long and hard; in 1403, for example,[26] a special statute came to their aid and protected them against evasions of their right by plaintiffs who framed their action fictitiously in account and then appealed to a prejudiced jury and thus cut off the defendant from exonerating himself by oath alone.[27]

What is the significance of this long struggle, successful for two centuries at least? It seems to be this, that in wager of law alone, and not in jury-trial, could the party have the benefit of his own oath.[28] Before a jury the parties do not swear. They plead orally, or argue, or allege things "in evidence", — either by themselves or by their counsel;[29] but they do not take an oath. The oath is in that epoch a solemn and determinative proceeding, — a mode of trying and deciding; the oath of jurors is that of triers of the fact; so also the oath of compurgators; so also, originally, that of deed-witnesses and transaction-witnesses, and even in later times (as late as Coke's day) these might go out with the jurors and help to decide by their oaths. The hesitancy in admitting ordinary witnesses to testify was probably due in part to a sense of the incongruity of an oath which had in it no flavor of decisiveness. Hence can be conceived the unnaturalness of admitting the party to his

[24] Thayer, Preliminary Treatise, 29–31.

[25] Thayer, *ubi supra*, 27; Pollock & Maitland, Hist. Eng. law, II, 632.

[26] St. 5 H. IV, c. 8.

[27] It is not improbable that the contracts found frequently in the 1500s and 1600s, by which the obligor promises to pay if the obligee will make oath that a specific sum is due (Knight *v.* Rushwood, Cro. Eliz. 469; Bretton *v.* Prettiman, T. Raym. 153, and many others), came into vogue as a method of ensuring the availability of the obligee's oath, at a time when jury-trial was defeating him of that right (*ante*, § 7 *a*).

[28] In 1561, Harwood *v.* Lee, Dyer 196 *b*, it is noted as the special custom of London that "the defendant should be affirmed by the oath of the party." Further details are given in Bateson's "Borough Customs", vol. II, Introd. pp. 29–32 (Selden Society Pub., XXI, 1906).

For some references upon the later history of other forms of the *party's decisory oath*, see *post*, § 1815.

In the Boston *Globe* of Aug. 21, 1907, is noted a pending lawsuit in Lynn, Mass., the settlement of which was, by consent, to be left to the defendant's decisory oath, taken according to the Jewish law before a rabbi.

[29] Thayer, *ubi supra*, 112, 120, 122.

oath before a jury. *That* would have been another mode of "trial", not to be mixed with trial by jury. A verdict was one kind of "proof"; deed-witnesses might be another kind; and the party's oath was still a different kind; there could not be two kinds of "proof" together, *i.e.* two ways of testing and settling the truth. The party's oath, then, had no place in trial by jury; its appropriate place was in a distinct mode of trial, wager of law. It can hardly be anything but this contrast which explains the determined struggle to retain the privilege of wager of law; it was the sole proceeding in which a party could have the benefit of his own oath, *i.e.* virtually, as a modern witness.[30]

If this be so, it is easy to see that, from the very beginning of modern witnesses, the party was incapable of being one. When ordinary witnesses began, in the 1400s, to be called with only slowly increasing frequency, the matter would be of little consequence. But in the 1500s, as witnesses came to be more and more the reliance of the jury and the parties for evidence, the conceded incapacity of the party to take the witness' oath would be more and more noticeable. It would be more worth while for the opponent to appeal to this rule; and thus it would naturally tend to happen (as we find it happening in fact) that the opponent would seek to disqualify witnesses by joining them as parties. This would not naturally be found, 'a priori,' until some time in the 1500s; and it is in the late 1500s [31] that we find apparently the first reported case.

The result, then, may be summed up in this way: That the party's oath was necessarily excluded in jury trial; that, when modern witnesses came into vogue in the 1400s and 1500s, the party was naturally deemed incapable of being such a witness; that otherwise no rule or disqualification for interested persons was recognized in the earlier days of witnesses; and that finally, after Coke's time and probably under the influence of his utterances, the rule for a party was extended by analogy to interested persons in general.

2. *Chancery Practice.* In Chancery practice, the problem would seem at first sight to have been a simpler one; for the Chancellor modelled his procedure after the canon (or ecclesiastical) law, and would in all probability have followed those rules substantially, not only in the mode of examination of witnesses (as is well established) but also in the rules of incompetency.[32] Nevertheless, by the end of the 1600s, Chancery is found enforcing the common-law rules of incompetency, just as through all its later history it professed to follow in general the common-law rules of evidence.[33] There must, then, have been, at some stage, a departure from the canon-law rules for wit-

[30] This seems to have been first suggested by Chief Justice Cushing of New Hampshire, in 1876 (King *v.* Hopkins, 57 N. H. 334, 367, "the fact of the history of jury trial, that one great purpose of its introduction was the exclusion of the parties as witnesses").

[31] *Supra*, note 21. See also Hudson's Star-Chamber Treatise, quoted in note 23.

[32] A token of the influence is found, for example, in the fact that at common law, up to the 1600s, an objection to a witness was called a "challenge", while in Chancery the canon-law term "exception" was used.

[33] *Ante*, § 4.

nesses, and the puzzling thing is that this stage appears to have been at least as early as those common-law rules themselves. In the first place, the disqualification of parties is seen already in the time of Elizabeth;[34] this, however, was consistent enough with the canon law. But, secondly, in the Chancery reporters of the 1500s (chiefly Cary and Tothill) there appear no precedents for the exclusion of interested persons other than parties; this harmonizes with the common-law history, but departs from the canon law. Thirdly, the Chancellors, who sat with other judges in the Star Chamber and presided, did not there fix into its practice the canon-law rules of disqualification by family-relationship.[35] Finally, the Chancery practice is found preserving, from the very beginning of the reports, the canon-law rule for the compulsory examination of parties at the opponent's instance, *i.e.* negativing any privilege for the party,[36] — a rule in direct discord with the common law; and it is a singularity that the Chancellor, while thus proceeding consistently to adopt the canon-law rules in a matter so radical, should nevertheless have ignored them in other respects in which their difference from the common law was equally radical. The details of the origin of the Chancery rules, and the motives leading to its peculiar combination of methods, remain still to be learned with accuracy.

3. *Criminal Trials.* It remains to notice the progress of the rule in criminal cases. (1) So far as concerns the prosecution's witnesses, it would seem that no exclusion by reason of interest was attempted before very near the time of Coke's book;[37] and even after that time, little recognition is given to that rule.[38] There was, however, in crown cases in this epoch, especially in the trials for treason, which form most of those that have come down to us, no dispo-

[34] 1580. Hollingworth *v.* Lucy, Cary 129 (defendant, moving for a commission, alleges that the plaintiff had notified only Smith, another of the defendants, "who is little interested in the cause, but made a party, as the defendant's counsel supposes, to take away his testimony from the other defendants"); and the citations *supra*, note 22. But in the precedents of the 1400s the plaintiff himself is admitted freely to testify on oath in the Chancellor's court: Barbour, History of Contract in Early English Equity, pp. 147–149 (Oxford Studies in Social and Legal History, IV, 1914).

[35] *Post*, § 600.

[36] *Post*, § 2218.

[37] No mention is made of any rule of exclusion as late as 1557, in Staunford's Pleas of the Crown, b. 3, c. 8, and 1565, in Smith's Commonwealth of England, b. 2, c. 26.

[38] 1640, Lord Strafford's Trial, 3 How. St. Tr. 1381, 1434 (a copy of an alleged illegal warrant, testified to by the serjeant claiming to act under the defendant's command, was objected to by the defendant, since "what he swears to my prejudice is to his own advantage; nor can a man, by any equity in the world, be admitted to testify against another 'in suam justificationem'"; and the copy was excluded); 1643, Col. Fiennes' Trial, 4 How. St. Tr. 185, 212 (court-martial; argued for the prosecution that defendant's father was "but 'testes domesticus' at the best"); 238 (argued for the prosecution that "many of them [defendant's witnesses] are 'testes domestici', as his brother, kinsmen, servants, footboys; most of the rest his officers and soldiers, against whom we excepted as incompetent"; the Court here went in part on civil law rules of procedure); 1644, Archbishop Laud's Trial, 4 How. St. Tr. 315, 383, 389, 402 (argued as an objection by the defendant that a witness testified "in his own cause"); 1649, Duke of Hamilton's Trial, 4 How. St. Tr. 1155 (defendant objected unsuccessfully against a witness' testimony, "he being a party and now in hazard"); 1649, Lilburne's Trial, 4 How. St. Tr. 1269, 1342 (similar); 1660, St. 12 Car. II, c. 32 (seizures of goods illegally executed; the person seizing "shall not be admitted or allowed to give in evidence upon his or their oath or oaths"); *ante* 1680, Hale, Pleas of the Crown, I, 302 ("A man concerned in point of interest is not a lawful accuser or witness in many cases").

sition to concede objections to the crown's testimony;[39] and this sufficiently explains the tardiness in the adoption of the rules in criminal trials; indeed, at no later time was the rule of interest as strictly construed as in civil cases.

(2) The accused himself, like the parties in civil cases, had always, under jury-trial, been allowed to plead his cause orally in person. This in civil cases naturally came to be done usually by the counsel. But, since in criminal causes, the accused was not allowed to have counsel in felony cases (until statute conceded this, for treason in 1695, and for felony in 1836),[40] his statements covered without distinction whatever he had to say of law, of evidence, and of argument. In effect, he furnished evidence, *i.e.* material which affected the jury's belief; but he was not sworn, he had no standing as a witness, and in theory of the law he therefore gave no evidence. During the period of recorded trials down to the second half of the 1500s this theory appears not to have been emphasized; the accused made an address at the proper stage, and, as witnesses came on, he spoke and was questioned freely, as if his statements counted for something, though he was not sworn.[41] But by the time of James II, just before the Revolution, the Court is found expressly repudiating the notion that the accused's statements are to be taken as testimony.[42] This, it may be supposed, was in part due to the then recently established principle in civil cases of disqualification by interest.

(3) The accused was at common law not allowed to have any witnesses on his behalf. This (to our eyes) barbarous rule was perhaps not unnatural in the earlier days, when the jurors had so much knowledge of their own. At any rate, as late as the 1400s, it was not an extraordinary thing, seeing that the practice of calling witnesses in the modern sense was only just beginning in civil cases. But, in the next century, when their use in civil cases was common enough, they were still not admitted in criminal trials;[43] not on any theory of disqualification (it was still too early for that), but on the pretext that they were not needed, — the same pretext that forbade the employment of counsel.[44] No doubt also a general disinclination prevailed

[39] Compare the history of the rule for infamy, *ante*, § 519.

[40] 7 & 8 W. III, c. 3; 6 & 7 W. IV, c. 114.

[41] The following trials illustrate this: 1554, Throckmorton's Trial, 1 How. St. Tr. 862, 873; 1571, Duke of Norfolk's Trial, 1 How. St. Tr. 958, 979; 1588, Knightley's Trial, 1 How. St. Tr. 1263, 1267; 1603, Ralcigh's Trial, 2 How. St. Tr. 1, 11; 1615, Weston's Trial, 2 How. St. Tr. 911, 928; 1649, Duke of Hamilton's Trial, 4 How. St. Tr. 1155, 1161; 1661, James' Trial, 6 How. St. Tr. 67, 79; 1662, Tonge's Trial, 6 How. St. Tr. 225, 256; 1663, Moders' Trial, 6 How. St. Tr. 273, 278; 1664, Turner's Trial, 6 How. St. Tr. 565, 595.

Compare Mr. J. Stephen's account of this: Hist. Crim. Law, I, 325, 377, 440.

[42] 1678, Coleman's Trial, 7 How. St. Tr. 1, 65 (Coleman: "I came home the last day of August"; L. C. J. Scroggs: "Have you any witness to prove that?"; Coleman: "I cannot say I have a witness"; L. C. J.: "Then you say nothing"); 1681, Colledge's Trial, 8 How. St. Tr. 549, 681.

[43] 1554, Throckmorton's Trial, 1 How. St. Tr. 862, 885; 1590, Udall's Trial, 1 How. St. Tr. 1271, 1280, 1304.

[44] 1678, L. H. Steward Finch, in Lord Cornwallis' Trial, 7 How. St. Tr. 143, 149: "The fouler the crime is, the clearer and the plainer ought the proof of it to be. There is no other good reason can be given why the law refuseth to allow the prisoner at the bar counsel in matter of fact when his life is concerned, but only this, because the evidence by which he is condemned ought to be so very evident and so plain that all the counsel in the world should not be able to answer upon it."

to concede anything that would weaken the hands of the prosecution. There seems to have been some general support for this rule in the notions of the time, for not until the middle of the 1600s is there any relaxation.[45] Then, first, the accused is gradually allowed to produce witnesses, who speak, however, without oath;[46] next, he is given compulsory process for them;[47] and, finally, by statutes in 1695[48] and 1701[48] he is allowed to have them sworn in treason and in felony. From that time on, the ordinary principle of disqualification by interest, already established for civil cases, is enforced wherever it is applicable to a defendant's witnesses.

§ 576. **Interest-Disqualification in general; Policy of the Rule; Statutory Abolition.** The theory of disqualification by interest was merely one variety of the general theory which underlay the extensive rules of incompetency at common law. It was reducible in its essence to a syllogism, both premises of which, though they may now seem fallacious enough, were in the 1700s accepted as axioms of truth: Total exclusion from the stand is the proper safeguard against a false decision, whenever the persons offered are of a class specially likely to speak falsely; Persons having a pecuniary interest in the event of the cause are specially likely to speak falsely; Therefore such persons should be totally excluded. This theory may be perceived running through all the authoritative expositions of the doctrine:

1727, Chief Baron GILBERT, Evidence, 119 (Lofft's ed. 223): "For where a man, who is interested in the matter in question, would also prove it, it rather is a ground for distrust, than any just cause of belief; for men are generally so short-sighted, as to look to their own private benefit, which is near them, rather than to the good of the world, which, though on the sum of things really best for the individual, is more remote; therefore, from the nature of human passions and actions, there is more reason to distrust such a biased testimony than to believe it. It is also easy for persons, who are prejudiced and prepossessed, to put

[45] There had been two statutes, of very limited extent, allowing witnesses to the accused, in 1589 (St. 31 Eliz. c. 4) and 1606 (St. 4 Ja. I, c. 1, § 16).

[46] 1645, Lord Macguire's Trial, 4 How. St. Tr. 653, 666 (Macguire: "I was told, when I came into the kingdom [from Ireland], that I might have witnesses"; Judge: "If you had witnesses here, we would hear them; but . . . we cannot protract time [to wait for them]. . . . If you will ask them [the king's witnesses] any questions for your defence, you shall"); 1649, Duke of Hamilton's Trial, 4 How. St. Tr. 1155, 1157, 1160 (defendant allowed to use some witnesses, but not granted a warrant for others); 1653, Faulconer's Trial, 5 How. St. Tr. 323, 357 (witnesses freely examined for the defendant; here under the Commonwealth); 1660, Hulet's Trial, 5 How. St. Tr. 1179, 1191 (under the Restoration; witnesses allowed, "but they are not to be admitted upon oath against the king"); 1661, James' Trial, 6 How. St. Tr. 67, 79; 1669, Hawkins' Trial, 6 How. St. Tr. 921, 933; 1678, Stayley's Trial, 6 How. St. Tr. 1501, 1508.

[47] Note that this reform comes in under the Restoration and before the Revolution: 1663, Twyn's Trial: 6 How. St. Tr. 513, 516 (L. C. J. Hyde: "Let's know their names, we will take care they shall come in"); 1664, Turner's Trial, 6 How. St. Tr. 565, 570 (L. C. J. Hyde: "The law will not admit us to summon any witnesses"); 1679, Reading's Trial, 7 How. St. Tr. 259, 278 (L. C. J. North: "There was never any subpœnas denied you; but you might have had them at any time"; and at pp. 288, 289, two witnesses were sworn).

Compare the history of compulsory process in general, *post*, § 2190.

[48] St. 7 Wm. III, c. 3, § 1; St. 1 Anne, c. 9, § 3. Compare the detailed history of the old rule in Thayer, Preliminary Treatise, 157, note, and the shorter account in Stephen, History of the Criminal Law, I, 350-354, 416.

In the Colonies, the earliest statute recognizing this new right of the accused to call witnesses was probably that of South Carolina, in 1712, now Code Crim. Pr. 1922, § 965.

false and unequal glosses upon what they give in evidence; and therefore the law removes them from testimony, to prevent their sliding into perjury; and it can be no injury to truth to remove those from the jury, whose testimony may hurt themselves, and can never induce any rational belief. If it be objected, that interest in the matter in dispute might, from the bias it creates, be an exception to the credit, but that it ought not to be absolutely so to the competency, any more than the friendship or enmity of a party, whose evidence is offered, towards either of the parties in the cause, or many other considerations hereafter to be intimated; the general answer may be this, that in point of authority no distinction is more absolutely settled; and in point of theory, the existence of a direct interest is capable of being precisely proved; but its influence on the mind is of a nature not to discover itself to the jury; whence it hath been held expedient to adopt a general exception, by which witnesses so circumstanced are free from temptation, and the cause not exposed to the hazard of the very doubtful estimate, what quantity of interest in the question, in proportion to the character of the witness, in any instance, leaves his testimony entitled to belief. Some, indeed, are incapable of being biased even latently by the greatest interest; many would betray the most solemn obligation and public confidence for an interest very inconsiderable. An universal exclusion, where no line short of this could have been drawn, preserves infirmity from a snare, and integrity from suspicion; and keeps the current of evidence, thus far at least, clear and uninfected."

1824, Mr. *Starkie*, Evidence, 83: "The law will not receive the evidence of any person, even under the sanction of an oath, who has an interest in giving the proposed evidence, and consequently whose interest conflicts with his duty. This rule of exclusion, considered in its principle, requires little explanation. It is founded on the known infirmities of human nature, which is too weak to be generally restrained by religious or moral obligations, when tempted and solicited in a contrary direction by temporal interests. There are, no doubt, many whom no interests could seduce from a sense of duty, and their exclusion by the operation of this rule may in particular cases shut out the truth. But the law must prescribe general rules; and experience proves that more mischief would result from the general reception of interested witnesses than is occasioned by their general exclusion."

The answer to this syllogism is merely that both its premises are unsound, — that pecuniary interest does not raise any large probability of falsehood, and that, even if it did, the risks of false decision are not best avoided by excluding such testimony. The classical expositions of these fallacies are found in the following passages: [1]

1827, Mr. *Jeremy Bentham*, Rationale of Judicial Evidence, b. IX, pt. III, c. III (Bowring's ed., vol. VII, pp. 393 ff.): "Ignoramus has for the purpose of this topic composed his system of psychology. What is it? A counterpart to the learned Plowden's system of mineralogical chemistry: equal as touching its simplicity — equal as touching its truth. Two parent metals, sulphur and mercury: the mother, sulphur; the father, mercury.

§ 576. [1] Mr. Bentham's was of course the first and greatest; the above quotation includes merely a few of the most typical and forcible passages from his argument. The other two quotations represent those which in the history of the law were next most potent in their practical consequences, namely, the utterances of the Commissions in England and America, whose proposals led directly to legislative reform. There were, of course, other admirable expositions, notably Lord Brougham's, in his speeches in Parliament, and Lord Denman's between 1824 and 1854, in his speeches, pamphlets, and articles. Both of these were Bentham's admirers. Perhaps the most comprehensive and concise, and the most profitable for perusal, next to Mr. Bentham's, are those of Chief Justice Appleton of Maine (a disciple of Bentham's) in his treatise (1860) on Evidence, chaps. I, IV, and Mr. Justice Edward Livingston (*circa* 1823), in his Introductory Report to the Code of Evidence (Works, ed. 1872, I, 424, 438 ff.); Livingston had read Bentham, probably in Dumont's earlier abridged edition.

Are they in good health? they beget the noble metals: are they in bad health? they beget the base. . . . In the view taken of the subject by the man of law, — to judge of trustworthiness, or at least, of fitness to be heard, *interest* of *no interest* is (flagrant and stigmatized improbity apart) the only question. . . . Between two opposite propositions, both of them absurd in theory, because both of them notoriously false in fact, the choice is not an easy one. But if a choice were unavoidable, the absurdity would be less gross to say, 'No man who is exposed to the action of interest will speak false', than to say, 'No man who is exposed to the action of interest will speak true.' Of a man's, of every man's, being subject to the action of divers mendacity-restraining motives, you may be always sure: of his being subjected to the action of any mendacity-promoting motives, you cannot be always sure. But suppose you were sure. Does it follow, because there is a motive of some sort prompting a man to lie, that for that reason he will lie? That there is danger in such a case, is not to be disputed: but does the danger approach to certainty? This will not be contended. If it did, instead of shutting the door against some witnesses, you ought not to open it to any. An interest of a certain kind acts upon a man in a direction opposite to the path of duty: but will he obey the impulse? That will depend upon the forces tending to confine him to that path — upon the prevalence of the one set of opposite forces or the other. All bodies on or about the earth tend to the centre of the earth; yet all bodies are not there. All mountains have a tendency to fall into a level with the plains; yet, notwithstanding, there are mountains. All waters seek a level; yet, notwithstanding, there are waves. . . . Any interest, interest of any sort and quantity, sufficient to produce mendacity? As rational would be it to say, any horse, or dog, or flea, put to a waggon, is sufficient to move it: to move it, and set it a-running at the pace of a mail-coach. . . . Take what everybody understands, money: for precision's sake, take at once £10; the £10 of the day, whatever be the ratio of it to the £10 of yesterday: to the present purpose, depreciation will not affect it. This £10, will its action be the same in the bosom of Crœsus as of Irus? in the bosom of Diogenes, as in that of Catiline? No man will fancy any such thing for a moment: no man, unless, peradventure, it may have happened to him to have been stultified by legal science. . . . In the eyes of the English lawyer, one thing, and one thing only, has a value: that thing is money. On the will of man, if you believe the English lawyer, one thing, and one thing only, has influence: that thing is money. Such is his system of psychological dynamics. If you will believe the man of law, there is no such thing as the fear of God; no such thing as regard for reputation; no such thing as fear of legal punishment; no such thing as ambition; no such thing as the love of power; no such thing as filial, no such thing as parental, affection; no such thing as party attachment; no such thing as party enmity; no such thing as public spirit, patriotism, or general benevolence; no such thing as compassion; no such thing as gratitude; no such thing as revenge. Or (what comes to the same thing) weighed against the interest produced by the value of a farthing, the utmost mass of interest producible from the action of all those affections put together, vanishes in the scale. . . . For a farthing — for the chance of gaining the incommensurable fraction of a farthing, no man upon earth, no Englishman at least, that would not perjure himself. This in Westminster Hall is science: this in Westminster Hall is law. According to the prints of the day, £180,000 was the value of the property left by the late Duke of Bridgewater. For a fraction of a farthing, Aristides, with the duke's property in his pocket, would have perjured himself. One decision I meet with, that would be amusing enough, if to a lover of mankind there could be anything amusing in injustice. A man is turned out of court for a liar, not for any interest that he has, but for one which he supposed himself to have, the case being otherwise. Instead of turning the man out of court, might not the judge have contented himself with setting him right? Would not the judge's opinion have done as well as a release? The pleasant part of the story is, that the fact on which the exclusion is grounded could not have been true. For, before the witness could be turned out of court for supposing himself to have an interest, he

must have been informed of his having none: consequently, at the time when he was turned out, he must have ceased to suppose that he had any. Another offence, for which I find a man pronounced a liar, seems to make no bad match with the foregoing: it was for being a man of honour. 'Oh ho! you are a man of honour, are you? Out with you, then — you have no business here.' Being asked whether he did not look upon himself as bound in honour to pay costs for the party who called him, supposing him to lose the cause, and whether such was not his intention, — his answer was in the affirmative, and he was rejected. It was taken for granted that he would be a liar. Why? Because he had shown he would not be one. . . . Exceptions, self-contradictions, spring up everywhere under their feet: exceptions, and, as far as they extend, all reasonable. Reasonable, and why? Because, the rule itself being fundamentally absurd, everything must be reasonable which goes to narrow its extent. . . . V. Exception the fifth: — . . . Question: A man who at the time of his examination has an interest in the cause, — is he an admissible witness, he having had no interest at the time of the supposed fact? Decision in the affirmative. Because he was under no temptation when he had not to speak, therefore, when he is to speak, knowing him to be under temptation, you are to suppose him not to be so. Just as if a pilot were to say in a storm, the vessel among the breakers, Sit still, there is no danger. Why so? Because yesterday it was a dead calm. VI. Exception the sixth: — 'Voire dire.' Truth expected, in spite of interest. . . . When a witness produced against you has an interest in the business (meaning always a pecuniary interest), and you cannot get other evidence of it, or do not care to be at the expense, you address yourself to the witness himself, and ask him whether he has or no: if he speaks truth, he is turned out; if he perjures himself, he is heard. This operation is called examining a witness upon the 'voire dire.' 'Voire dire' is, in law French, to tell the truth. A man might look a good while, even in the vocabulary of English law, before he would find so silly a one. 'Come, my honest friend, I am going to put some questions to you. To the first of them, the court expects you to speak truth: to the others, as you please.'"

1853, *English Common Law Practice Commissioners*, Second Report,[2] p. 10: "Plain sense and reason would obviously suggest that any living witness who could throw light upon a fact in issue should be heard to state what he knows, subject always to such observations as may arise as to his means of knowledge or his disposition to the truth. The law of England, however, at least until a recent period, proceeded on a very different principle. Acting apparently on a distrust both of the integrity of witnesses and of the discernment of the tribunals, it sought to protect the latter from the possibility of being misled, by carefully excluding from giving testimony not only the parties to the cause, but any one who had any, even the most minute, interest in the result. Every person so circumstanced, however small and insignificant the amount of his interest, was presumed to be incapable of resisting the temptation to perjury; and every judge and juryman was presumed to be incapable of discerning perjury under circumstances peculiarly calculated to excite suspicion and watchfulness. It is painful to contemplate the amount of injustice which must have taken place under the exclusive system of the English law, not only in cases actually brought into court and there wrongly decided in consequence of the exclusion of evidence, but in numberless cases in which the parties silently submitted to wrongs from inability to avail themselves of proof which, though morally conclusive, was in law inadmissible. From the time, however, when the late Mr. Bentham first turned the attention of the public to the defects of the English law of evidence, the system of exclusion has been crumbling away before the power of discussion and improved legislation. . . .

[2] This Report was ten years subsequent to the abolition of the interest-disqualification; but the passage was useful as confirming by experience the wisdom of the steps so recently taken, and thus made it possible to obtain support for the further reform of abolishing marital incompetency, — a measure which followed immediately in 1854. It was in consequence of the First Report of this same Commission that the incompetency of civil parties had been abolished in 1851.

[After noting the three general statutes between 1843 and 1851, which had by successive steps removed incompetency for interest,] Such is the gradual progress of opinion and intelligence. A quarter of a century ago such a measure, if proposed, would doubtless have been treated as a wild and dangerous innovation, altogether unfit to be entertained by the Legislature. The new law has now been in practical operation for eighteen months; and according to the concurrent testimony of the bench, the profession, and the public, is found to work admirably and to contribute in an eminent degree to the administration of justice."

1848, *New York Commissioners on Practice and Pleadings*,[3] First Report, p. 246: "The rule appears to us to rest upon a principle altogether unsound; that is, that the situation of the witness will tempt him to perjury. The reason strikes at the foundation of human testimony. The only just inquiry is this; whether the chances of obtaining the truth are greater from the admission or the exclusion of the witness. Who that has any respect for the society in which he lives can doubt, that, upon this principle, the witness should be admitted? The contrary rule implies, that, in the majority of instances, men are so corrupted by their interest, that they will perjure themselves for it, and that besides being corrupt, they will be so adroit, as to deceive courts and juries. This is contrary to all experience. In the great majority of instances the witnesses are honest, however much interested, and in most cases of dishonesty the falsehood of the testimony is detected, and deceives none. Absolutely to exclude an interested witness, is therefore as unsound in theory, as it is inconsistent in practice. It is inconsistent, because the law admits witnesses far more likely to be biased in favor of the party, than he who has merely a pecuniary interest. A father may testify for his son; a child living with his father and dependent upon his bounty, may appear as his witness, nay, as his only witness, without question. Is the immediate gain of a dollar, by the result of a cause, so potent to outweigh integrity, while affection, consanguinity, dependence, are put down as dust in the balance? There is not another rule in the law of evidence so prolific of disputes, uncertainties, and delays, as that we are considering. Not a circuit is held, but question after question is raised upon it; nor a term where exceptions growing out of it are not debated. . . . England has outstripped us in this most necessary reform. Five years ago, an act of Parliament obliterated the rule from the laws of that country. . . . Lord Brougham has spoken of it, in the following language: 'This is certainly the greatest measure that has been carried under the head of judicial procedure, since the statute of frauds, that is, since the Restoration. It places the law of evidence at length upon a rational footing, and makes its provisions consistent with themselves. It protects judges and juries and parties, from the miscarriages, heretofore constantly produced, by the exclusion of important testimony; wisely opening the door to the witness, but reserving the estimate of his credit and the value of his evidence, to those who are to judge the cause. It also sweeps away the numberless nice and subtle distinctions in which the profession was wont to luxuriate; disencumbers our jurisprudence of a heavy load of useless decisions, resting upon refinements and not principles, and abridges the trial of causes, by shutting out those debates that used daily to arise upon the admission of proofs, which the common sense of mankind at once pronounced should be received, and which the law itself did receive in other instances, not distinguishable by the naked eye of plain reason. There have been few greater improvements in our judicial system, than those which are effected by this valuable statute.'"

It is not easy nowadays to appreciate why these plain objections remained so long without recognition:

[3] This Commission, appointed through efforts led by Mr. David Dudley Field, consisted of Messrs. Nicholas Hill, David Graham, and Arphaxad Loomis; but, before its labors began, Mr. Hill resigned and was replaced by Mr. Field. Compare with the above Report the Complete Report of 1850, p. 715, note to § 1708; this section, making "all persons without exception" competent, except specified classes, has served as the type for the legislation of a majority of our jurisdictions.

(1) One reason, certainly, is found in the much stronger influence, up to the 1800s, of the emotional element in all human conduct. The belief that a partisan would likely falsify, or at least distort unconsciously the truth, was then much closer than now to the facts of life; because partisanship did then have an influence which has now largely given place to cooler and more rational motives of action. This may be gathered from various features of life in those days. Partisanship then colored the whole existence and committed one to set views and courses of conduct which had no relation to a discriminating choice. Speech and action were more passionate and violent; witness Burke's diatribes against Warren Hastings, and the enormous excess of libel actions over their present number, as well as the extremities of abuse which were indulged in between gentlemen; compare the almost incredible vituperation employed against such majestic characters as Washington and Jefferson with the decline of political personalities in the last few decades. Motives then rested more on sentiment; witness the rise of Romanticism in literature and politics, the careers of Byron and Shelley, the vogue of "Paul and Virginia" and "Thaddeus of Warsaw." Note, too, that these features are still found surviving in the traditions of precisely that portion of our community — the South — where we may see with our own eyes that the emotional element — both in its highest and its lowest forms — predominates in the character. During the 1800s this predominance was gradually disappearing; the influence of scientific research and of industrial invention and organization made for a more rational and less emotional life. That influence, no doubt, has in part had its degrading effect in strengthening the calculative, sordid, and commercial standards of action; but it has also had the effect of establishing, in general, cool reason as the orthodox test of conduct. Thus, with the diminution of the control of mere emotion and partisanship over conduct and opinion, the rules of law which were natural enough while that domination existed, ceased gradually to correspond to the facts of life and survived as anachronisms. It became possible to see their fallacies as soon as their moral basis disappeared, but not till then. In short, not before the second half of the 1800s could it have been fairly expected that public opinion would demand or even support the abolition of disqualification by interest; nor yet, perhaps, does that abolition, in a few communities (chiefly in the South[4]), correspond to the facts of life and public opinion, as it certainly does in most.

(2) A second reason perhaps is to be found in that "dead weight of an oath" (in Mr. Justice Stephen's phrase), which in popular probative notions prevailed from primitive times and still is so difficult in some communities to make way against. As long as juries were inclined to give a numerical value to witnesses, to believe that ten witnesses were ten times as probative

[4] In 1898, Mr. N. J. Hammond, an accomplished and thoughtful member of the bar of Georgia, at one time Attorney-General, said to the writer that the abolition of parties' incompetency had in his opinion been a mistake. Perhaps there exist other doubters still; see Jenkins, J., diss. in Harman *v.* Harman, 1895, 17 C. C. A. 479, 70 Fed. 926, and *ante*, § 289.

as one witness, and to treat a sworn assertion on the stand as being good for so much testimony, irrespective of the witness' personal credit, so long might the Legislature well hesitate to admit to the stand persons who in their credit would certainly be weaker than the normal witness and would yet be indiscriminately counted as good witnesses by the jury. In other words, the tribunal's opportunity for a careful weighing of a witness' measure of credit, and the means afforded for doing so by cross-examination and the like, form the safeguards which induce us to take the risk of admitting interested witnesses; we rely on being able to make the proper allowance for the danger; if, then, the tribunal is apt to ignore those safeguards, the reason for admission is much weaker. Some such thought must have operated to prolong the delay in abolishing disqualification by interest.[5] Perhaps the two foregoing considerations sufficiently explain why the reforming legislation dates no earlier than the second half of the 1800s.

In England, the publication (in 1827) of Bentham's great treatise first furnished the arsenal of arguments for transforming public opinion. The weapons were wielded and the forces marshalled by Mr. (afterwards L. C. J.) Denman and Mr. (afterwards L. C.) Brougham.[6] Mr. Denman had indeed, as early as 1824, in reviewing the French edition of Bentham's work,[7] given voice to the new views; he had always been, and never ceased to be, far in advance of public opinion in his measures of reform. By 1843 the result was finally achieved, in the statute 6 & 7 Victoria, chapter 85, known ever since as Lord Denman's Act.[8]

In the United States, the English statutes served as an example, and it was soon followed. The earliest enactment abolishing interest as a disqualification seems to have been that of Michigan.[9] But the broad movement of reform in New York, led by Mr. David Dudley Field, brought results which attracted more general attention; and the legislation of that State, in 1848, was the direct means by which the reform of testimonial rules spread, within the next decade, to most of the other States.[10] The details of the old rule, in its application to the numerous circumstances of pecuniary interest, may

[5] This consideration is noted, in dealing with the history of the rules of number, *post*, § 2032.

[6] The campaign of reform in the political field was signalized, within a year after the publication of Bentham's book, by Mr. Brougham's great speech, of Feb. 7, 1828, on the reform of procedure, in which occurred the oft-quoted peroration: "It was the boast of Augustus that he found Rome of brick and left it of marble. But how much nobler shall be the sovereign's boast, when he shall have it to say that he found law dear, and left it cheap; found it a sealed book, — left it a living letter; found it the patrimony of the rich, — left it the inheritance of the poor; found it the two-edged sword of craft and oppression, — left it the staff of honesty and the shield of innocence!" (Hans. Parl. Deb., 2d ser., vol. 18, p. 247).

[7] Edinburgh Review, March, 1824, vol. 40, p. 176. This French translation appeared before the English edition of the original.

[8] For Lord Denman's speech (then Chief Justice and a peer) in moving the second reading of this bill, see Hansard, Parl. Deb., 3d ser., vol. 61, p. 208, March 8, 1842. In 1833, a statute of 3 & 4 W. IV. c. 42, had removed this disqualification so far as it depended on the verdict being usable for or against the witness in other litigation. All these statutes are noted *ante*, § 488. It would seem also that the Admiralty Courts had for some time before these statutes ceased to regard interest as a disqualification: Dr. Lushington, in The Peerless, 1 Lush. 30, 41.

[9] Michigan, Rev. St. 1846, c. 102, § 99.

[10] See note 3, *supra*.

therefore be ignored as having no longer any importance.[11] In every jurisdiction under our law interest as a disqualification is expressly abolished.[12]

§ 577. **Civil Parties' Disqualification; Statutory Abolition.** The notion of interest at common law applied of course to the parties to the suit, for their interest in the event of the litigation was obviously the most marked. That this general principle of disqualifying interest was the real ground of their exclusion from testifying in their own favor is clear; and certain details of the rule rested directly on this theory, — for example, the consequence that a mere titular or nominal party was admissible, or a party against whom judgment had gone by default. The hardship and the anomaly, however, of this ground for exclusion were even more emphatic and apparent than in the case of ordinary interested persons.[1] To this branch of the rule also Mr. Bentham paid special attention in his scathing denunciations: [2]

1827, Mr. *Jeremy Bentham*, Rationale of Judicial Evidence, b. IX, pt. V, c. I (Bowring's ed. vol. VII, pp. 487, 507): "The reason which forbids the admission of the testimony is weaker in this case than in the case of an interested extraneous witness. The real magnitude of the interest being the same in both cases, — in the case of a party the interest is more palpable: the objection created by it is likely to act with greater force upon the judicial faculties of the magistrate: his mind is more surely open to it: the danger of deception is therefore less. If, in so far as it operates in his own favor, the testimony of the party is liable to be drawn aside from the line of truth by the action of this force, which is so obvious even to the most unobservant eye, — in so far as it operates in his disfavor, it possesses, in a degree superior to all other testimony, a claim to confidence. That, in this case, the error, if any there be in the testimony, is not a wilful one — is not accompanied, at the same time, with a knowledge of the falsity of the information, and of the tendency it has to operate to the deponent's prejudice — is a proposition, the truth of which is far more certain in this instance, than it can be in any other. Accordingly, as often as the testimony of a party is received — so sure as it enters into the mind of any one who has to judge of it — so sure is it to be analyzed, and, as it were, divided into two parts. To the part which is regarded as operating in the deponent's own favor, the incredulous, the diffident part of the judge's mind, applies itself of course: while the part regarded as operating in his disfavor, commands, on the part of the judge, an almost unlimited share of confidence: in a word, what portion of the mass is understood as belonging to this division, is, by the common sense and consent of mankind, universally regarded as the best evidence. Such is the evidence, of which, on the ideal supposition of extraordinary vexation, the rashness of a certain class of jurists has not hesitated to rob the treasury of justice. A party is not suffered to be examined on his own behalf. Observe the consequence; he is delivered without mercy into the hands of a mendacious witness on the other side. 'Your adversary, to make evidence for a suit he means to bring against you, sends an emissary to you to engage you in a conversation, that, when called upon as a witness, he may impute confessions

[11] Except for the rule (*post*, § 578) excluding survivors from testifying against a decedent. The scope for the application of the old rules is even there, however, so narrow that it will be sufficient to refer the reader to Professor Greenleaf's exposition of them, in his Treatise, §§ 329–430.

Distinguish, however, the rule for a valid *attestation* by a credible witness (*post*, §§ 582, 1292).

[12] The statutes are set forth *ante*, § 488. In general, the legislation was later in the Southern States than elsewhere.

§ 577. [1] "When as a boy I read the Pickwick Papers, I was always puzzled to know why Mr. Pickwick did not go into the witness-box, and say that he never promised to marry Mrs. Bardell, and explain how the good lady came to make such a mistake" (W. Blake Odgers, Esq., A Century of Law Reform, 1901, p. 217).

[2] Compare the arguments of Livingston and Appleton, in the citations *ante*, § 576, note 1.

to you such as you never made. When the evidence comes to be given at the trial, the witness tells what story he pleases: as for you, you must not open your mouth to contradict him, although, were you admitted to state what passed, it might be in your power to satisfy the judge, that the account given of the conversation by the witness could not possibly have been true. . . . Parties, how numerous soever, being excluded, while, in the character of an extraneous witness, the testimony of a single deponent is sufficient to warrant, and (if clear of contradiction, as well from within as without), in a manner to command, decision; — a single tongue obtains thus a certain victory over a thousand, that would have sounded in contradiction to it, had they been suffered to be heard. Every defendant is, 'par etat', by his station in the cause, a liar: a man who, if suffered to speak, would be sure to speak false, and equally sure to be believed. Every defendant is a liar. But every human being may, at the pleasure of every other, be converted into a defendant. Therefore, and by that means, every human being may, at the pleasure of every other, be converted into a liar, and, in that character, his capacity of giving admissible testimony annihilated. The 'jus nocendi', the power of imposing unlimited burthens by calumnies not suffered to be contradicted, is thus offered constantly upon sale, to every man who will pay the price for it. . . . In principle there is but one mode of searching out the truth: and (bating the corruptions introduced by superstition, or fraud, or folly, under the mask of science) this mode, in so far as truth has been searched out and brought to light, is, and ever has been, and ever will be, the same, in all times, and in all places, in all cottages and in all palaces — in every family, and in every court of justice: Be the dispute what it may, see everything that is to be seen; hear everybody who is likely to know anything about the matter: hear everybody, but most attentively of all, and first of all, those who are likely to know most about it — the parties."

Mr. Bentham had rightly perceived that the incompetency of parties could be treated as a different question from that of interested persons not parties; for, while the impropriety of their exclusion was more marked in rational policy, yet the common-law theory of interest was in their case most strongly applicable and the instinct against altering it would therefore offer more obstinate resistance. And so it did. In England, this stage of reform was not reached until 1851, eight years after the first great step had been taken; [3] and in most of the United States such an interval between the two steps similarly appears. [4] To-day the disqualification has everywhere disappeared,[5] and its details are no longer of any consequence.[6]

§ 578. **Survivor's Disqualification against Opponent Deceased or Incapable.** In almost every jurisdiction in the United States, by statutes enacted in connection with or shortly after the statute removing the general disqualification

[3] St. 14 & 15 Vict. c. 99, excepting actions for adultery and breach of marriage-promise; this exception was removed in 1869, St. 32 & 33 Vict. c. 68. In 1846, St. 9 & 10 Vict. c. 95, an experiment had already been tried, by admitting parties in the county courts.

[4] The earliest statute seems to have been that of Connecticut, in 1849, prior to the English Act. In Alabama, the disqualification by interest generally was removed in 1852, but that of parties not until 1867. But in some jurisdictions, at much earlier dates, statutes had made partial exceptions to the general disqualifications, *e.g.* in bastardy cases and in actions on book-accounts, suits involving municipal corporations, and suits before justices of the peace. Some of these statutes making parties competent provided, as a condition, that he should testify first of the witnesses on his side; see *post*, § 1869.

The old rules may be found in Greenleaf, Evidence, §§ 329–331.

[5] The statutes are set forth *ante*, § 488.

[6] Except under the Statutory rule of § 578, *post*. For the effect of one of the exceptions to the old rule, namely, that parties might make affidavits to the *loss of a document*, see *post*, §§ 1196, 1225.

by interest, an exception was carved out of the old disqualification and was allowed to perpetuate within a limited scope the principle of the discarded rule. The scope of this modern rule excludes the testimony of the *survivor of a transaction with a decedent*, when offered against the latter's estate.[1]

It does not appear that there was any precedent which could have served as an example;[2] and the almost universal vogue of this modern fragment of the old anomaly is therefore the more remarkable.

The defenders of this rule are usually content to invoke some vague metaphor in place of a reason, but occasionally there is found an attempt at a rational justification:

1873, BRICKELL, J., in *Louis* v. *Easton*, 50 Ala. 471: "This right and privilege [of testifying] must be mutual. It cannot exist in the one party and not in the other. If death has closed the lips of the one party, the policy of the law is to close the lips of the other."

1878, HAYMOND, J., in *Owens* v. *Owens*, 14 W. Va. 88, 95: "The law in the exception to the privilege to testify was intended to prevent an undue advantage on the part of the living over the dead, who cannot confront the survivor, or give his version of the affair, or expose the omission, mistakes, or perhaps falsehoods of such survivor. The temptation to falsehood and concealment in such cases is considered too great to allow the surviving party to testify in his own behalf. Any other view of this subject, I think, would place in great peril the estates of the dead, and would in fact make them an easy prey for the dishonest and unscrupulous."

The argument of the latter passage, that a contrary rule "would place in great peril the estates of the dead" sufficiently typifies the superficial reasoning on which the rule rests. Are not the estates of the living endangered daily by the present rule, which bars from proof so many honest claims? Can it be more important to save dead men's estates from false claims than to save living men's estates from loss by lack of proof?

The truth is that the present rule is open, in almost equal degree, to every one of the objections which were successfully urged nearly a century ago against the interest-rule in general. Those objections may be reduced to four heads: (1) That the supposed danger of interested persons testifying falsely exists to a limited extent only; (2) That, even so, yet, so far as they testify truly, the exclusion is an intolerable injustice; (3) That no exclusion can be so defined as to be rational, consistent, and workable; (4) That in

§ 578. [1] The statutes are set forth *ante*, § 488; the jurisdictions not recognizing this disqualification are half-a-dozen only. The interpreting decisions will not be given here, for three reasons: first, they depend largely on the wording of the local statute: secondly, they are extremely numerous, and usually cannot be correctly summarized without a voluminous statement of the circumstances of the case and a comparison with the various parts of the statute, for which the present space does not suffice; thirdly, they are usually accessible to every practitioner in the form of annotations to the statute. This conclusion has been reached only after a full examination of all the rulings in one of the States, and a collection of the current rulings in all the jurisdictions for a period of several years.

[2] Except the analogy of some earlier chancery rulings, which however merely required corroboration and did not exclude the witness (*post*, § 2065). But the expedient was an old one; it is found in several mediæval codes, *e.g.*, "Nulla probatio testimonii de mutuo vel deposito valeat contra defunctos" (Pertile, Storia del diritto italiano, 2d ed., 1900, vol. VI, pt. 1, p. 400).

any case the test of cross-examination and the other safeguards for truth are a sufficient guaranty against frequent false decision. Every one of the first three objections applies to the present rule as amply as to the old and broader rule. The fourth applies with less apparent force, because the opponent's testimony is lacking in contradiction. And yet, upon what inconsistencies is based even this support for the rule! For its defenders in effect declare the lack of this opposing testimony to be the sole ground for an exceptional rule adapted to that particular situation; and yet, since the deceased opponent is a party, he would have been by hypothesis a potential liar equally with the disqualified survivor; so that the rule rests on the supposed lack of a questionable species of testimony equally weak with that which is excluded. There never was and never will be an exclusion on the score of interest which can be defended as either logically or practically sound. Add to this, the labyrinthine distinctions created in the application of the complicated statutes defining this rule; and the result is a mass of vain quiddities which have not the slightest relation to the testimonial trustworthiness of the witness:

1895, CORLISS, J., *St. John* v. *Lofland*, 5 N. D. 140, 64 N. W. 930: "Statutes which exclude testimony on this ground are of doubtful expediency. There are more honest claims defeated by them, by destroying the evidence to prove such claim, than there would be fictitious claims established if all such enactments were swept away and all persons rendered competent witnesses. To assume that in that event many false claims would be established by perjury is to place an extremely low estimate on human nature, and a very high estimate on human ingenuity and adroitness. He who possesses no evidence to prove his case save that which such a statute declares incompetent is remediless. But those against whom a dishonest demand is made are not left utterly unprotected because death has sealed the lips of the only person who can contradict the survivor, who supports his claim with his oath. In the legal armory, there is a weapon whose repeated thrusts he will find it difficult, and in many cases impossible, to parry if his testimony is a tissue of falsehoods, — the sword of cross-examination. For these reasons, which lie on the very surface of this question of policy, we regard it as a sound rule to be applied in the construction of statutes of the character of the one whose interpretation is here involved, that they should not be extended beyond their letter when the effect of such extension will be to add to the list of those whom the act renders incompetent as witnesses."

1921, Mr. *Henry W. Taft*, "Comments on Will Contests in New York", Yale Law Journal, xxx, 593, 605: "This restriction not infrequently works intolerable hardship in preventing the establishment of a meritorious claim. Furthermore, it has been enforced with the most rigorous literalness, and has been the occasion of a labyrinth of subtle decisions. A long experience leads me to believe that the evils guarded against do not justify the retention of the rule. In the early development of our jurisprudence the testimony of all interested witnesses was excluded; but experience gradually led to the conclusion that the restriction should be relaxed and more reliance should be placed upon the efficacy of our process of investigating truth. Cross-examination, for instance, has been found to be well calculated to uncover a fraudulent scheme concocted by an interested party and where that has failed the scrutiny to which the testimony of a witness is subjected by the court and by the jury, has proven efficacious in discovering the truth, to say nothing of the power of circumstantial evidence to discredit the mere oral statement of an interested witness."

As a matter of policy, this survival of a part of the now discarded interest-qualification is deplorable in every respect; for it is based on a fallacious and exploded principle, it leads to as much or more false decision than it prevents, and it encumbers the profession with a profuse mass of barren quibbles over the interpretation of mere words.[3]

If any concession at all is to be made to the considerations of caution underlying the rule, there are three simple ways available, each of them in actual and tried operation, and each of them able to accomplish the purpose without following the crude, technical, and unjust method of disqualifying surviving witnesses. One of these, adopted in Oregon, New Mexico, and Canada, is to allow no recovery in such cases on the party's sole testimony, without corroboration of some sort.[4] The second, followed in Connecticut, Virginia, and Oregon, is to admit, as well as the surviving party, any extant writings or declarations of the deceased party on the subject in issue.[5] The third, invented in New Hampshire and followed in Arizona, is to exclude the testimony, except when it "appears to the Court that injustice may be done without the testimony of the party;"[6] this removes the arbitrary feature of the rule and gives flexibility.

The following incident deserves to be perpetuated as illustrating the honorable man's method of practising law under this rule (or any other rule, for that matter):

1921, *Kinley* v. *Largent*, — Cal. —, 200 Pac. 937. The action was brought to recover the sum of $3444, which appellant had turned over to decedent for investment in street bonds. Up to the time of his death he had made no report on the investment. Upon the trial appellant offered herself as a witness, whereupon the following statements by the court and the respective counsel were made: *The Court:* "Is this such a claim against an estate as bars the claimant from being a witness under section 1880 of the Code of Civil Procedure?" *Mr. O'Brien:* "I presume that the claimant would be disqualified as a witness under that section if an objection were made to her testimony. This matter, however, has already been discussed with the administrator and his attorney, and, in view of the fact that both the administrator and his attorney are convinced that an injustice would result if such an objection were made, they have decided not to make any objection to the competency of the plaintiff as a witness in her own behalf in support of her claim against the estate." *Mr. Barry:* "I want to say, your honor, that Mr. Largent, the administrator of decedent, was a next-door neighbor of the plaintiff and her husband for a long time prior to the latter's death. He became intimately acquainted with them, and knew, prior to the death of Kinley, that moneys had been so advanced to him by his wife, as now claimed by her. Under those conditions we feel that to interpose a technical objection to the competency of the plaintiff to testify as a witness in her own behalf in this

[3] Approved in the following opinions: 1907, Omlie *v.* O'Toole, 16 N. D. 126, 112 N. W. 677; 1917, Corbett *v.* Kingan, 19 Ariz. 134, 166 Pac. 290; cited with approval by the Virginia Code Commissioners of 1919 (Annot. ed. § 6209), in giving reasons for the abolition of the rule.

[4] *Post*, § 2065.

[5] *Post*, § 1576.

[6] *N. H.* Pub. St. 1891, c. 224, §§ 16, 17, quoted *ante*, § 488; 1919, Cobb *v.* Follansbee, 79 N. H. 205, 107 Atl. 630, reviews the entire body of rulings under this statute; 1920, Gosselin *v.* Griffin, 79 N. H. 510, 111 Atl. 854 (injury of an employee; deceased defendant not having been present, held that plaintiff's testimony was admissible, under Pub. St. c. 224, § 16); *Ariz.* 1921, Johnson *v.* Moilanen, — Ariz. —, 201 Pac. 634 (applying Rev. St. 1913, § 1678, quoted *ante*, § 488, and citing prior cases).

suit would result in an injustice. As we have no desire to be the cause of an injustice, we do not feel it right or proper to make such objection." . . . Appellant identified five drafts, aggregating $2467.10, which were admitted in evidence, and testified to other advances aggregating $979.50.

§ 579. **Accused in Criminal Cases; Statutory Abolition.** The disqualification of the accused in criminal cases to testify for himself seems not to have been questioned in policy until Bentham's time.[1] But his arguments in this respect took longer for their fruition in legislation than any other of his proposals for abolishing witnesses' incapacities. The order of their abolition was almost everywhere the same; first, that of interested persons, next and in short space, that of civil parties, and then after a long interval, that of accused persons; that of husband and wife came about at varying times in the third interval, and in some communities remains still unachieved.

The competency of accused persons was first declared in Maine, in 1864,[2] and was not finally reached in England until 1898;[3] it now remains unaccomplished in Georgia only. It came later, in general, in the Southern States; and it was sometimes there accompanied by the proviso that the accused should testify, if at all, first in order of the witnesses on his own side.[4]

What was the reason for the general slow arrival at this measure? Not entirely a failure to perceive the fairness of giving the accused an opportunity to tell his story in exculpation. This fairness must have been appreciated as soon as any perception was reached of the impropriety of excluding parties and other interested persons. Indeed, before that time, it had become customary in England to allow the accused to make a "statement" to the jury, *i.e.* to tell his story, not on oath and not as a witness, but in the guise of an address or argument on the testimony and the whole case.[5] A similar practice grew up or was introduced by statute in some of our own jurisdic-

§ 579. [1] See the quotations *ante*, § 577, and *post*, § 2250. Bentham's arguments are summarized in (1860) Appleton, Evidence, c. VII.

[2] Me. St. 1864, c. 280; said by Professor Thayer (Cases on Evidence, 2d ed., p. 1117) to be "the earliest statute permitting the defendant in a criminal case to testify. In Massachusetts it was allowed in 1866, in Connecticut in 1867, in New York and New Hampshire in 1869, in New Jersey in 1871."

[3] *Ante*, § 488, where the statutes of the various jurisdictions are collected. There had been several statutes in England before 1898, qualifying the accused in particular issues; they are collected in Best, Evidence, 8th ed., § 622 A; they begin in 1872. The statute of 1898 has needed little interpretation on this point: 1916, R. *v.* Wheeler, 1 K. B. 283 (under St. 1898, § 1, the accused is a competent witness after pleading guilty and on hearing to fix sentence, so as to be guilty of perjury).

[4] *Post*, § 1869.

[5] 1838, R. *v.* Malings, 8 C. & P. 242; 1838, R. *v.* Walkling, 8 C. & P. 243; 1844, R. *v.* Dyer, 1 Cox Cr. 113; 1846, R. *v.* Williams, 1 Cox Cr. 363; 1882, R. *v.* Shimmin, 15 Cox Cr. 122 (with a note referring to preceding inconsistent rulings now repudiated); 1885, R. *v.* Millhouse, 15 Cox Cr. 622 (limited to cases where defendant calls no witnesses). The following are good examples of such "statements": 1827, Corder's Trial, Pelham's Chronicles of Crime, ed. 1891, II, 151; 1831, Taylor's Trial, ib. 233.

For this practice, see also the following: 1883, Stephen, Hist. Crim. Law, I, 440; 1893, Lely, editor, in Best on Evidence, 8th ed., § 635 (explaining the construction put on the Prisoners' Counsel Act, 1836, St. 6 & 7 Wm. IV, c. 114); 1914, R. *v.* Krafchenko, 17 D. L. R. 244, Man. (since the Canada Evidence Act of 1893, permitting the accused to testify, the common law practice of making an unsworn statement has been abrogated by implication; history of the practice surveyed by Mathers, C. J.).

tions,[6] and still obtains in Georgia.[7] That the formal grant of competency, then, was so long withheld was due rather to a hesitation founded on the supposed interest of the accused himself. His failure to use the right of testifying would (it was believed) damage his cause more seriously than if he were able to claim that his silence was enforced by law. But, chiefly, his exercise of the right to testify would (it was believed), in subjecting him to the ordeal of cross-examination, place him in a situation in which even an innocent man would show at a disadvantage, and would injure more than assist his own cause:[8]

1868, STEELE, J., in *State* v. *Cameron*, 40 Vt. 555, 565: "In the great body of cases, no wise practitioner would permit his client, whether he believed him guilty or innocent, to testify when upon trial on a criminal charge. The very fact that he testifies as if with a halter about his neck, that he is under such inducement to make a fair story for himself, his character and his liberty if not his fortune and his life being at stake, is enough to usually deprive his testimony of all weight in his favor, whether it be true or false. This is the case even when his manner upon the stand is unexceptionable, while his critical condition often creates such apprehension and excitement that his manner is open to great criticism, and if he does make a mis-step after voluntarily assuming the responsibility of testifying, it will naturally be construed strongly against him. In short, his testimony is far more likely to injure him seriously than to help him a little. It is true that a clear intellect and perfect self-possession may enable an unscrupulous rogue to run the gauntlet of a cross-examination and make something out of this privilege; and the same qualities will be still more likely to help an innocent man to some advantage from it; but the true application of the statute [qualifying him] is only to those rare cases, when a word from the prisoner, and him only, will manifestly dispose of what otherwise seems conclusive against him."

1869, SAWYER, C. J., in *People* v. *Tyler*, 36 Cal. 522, 528: "The policy of such a statute has been considerably discussed by law writers and others, and, to our minds, the strongest objection that has been urged against it, is, that it places a party charged with crime in an embarrassing position; that, even when innocent, a party upon trial upon a charge for some grave offence may not be in a fit state of mind to testify advantageously to the truth even, and yet if he should decline to go upon the stand as a witness, the jury would, from this fact, inevitably draw an inference unfavorable to him, and thus he would be compelled, against the humane spirit of the common law, to furnish evidence against himself, negatively at least, by his silence, or take the risk, under the excitement incident to his position, of doing worse, by going upon the stand and giving positive testimony."

[6] *E.g.* 1861, People *v.* Thomas, 9 Mich. 314.

[7] 1895, Boston *v.* State, 94 Ga. 590, 20 S. E. 98, 21 S. E. 603; 1897, Hackney *v.* State, 101 Ga. 512, 519, 28 S. E. 1007; 1900, Tiget *v.* State, 110 Ga. 244, 34 S. E. 1023; 1900, Sharp *v.* State, 111 Ga. 176, 36 S. E. 633; 1900, Knox *v.* State, 112 Ga. 373, 37 S. E. 416; 1901, Cochran *v.* State, 113 Ga. 736, 39 S. E. 337; 1901, Peavy *v.* State, 114 Ga. 260, 40 S. E. 234; 1903, Dunwoody *v.* State, 118 Ga. 308, 45 S. E. 412; 1912, Lindsay *v.* State, 138 Ga. 818, 76 S. E. 369 (whether the defendant's counsel may elicit his evidence by questions is in the trial Court's discretion); 1912, Jones *v.* State, 12 Ga. App. 133, 76 S. E. 1070 (whether the accused may make a second statement, after rebuttal evidence by the State, is in the trial Court's discretion); 1921, Causey *v.* State, 26 Ga. App. 632, 107 S. E. 68 (weight to be accorded).

In *Wyoming* the accused may elect either to testify under oath or to make an unsworn "statement"; 1921, Anderson *v.* State, 27 Wyo. 345, 196 Pac. 1047.

For the question whether an accused making such a statement can be *impeached*, see *post*, § 892.

[8] The apprehensions of conservative lawyers, at the time of enacting this reform, as to its ill consequences upon interests of the innocent accused, may be seen forcibly set forth in an article on "Testimony of Persons accused of Crime", 1 Amer. Law Rev. 443 (1866); and it was even argued by some of the obstinate ones that the reform was unconstitutional: Wm. A. Maury, in 14 American Law Rev. 752 (1880).

These apprehensions, as experience seems to have shown, were unfounded, — at any rate, the second of them (the disadvantage of taking the stand); while the first (the disadvantage of claiming silence), protected as it is by the strict law forbidding any inferences to be drawn from such silence,[9] gives at least as much benefit as in common sense can be afforded to the accused who takes the unnatural and suspicious course of declining to testify for himself.

That an accused ought to be competent to testify can no longer be questioned.[10] The following passages illustrate what can be said for that proposition from the standpoint of judicial experience:

1883, Sir JAMES STEPHEN, History of the Criminal Law, I, 442: "I am convinced by much experience that questioning [the accused], or the power of giving evidence, is a positive assistance, and a highly important one, to innocent men, and I do not see why in the case of the guilty there need be any hardship about it. It must be remembered that most people accused of crime are poor, stupid, and helpless. They are often defended by solicitors who confine their exertions to getting a copy of the depositions and endorsing it with the name of some counsel to whom they pay a very small fee, so that even when prisoners are defended by counsel the defence is often extremely imperfect, and consists rather of what occurs at the moment to the solicitor and counsel than of what the man himself would say if he knew how to say it. When a prisoner is undefended his position is often pitiable, even if he has a good case. An ignorant, uneducated man has the greatest possible difficulty in collecting his ideas, and seeing the bearing of facts alleged. He is utterly unaccustomed to sustained attention or systematic thought, and it often appears to me as if the proceedings on a trial, which to an experienced person appear plain and simple, must pass before the eyes and mind of the prisoner like a dream which he cannot grasp. I will give an illustration of what I mean. . . . A man was indicted at a Court of Quarter Sessions for stealing a spade. The evidence was that the spade was safe overnight and was found in his possession next day, and that he gave no account of it. He made no defence whatever, and was immediately convicted. When called upon to say why sentence should not be passed upon him, he replied in a stupid way, 'Well, it is hard I should be sent to gaol for this spade, when the man I bought it of is standing there in court.' The chairman caused the man referred to to be called and sworn; the jury, after hearing him, recalled the verdict they had given, and the man was acquitted at once. . . . The propriety of making the parties competent witnesses in civil cases is no longer disputed. It is difficult to say why the same rule should not apply to criminal cases also. One objection to the admission of such evidence rests upon the false supposition that a witness is to be believed because he is sworn to speak the truth. The proper ground for admitting evidence is not that people are reluctant to lie, but that it is extremely difficult to lie minutely and circumstantially without being found out."

[9] *Post*, § 2272.

[10] For the history of the efforts at reform in England, and specimens of the arguments *pro* and *con*, see 99 Law Times 103; 100 Law Times 412; 101 Law Times 582; 103 Law Times 297; 104 Law Times 415; 32 Law Journal 210; 32 Law Times 362; 30 Law Times 218, 277, 288, 378; 31 Law Times 140, 151, 189; 1893, Mr. J. M. Lely, editor, in Best on Evidence, 8th ed., § 622 A; 1894, Serjeant Robinson, Bench and Bar, 4th ed., 296; 1915, Lord Alverstone, Recollections of Bar and Bench, p. 176.

A rational statement of the American experience under the modern rule will be found in Mr. (Assistant District Attorney) C. C. Nott's article, "In the District Attorney's Office", Atlantic Monthly, 1905, p. 481. The best survey of the question, from the point of view of experience, is found in Mr. (Assistant District Attorney) Arthur Train's invaluable and entertaining book, "The Prisoner at the Bar" (1906), pp. 161–164.

1908, Hon. E. J. SHERMAN (Justice of the Superior Court of Massachusetts), Recollections of a Long Life, 234: "James H. Vahey, during the trial [of Charles L. Tucker for murder, in 1904,] entered the judge's lobby, after the adjournment of court, Judges Sherman and Sheldon, Sheriff John R. Fairbairn and Mr. Vahey, being present; the following conversation took place: Mr. *Vahey:* 'Judge Sherman, you having had a large experience as attorney general and as a justice of this court in capital trials, I want to ask your advice, as I have had little or no experience in such cases and am a good deal embarrassed.' Judge *Sherman:* 'If I can properly advise you, I will.' Mr. *Vahey:* 'Shall I put the prisoner on the witness stand?' Judge *Sherman:* 'I do not think it would be proper for me to answer that question. Perhaps I can tell you what the rule and practice is among the best lawyers in such cases. If the attorney believes his client innocent, put him on the witness stand without hesitation. If, however, he believes him guilty, never put him on the witness stand. If the prisoner insists on being a witness and the attorney believes him guilty, the attorney should say to him: "I advise you not to testify, but as you have more interest in the case than I have, I shall not interfere."' 'What do you say, Judge Sheldon?' Judge *Sheldon:* 'I fully concur in what you say about the practice among the best lawyers in such cases.' Mr. *Vahey:* 'I thank you, gentlemen, for advising me.' Some days after, Mr. Vahey again entered the judges' office and said: 'After our interview the other evening, I told Tucker what you said to me concerning his being a witness. After talking with him a long time, I told him to think it over carefully and then to decide what to do. Subsequently he told me that he had decided not to be a witness, and thereby he relieved me of a great responsibility, and I did not have to advise him.'"

1915, Lord ALVERSTONE, Recollections of Bar and Bench, p. 176: "It will be convenient here to refer to the effect of the passing of the Act which enables prisoners to give evidence. I had long been impressed with the absolute necessity of such a measure in the interests of justice, for the protection of the innocent and (it may be) for the more certain conviction of the guilty. My main object was to enable an innocent man to give his own account of transactions in which he had been engaged, and which might appear to tell against him. . . . A short time before, I had as leader to Mr. Lockwood, conducted the defence in a civil action for fraud brought against a gentleman named Barber, who had been prosecuted and convicted at the Old Bailey for the same fraud, and had served two or three months in prison. The case was tried before Lord Coleridge; and Sir Charles Russell, who was counsel for the plaintiff, not unnaturally treated it as an undefended action, and opened a very serious fraud, mentioning the previous conviction. Lord Coleridge also took a very strong view against the defendant up to the end of the case for the plaintiff, which lasted more than two days. It being a civil action, I was able to call the defendant, who gave his evidence in a very straightforward manner, denying all the imputations of fraud, and showing that he and other members of his family had invested considerable sums of money in the company in connection with which the original charge had been made. He had not attempted to sell his shares, and had lost several thousand pounds. In the course of his examination in chief, the jury interposed and found that the defendant had not been guilty of fraud. Lord Coleridge often referred to the case, expressing the view that if the defendant's evidence could have been given at the criminal trial, he could not possibly have been convicted and punished. These are two important cases showing the value to an innocent man of being able to tell his own story.

"I was so convinced of the necessity for the amendment of the law in this direction that I had already introduced a Bill for several sessions into the House of Commons. At first it met with very lukewarm support; in some quarters there was considerable opposition. Many suggested that the power of the accused to give evidence would deprive the defending counsel of the advantage of the observations which the prisoner's inability to give evidence always enabled him to make to the jury — namely, that the mouth of the defendant, who alone knew the real facts, was unfortunately closed. Gradually, however, though still

opposed by many eminent barristers and clerks of assize, my opinion gained ground, and after five or six years, Lord Halsbury, who was much interested in the matter, took up the Bill, and it became an Act of Parliament. . . .

"I regard the Act as a great protection to those who are made the subjects of unfounded or blackmailing prosecutions. . . . I think that the greatest protection which an innocent man can have is to be able to give an account of the matter at the earliest possible moment. I have, of course, discussed the question with many Judges, who are all practically now of my opinion. One Judge from Australia told me that he had worked under both systems, and that he would not now try a single case without giving the defendant the opportunity of giving evidence."

1919, Sir *Edward Clarke*, K. C., The Story of My Life, 144 (commenting on his defence of Clarke, the detective, in 1877): "It will be realised that my task in defending my client was a very difficult one. It would, indeed, in my opinion, have been practically impossible to obtain an acquittal if at that time the law had permitted accused persons to be called as witnesses. The strange rule which then prevailed by which neither a prisoner nor his wife was a competent witness (a rule which was the worst example of judge-made law which I have ever known) often operated cruelly against an innocent person; but in nine cases out of ten it was of advantage to the guilty."

§ 580. **Same: Co-indictees and Co-defendants.** There remains to-day, in spite of the statutory abolition of the accused's incapacity, a group of questions inherited from the common-law rule, and liable still to arise because of the incomplete and careless formulation of the statutes in some jurisdictions.

At common law, when two or more persons were tried upon the same charge, each and all were naturally disqualified.[1] Only by ceasing to be a party in the cause could one of them become a witness, for or against his co-defendants; and there were precedents concerning the manner in which a defendant could be deemed thus to have ceased to be a party. Now, when legislation came to remove the disqualification of the accused, the statutory phrase ran frequently that he should be receivable "in his own behalf", — thus omitting in terms to provide for competency on behalf of or against another defendant. However, before this legislation had made the change, statutes had been passed, in many jurisdictions, declaratory of the common-law rules as to the mode of making a co-defendant competent by removing him from the record, or settling some of the details left doubtful in that respect by judicial precedent; and these statutes, appropriate enough while the accused's disqualification continued, were often left upon the statute-book, in spite of successive revisions, after the general statute abolishing the disqualification had been enacted; so that it became necessary to reconcile the latter statute with the former. The result has been some confusion and uncertainty in the state of the law after the statutes' enactment, — an uncertainty wholly unnecessary if proper caution had been taken in framing them. To ascertain the present law, it is therefore necessary to consider what the rule of the common law was, and then to observe the effect of the statutory modification.

§ 580. [1] For the question whether the *confession* of one defendant can be used as an admission against the other, see *post*, §§ 1076, 1079.

For the *right to cross-examine* a co-defendant who takes the stand in his own behalf, see *post*, § 2276.

A. *Common Law.* (1) It is plain that a person *not a party of record to the same charge* would not be disqualified to testify, either for or against the accused. Hence, in the first place, a person who is merely an *unindicted accomplice* is as such not disqualified;[2] nor yet a person charged in *another indictment*.[3] Whether a person charged in another indictment *for the same crime*, as principal or as accessory, would be disqualified, was left doubtful,[4] though upon principle he was properly not to be treated as a party to the charge.

(2) Furthermore, a person who had been *charged in the same indictment*, but had *ceased to be a party* to the charge, by the time his testimony was offered, would cease to be disqualified. This principle was not disputed; the differences of opinion grew out of the question whether the cessation of his party-character should be tested by the technical state of the record or merely by his substantial lack of further interest in the result. In strictness, the former test might be more consistent with the settled doctrine already noted under (1) *supra;* but, in an enlightened view of the object of the disqualifying rules, the other test was preferable. Accordingly, there was good authority for the rules that a person jointly indicted would be admissible if he had ceased to have an interest in the result by virtue of an *entry of nolle prosequi*,[5] or of a formal *acquittal* or *discharge*,[6] or of a judgment of *conviction on the verdict*,[7] or of a judgment of *conviction on*

[2] This was hardly even doubted; compare the cases cited *post*, § 2056.

The only question ever seriously made was whether a *promise of pardon* disqualified the accomplice; and this was universally decided in the negative: 1662, Tonge's Trial, 6 How. St. Tr. 226, Kelyng 16 (Hale, C. J., and Brown, J., diss.); 1696, Charnock's Trial, 12 How. St. Tr. 1404, 1454; 1722, Layer's Trial, 16 How. St. Tr. 160 (Solicitor-General: "Suppose, then, for argument sake, that there was a promise of pardon made to a man upon condition that he should give evidence; I apprehend that would not disable him from being a witness"); 1920, Bush *v.* People, 68 Colo. 75, 187 Pac. 528; 1784, Com. *v.* Fairfield, Mass., Dane's Abr., c. 84, art. 2, § 3; 1898, State *v.* Reed, 50 La. An. 990, 24 So. 131; 1897, State *v.* Riney, 137 Mo. 102, 38 S. W. 718; 1897, State *v.* Magone, 32 Or. 206, 51 Pac. 452.

In a few jurisdictions, the trial Court's discretion was said to control: 1827, People *v.* Whipple, 9 Cow. 708, 713; 1875, Lindsay *v.* People, 63 N. Y. 143, 153; 1877, Wight *v.* Rindskopf, 43 Wis. 344, 348.

An interesting episode, illustrating this principle, is found in the trial of the Spanish pirates before Justice Story, in 1834: U. S. *v.* Gibert, 10 Amer. St. Tr. 699, 715.

For a promise of pardon as *impeaching the credit* of an accomplice, see *post*, § 967.

For *moral turpitude* as disqualifying an accomplice, see *ante*, § 526.

[3] 1867, McKenzie *v.* State, 24 Ark. 636; 1886, Ex parte Stice, 70 Cal. 51, 56, 11 Pac. 459; 1888, State *v.* Walker, 98 Mo. 95, 102, 9 S. W. 646, 11 S. W. 1133; 1906, Barbe *v.* Terr., 15 Okl. 562, 86 Pac. 61.

Contra: 1912, State *v.* Case, 61 Or. 265, 122 Pac. 304 (following State *v.* White).

[4] 1840, R. *v.* Lyons, 9 C. & P. 555 (one indicted separately as principal; (not decided); 1905, State *v.* Cobley, 128 Ia. 114, 103 N. W. 99 (admitted for the State); 1873, Davis *v.* State, 38 Md. 15, 47 (one indicted separately as accomplice, excluded); 1898, State *v.* Stewart, 142 Mo. 412, 44 S. W. 240 (one indicted separately as accomplice, admitted); 1898, State *v.* Black, 143 Mo. 166, 44 S. W. 341 (same); 1906, State *v.* Myers, 198 Mo. 225, 94 S. W. 242 (same; here an accomplice separately charged and convicted).

[5] 1741, L. C. Hardwicke, in Man *v.* Ward, 2 Atk. 228; 1896, Love *v.* People, 160 Ill. 501, 43 N. E. 710; 1891, State *v.* Steifel, 106 Mo. 129, 133, 17 S. W. 227; 1875, Lindsay *v.* People, 63 N. Y. 143, 153.

[6] 1893, State *v.* Minor, 117 Mo. 302, 305, 22 S. W. 1085; 1877, Kehoe *v.* Com., 85 Pa. 127, 137 (excluded, because no judgment was passed).

[7] 1736, R. *v.* Sherman, Lee cas. t. Hardwicke 303 (discharge, after plea in abatement); 1826, R. *v.* Rowland, Ry. & Mo. 401; 1857, R. *v.* O'Donnell, 7 Cox Cr. 337; 1915, R. *v.* McClain, 23 D. L. R. 312, Alta. (convicted accomplice, not yet sentenced, held competent for the Crown).

default,[8] or of a *plea of guilty*, with or without the passing of sentence or judgment thereon.[9]

(3) Does a *severance of trials* of persons *jointly charged* in a single indictment have the same effect in qualifying them as a discharge from the record? In form, it does not; they remain named together as parties. But in substance, it does; for they are tried by different juries, and nothing said by one to the other's jury can either help or hurt his own cause:

1884, PETERS, C. J., in *State* v. *Barrows*, 76 Me. 401, 408: "The argument against the admission of such evidence does not strike us with much force. It is almost universally admitted that an accomplice separately indicted may be a witness for the State, and any distinction arising between trials on a joint indictment and trials on separate indictments is not readily appreciated. The crime is supposed to be jointly committed in either case; . . . the interest and motives of the witness must be the same whether he is to be afterwards tried under the same or another indictment. As said by BEASLEY, J., in State v. Brien, [*infra*] 'The only reason for the rejection of such a witness is that his own accusation of crime is written on the same piece of paper with the charge against the culprit whose trial is in progress.' . . . Stringent as the rule [of interest] was, it did not apply to indictments to its full extent. . . . Courts seemed inclined to regard a co-defendant in a criminal case as not a party unless a party to the issue on trial. . . . To be incompetent to testify, the defendants must be in charge of the same jury."

The better opinion, then, was that an indictee for whom a severance had been granted was receivable, not only for the *prosecution*,[10] but also on behalf

[8] *Contra:* 1804, R. *v.* Lafone, 5 Esp. 154, Lord Ellenborough, C. J. (for the special case of a joint offence); this case, though often cited, seems to stand alone.

[9] The English rulings agreed to this, equally whether the witness was called for or against the co-defendant; 1738, R. *v.* Fletcher, 1 Stra. 633 (here after fine paid); 1840, R. *v.* Lyons, 9 C. & P. 555, 558 (here before sentence served); 1841, R. *v.* George, Car. & M. 111 (here before sentence passed); 1847, R. *v.* Hinks, 1 Den. Cr. C. 84, 2 C. & K. 462, 465, by all the judges (here before sentence passed); 1849, R. *v.* Arundel, 4 Cox Cr. 260 (here before sentence passed); 1875, R. *v.* Gallagher, 12 Cox Cr. 61 (same).

Contra: 1855, R. *v.* Jackson, 6 Cox Cr. 525 (here allowed only after sentence passed).

In the United States, it seems conceded that he may be called *for the prosecution:* 1847, Com. *v.* Smith, 12 Metc. Mass. 238 (here before sentence); 1891, State *v.* Jackson, 106 Mo. 174, 177, 17 S. W. 301 (here before sentence); 1900, State *v.* Young, 153 Mo. 445, 55 S. W. 82; 1919, State *v.* Reppley, 278 Mo. 333, 213 S. W. 477; 1897, State *v.* Magone, 32 Or. 206, 51 Pac. 452; 1900, State *v.* Savage, 36 Or. 191, 60 Pac. 610.

He ought to be equally admissible *for the defendant:* 1863, State *v.* Jones, 51 Me. 125 (either before or after sentence); 1875, Lee *v.* State, 51 Miss. 566, 568, 574.

Contra, unless sentence is passed: 1881, Henderson *v.* State, 70 Ala. 23, 24 (there must be "some order which amounts to an acquittal or a severance"; following R. *v.* Lafone, *supra*, note, and ignoring the other precedents); 1859, State *v.* Young, 39 N. H. 283, 284 (plea of 'nolo contendere', not sufficient without judgment; the rule being equally applicable to the plea of not guilty); 1871, State *v.* Bruner, 65 N. C. 499 ('nolo contendere'); 1877, Kehoe *v.* Com., 85 Pa. 127, 137.

[10] *Eng.* 1865, R. *v.* Winsor, 10 Cox Cr. 276, 300, 314, 320, 323, 326 (by all the judges); 1866, Winsor *v.* Regina, L. R. 1 Q. B. 289, 311, 320, 324, 327, 390, 396; *U. S.* 1891, Adams *v.* State, 28 Fla. 511, 533, 10 So. 106; 1838, Gilman's Trial, Ill., 5 Amer. St. Tr. 528, 556 (trial arising out of the destruction of Lovejoy's Abolition printing-press); 1873, State *v.* Prudhomme, 25 La. An. 522; 1886, State *v.* Mason, 38 La. An. 476; 1884, State *v.* Barrows, 76 Me. 401, 408 (see quotation *supra*); 1920, People *v.* Schultz, 210 Mich. 297, 178 N. W. 89; 1883, Evans *v.* State, 61 Miss. 157; 1876, Carroll *v.* State, 5 Nebr. 31, 35; 1868, State *v.* Brien, 32 N. J. L. 414; 1879, Noyes *v.* State, 41 N. J. L. 418, 429; 1859, Allen *v.* State, 10 Oh. St. 287, 303; 1869, Brown *v.* State, 18 Oh. St. 496, 509.

Contra: 1887, State *v.* Chyo Chiagk, 92 Mo. 395, 401, 4 S. W. 704; 1901, State *v.* Weaver, 165 Mo. 1, 65 S. W. 308.

of the *co-indictee* himself; yet on the latter point, by some obscure reasoning, the majority of Courts were opposed.[11]

B. *Statutes.* Let us now suppose that a statute has given to the accused person the right to testify, *i.e.* has removed his disqualification as a party. Such a statute exists, in one form or another, in every jurisdiction but one. This statute is now to be applied to the law as it stood, and the question is, what effect it has had upon the situations in which at common law a co-indictee was disqualified. Those cases were substantially two, (1) a co-indictee, after a severance of trial, called on the defendant's behalf (here, by the great majority of Courts excluded), (2) a co-defendant, tried at the same time, called either for or against the defendant (here by all Courts excluded).

(1) *Separate trial.* The plain object of the statute was to remove the disqualification of the accused as a party; his common-law incompetency as co-indictee was due solely to his being a party in interest; therefore any and every such disqualification has disappeared. This is impregnable logic, if the premises be conceded:

1881, SCHOFIELD, J., in *Collins* v. *People*, 98 Ill. 584, 587: "We do not deem it necessary to inquire what was the common law in this respect, since we are of opinion that the question is conclusively settled against plaintiff in error by our statute. It provides: 'No person shall be disqualified as a witness in any criminal case or proceeding by reason of his interest in the event of the same, as a party or otherwise, or by reason of his having been convicted of any crime; but such interest or conviction may be shown for the purpose of affecting his credibility; provided, however, that a defendant in any criminal case or proceeding shall only at his own request be deemed a competent witness. . . . If at common law Lacomb would have been an incompetent witness, it must have been because he was interested in the event of the suit, and under the above language it is wholly unimportant whether that interest arose from his being a party or otherwise, for in either event he is rendered competent. The proviso adds force to this view; it shows that it was intended that *all* defendants should be *allowed* to testify, for otherwise the proviso was wholly unnecessary. Under that section a defendant is unquestionably entitled to have the benefit, for what it is worth, of the evidence of a co-defendant; and the same right is equally clearly given to the State. The infamy arising from convicted guilt, and the interest resulting from being a party to the same case or proceeding, may now be considered for the purpose of determining what credence should be given to the testimony of the witness, but they no longer furnish any ground for excluding his testimony."

1884, PETERS, C. J., in *State* v. *Barrows*, 76 Me. 401, 410: "[Our statutory enactments] have weakened, if not abrogated, the argument of public policy. It was, no doubt, the

[11] *Pro: Eng.* 1872, R. *v.* Payne, 12 Cox Cr. 118, *semble; Can.* 1863, R. *v.* Jerrett, 22 U. C. Q. B. 499, 511; 1906, R. *v.* Blais, 11 Ont. L. R. 345; *U. S.* 1881, Henderson *v.* State, 70 Ala. 23, 25; 1914, Lujan *v.* State, 16 Ariz. 123, 141 Pac. 706; 1846, Jones *v.* State, 1 Ga. 610, 617; 1854, Ward's Trial, Ky., 3 Amer. St. Tr. 70, 103 (murder); 1859, Allen *v.* State, 10 Oh. St. 287, 303.

Contra: U. S. 1856, Moss *v.* State, 17 Ark. 327, 330; 1891, Adams *v.* State, 28 Fla. 511, 534, 10 So. 106; 1859, State *v.* Nash, 10 Ia. 81, 85; 1856, Adwell *v.* Com., 17 B. Monr. Ky. 310, 318; 1873, Davis *v.* State, 38 Md. 15, 47 (for accessories); 1830, Com. *v.* Marsh, 10 Pick. Mass. 57; 1860, State *v.* Dumphey, 4 Minn. 438, 449; 1851, State *v.* Roberts, 15 Mo. 28, 59; 1887, State *v.* Chyo Chiagk, 92 Mo. 395, 401; 1813, People *v.* Bill, 10 Johns. N. Y. 95; 1917, State *v.* Schyhart, — Mo. —, 199 S. W. 205 (killing cattle); 1838, People *v.* Williams, 19 Wend. N. Y. 377; 1877, Kehoe *v.* Com., 85 Pa. 127, 137; 1853, Lazier *v.* Com., 10 Gratt. Va. 708, 716 (changed here by express statute, as applied in 1894, Smith *v.* Com., 90 Va. 759, 19 S. E. 843).

design of the Legislature that the objection to the competency of parties as witnesses should be removed both in civil and criminal cases. In crininal cases the provision is this: 'In criminal trials the accused shall at his own request, but not otherwise, be a competent witness.' . . . If the argument for the defendant is sound, then the common-law rule has become reversed; defendants can testify against each other when tried together, and cannot so testify when tried apart. . . . It would present a singular inconsistency in criminal procedure if . . . a co-defendant on trial may be called from the dock to the witness-stand, but a companion in guilt, included in the same indictment, not on trial, be excluded therefrom."

This is plain enough, when the witness is called for the *prosecution*, because at least that much was already conceded at common law.[12] But the reasoning applies equally to the witness called for his *co-defendant*, so that the common-law rule (as it had been applied by most Courts) must be deemed changed in that respect, by implication of the statute.[13]

(2) *Same trial.* The reasoning has precisely the same effect in its application to the case of the disqualification (unanimously conceded) at common law, namely, testimony of a co-defendant being tried at the same time. The statute has removed all his incapacity as a party, both in its direct effect upon himself and in its indirect effect upon others:

1900, SHELBY, J., in *Wolfson* v. *U. S.*, 41 C. C. A. 422, 101 Fed. 430, 436: "When any defendant chooses to testify, the statute permits him to do so. It does not matter whether his testimony is for or against himself, or for or against his co-defendant. The only limitation in the statute is that he shall not be made a witness except on his own request. Being sworn as a witness at his own request, he is amenable, generally, to the rules governing

[12] *Federal:* 1892, Benson *v.* U. S., 146 U. S, 325, 333, 13 Sup. 60 (explaining U. S. *v.* Reid. 12 How. 361); 1905, Wong Din *v.* U. S., 135 Fed. 702, 68 C. C. A. 340 (conspiracy to evade immigration law); 1917, Rosen *v.* U. S., 245 U. S. 467, 38 Sup. 148 (co-indictee admitted for prosecution; Benson *v.* U. S. followed); *Arkansas:* 1881, Casey *v.* State, 37 Ark. 67, 83, *semble; Florida:* 1899, Bishop *v.* State, 41 Fla. 522, 26 So. 703 (pleading guilty but not sentenced); 1900, Williams *v.* State, 42 Fla. 205, 27 So. 898; 1910, Menefee *v.* State, 59 Fla. 316, 51 So. 555 (Rev. St. § 2905, Gen. St. § 3975, excluding approvers, held not applicable to the witness offered); *Idaho:* 1905, State *v.* Knudston, 11 Ida. 524, 83 Pac. 226 (pleading guilty, but not yet discharged from the information); *Illinois:* 1881, Collins *v.* People, 98 Ill. 584, 587 (see quotation *supra*); *Kentucky:* 1907, Simpson *v.* Com., 126 Ky. 441, 103 S. W. 332; *Louisiana:* 1898, State *v.* Asbury, 49 La. An. 1741, 23 So. 322; 1901, State *v.* Slutz, 106 La. 637, 31 So. 179; *Missouri:* 1909, State *v.* Shelton, 223 Mo. 118, 122 S. W. 732; 1906, State *v.* Myers, 198 Mo. 225, 94 S. W. 242 (convicted); 1917, State *v.* Schyhart, — Mo. —, 199 S. W. 205 (nor does a promise of immunity bar the accomplice); *New Jersey:* 1899, Munyon *v.* State, 62 N. J. L. 1, 42 Atl. 577; *New York:* 1903, People *v.* Van Wormer, 175 N. Y. 188, 67 N. E. 299; *Oklahoma:* 1905, Wells *v.* Terr., 15 Okl. 195, 81 Pac. 425 (pleading guilty but not sentenced); *South Carolina:* 1910, State *v.* Kennedy, 85 S. C. 146, 67 S. E. 152; *Texas:* 1907, Burdett *v.* State, 51 Tex. Cr. 345, 101 S. W. 988 (after plea of guilty and before sentence); *Vermont:* 1917, State *v.* Nelson, 91 Vt. 168, 99 Atl. 881 (burglary); *Virginia:* 1894, Smith *v.* Com. 90 Va. 759, 19 S. E. 843; *Washington:* 1891, Edwards *v.* State, 2 Wash. 291.

Contra: 1906, State *v.* White, 48 Or. 416, 87 Pac. 137.

[13] *Accord:* 1892, Benson *v.* U. S., 146 U. S. 325, 337, 13 Sup. 60, *semble;* 1898, McGinnis *v.* State, 4 Wyo. 115, 53 Pac. 492; 1855, People *v.* Labra, 5 Cal. 184; 1862, People *v.* Newberry, 20 id. 439; 1905, State *v.* Knudston, 11 Ida. 524, 83 Pac. 226; 1881, Collins *v.* State, 98 Ill. 584, 587; 1893, State *v.* Bogue, 52 Kan. 79, 84, 34 Pac. 410; 1921, Welch *v.* State, 88 Tex. Cr. 346, 227 S. W. 300 (co-indictee for perjury, admitted for defendant).

Contra: 1885, Foster *v.* State, 45 Ark. 328; 1884, State *v.* Drake, 11 Or. 396, 402, 4 Pac. 1204; 1906, State *v.* White, 48 Or. 416, 87 Pac. 137 (the trial Court has discretion as to the one discharged); 1907, Burdett *v.* State, 51 Tex. Cr. 345, 101 S. W. 988 (for a misdemeanor).

other witnesses. He could testify against or for his co-defendant on trial with him, because the only reason why he could not do so at common law was that he was a party to the record and interested in the case. In other words, the only common-law reason for his exclusion was that he was a defendant also on trial. The statute clearly removes that objection. The fact that two defendants were on trial does not prevent the statute applying. There is nothing in it to confine its operation to cases where but a single defendant is named in the indictment."

This result is generally accepted, at least for a co-defendant called for the *prosecution*.[14] The reasoning applies with equal force to a co-defendant called for the *accused*,[15] though a few Courts, having perhaps in mind the common-law distinction, or going upon the special words of a statute, declined to take this last step.[16] There ought to-day to be no further question in any jurisdiction (except Georgia) that there is no limitation whatever on the qualification of a co-indictee or co-defendant to testify either for or against the accused.

§ 581. **Testifying to One's Own Intent.** Under the influence of some obscure suggestion, not easily traceable, the view has been often urged upon

[14] 1900, Wolfson *v.* U. S., 41 C. C. A. 422, 101 Fed. 430, 102 id. 134 (Boarman, J., diss.); 1898, People *v.* Plyler, 121 Cal. 160, 53 Pac. 553; 1888, Conway *v.* State, 118 Ind. 482, 484, 21 N. E. 285; 1878, State *v.* Hudson, 50 Ia. 157, 161, *semble;* 1899, Gilbert *v.* Com., 21 Ky. 544, 51 S. W. 804; 1915, State *v.* Lebleu, 137 La. 1007, 69 So. 808 (larceny); 1882, State *v.* Smith, 86 N. C. 705; 1918, U. S. *v.* Abanzado, 37 P. I. 658, 662 (applying Act No. 2709, which replaced Gen. O. 58, § 34, quoted *ante*, § 488); 1918, U. S. *v.* Alabot, 38 P. I. 698 (similar); 1919, U. S. *v.* Enriquez, 40 P. I. 603 (Act No. 2709 held not applicable to an accomplice not charged in the information; three judges diss.); 1903, People *v.* Ortiz, 4 P. R. 533, 545; 1915, People *v.* Alsina, 22 P. R. 426, 437 (C. Cr. P. § 239 applied); 1896, State *v.* Smith, 8 S. D. 547, 67 N. W. 619 (co-defendant may testify without limitation; Compiled Laws, § 7381, prevailing over §§ 7379, 7380, which prevailed over § 5260); 1900, State *v.* Hyde, 22 Wash. 551, 61 Pac. 718.

The following case rests on the peculiar provisions of the English statute: 1920, The King *v.* Paul, 2 K. B. 183 (burglary; under St. 1898, c. 36, § 1, quoted *ante*, § 196, a co-defendant who takes the stand and pleads guilty may be cross-examined to obtain testimony against other defendants).

[15] ENGLAND: 1909, Macdonnell's Case, 2 Cr. App. 322 (under St. 1898, c. 36, § 1, "a prisoner is a competent, though not a compellable, witness for a co-prisoner jointly indicted with him for the same offence").

UNITED STATES: *Fed.* 1900, Wolfson *v.* U. S., 41 C. C. A. 422, 101 Fed. 430, 436; *Ill.* 1881, Collins *v.* State, 98 Ill. 584, 587, *semble; Iowa:* 1867, State *v.* Gigher, 23 Ia. 318; 1879, State *v.* Stewart, 51 Ia. 312, 1 N. W. 646; *S. Dak.* 1896, State *v.* Smith, 8 S. D. 547, 67 N. W. 619; *Tenn.* 1892, Richards *v.* State, 91 Tenn. 723, 20 S. W. 533; *Wyo.* 1893, McGinnis *v.* State, 4 Wyo. 115, 53 Pac. 492.

In *Kentucky*, a statute (Cr. Code, § 234, as amended by St. May 1, 1886) formerly prohibited co-defendants from testifying on each other's behalf in cases of conspiracy; this was abolished by St. March 23, 1894, applied as follows: 1894, Thompson *v.* Com., — Ky. —, 26 S. W. 1100; 1895, Kidwell *v.* Com., 97 id. 538, 31 S. W. 131; 1902, Williams *v.* Com., — Ky. —, 68 S. W. 7 (following Kidwell *v.* Com.).

In *Texas* there is a peculiar doctrine as to the right of a defendant to insist on the State's *guaranty of immunity* to a co-defendant thus dismissed, in order that the defendant may call him without the obstacle of his claim of privilege: 1906, Puryear *v.* State, 50 Tex. Cr. 454, 98 S. W. 258.

[16] 1893, Ballard *v.* State, 31 Fla. 266, 284 (§§ 1095, 2863, 2908, do not abolish the common-law rule); 1899, State *v.* Angel, 52 La. An. 485, 27 So. 214; 1901, State *v.* Breaux, 104 La. 540, 29 So. 222; 1898, State *v.* Franks, 51 S. C. 259, 28 S. E. 908 (C. Cr. P. § 63, does not make a defendant competent for a co-defendant).

But the co-defendant is of course competent *on his own behalf:* 1901, State *v.* Sims, 106 La. 453, 31 So. 71.

For an exclusion under a special English statute, see the following: 1872, R. *v.* Payne, 12 Cox Cr. 118 (the reason being that his cross-examination might make him testify against himself).

In Louisiana, St. 1904, No. 41 removed all disqualification on the above grounds.

Courts that a person — especially a party — should be disqualified from *testifying to his own intent* or motive, even where that intent or motive is material to be investigated.

The argument is (so far as any has been vouchsafed) that such testimony may be falsified without the possibility of detection, and that therefore it is dangerous to permit an interested person to allege, in effect, whatever he pleases as to his own state of mind.[1] The answers to this argument are various and sufficient. In the first place, there is no precedent for it in the inherited common law; it is an attempt to create a rule without an analogy in the accepted doctrines of the judicial rulings. In the next place, it assumes that there is no counter-evidence available, and yet asks that the only evidence which it assumes to be available shall be excluded, — in other words, asks that a concededly proper issue be submitted to the jury with no evidence at all. In the third place, its assumption is incorrect in fact, namely, that there is no other available and sufficient evidence of intent or motive by which the person's own testimony can be tested and checked; for the evidence from conduct and circumstances and from others' testimony is not only a permissible but a potent source of belief,[2] and is amply sufficient to guard against falsification. Finally, the argument is at least of no higher value than the argument in favor of the unsatisfactory statutory rule against survivors' testimony (*ante*, § 578). It is merely of a piece with all crude attempts to disqualify a witness by reason of interest, — attempts which to-day must stand discredited by the general repudiation of that species of disqualification (*ante*, § 576). Some of these answers to the argument are represented in the following judicial utterances disapproving it, — a disapproval which is to-day practically unanimous:[3]

§ 581. [1] The argument is set forth in extracts from Alabama opinions quoted *post*, § 1966.

[2] *Ante*, §§ 237–242, 300–371, 385–406, *post*, §§ 661, 1963 ff.

[3] In all the following cases the testimony was held receivable:

ENGLAND: 1791, Answer of the Judges concerning Fox's Libel Act, 22 How. St. Tr. 296, 300, *semble* (quoted *post*, §§ 661, 1962); 1897, R. *v.* King, 1 Q. B. 214 (false pretences, by the prosecuting witness, as to his belief upon the representation).

UNITED STATES: *Federal:* 1872, Bank *v.* Kennedy, 17 Wall. 20, 26 (purpose of an advance of money); 1896, Wallace *v.* U. S., 162 U. S. 466, 16 Sup. 859 (the defendant's belief that the deceased was about to assault the defendant); 1909, Crawford *v.* U. S., 212 U. S. 183, 29 Sup. 260 (an accused having taken surreptitiously certain letters from a third person's file, with apparent intent to suppress inculpating evidence, it was held proper for him to state that his intent was not to suppress them, but to preserve them for use in his trial); 1912, Hedderly *v.* U. S., C. C. A., 193 Fed. 561 (intent of entrymen in filing upon public lands, allowed); 1916, Buchanan *v.* U. S., 8th C. C. A., 233 Fed. 257 (accused may testify to his belief); 1917, Sparks *v.* U. S., 6th C. C. A., 241 Fed. 777, 791 (fraudulent use of the mails; defendant's testimony to lack of fraudulent intent, and the circumstances thereof, held improperly rejected);

Alabama: see *supra*, in the text:

California: 1899, Kyle *v.* Craig, 125 Cal. 107, 57 Pac. 791 (intent in executing a deed 'mortis causa'; grantor's testimony to his intent); 1909, Fanning *v.* Green, 156 Cal. 279, 104 Pac. 309 (husband's gift to wife; the husband-plaintiff's testimony to his intent held admissible, the intent being here material in the substantive law); 1912, Runo *v.* Williams, 162 Cal. 444, 122 Pac. 1082 (malicious prosecution; whether defendant was actuated by malice, etc., allowed);

Colorado: 1906, Boulder & W. R. D. Co. *v.* Leggett D. & R. Co., 36 Colo. 455, 86 Pac. 101 (by a party, whether he intended to abandon a water-right, allowed);

Columbia (Dist.): 1902, Bass *v.* U. S., 20 D. C. App. 232, 242 (by one charged with false

1827, SAVAGE, C. J., in *People* v. *Ferguson*, 8 Cow. 107: "It is true, if the voter should swear falsely, you probably cannot convict him of perjury. But are we to reject every witness who comes to swear under such circumstances that if he swears false he cannot be convicted of perjury? I know of no such rule of evidence. If this principle is to be engrafted upon the law of evidence, we must always inquire, before a witness is sworn, whether he can be convicted of perjury if he swears falsely, and if not, he must be rejected."

representation, as to his motive and belief);
Connecticut: 1910, Fox v. Shanley, 94 Conn. 350, 109 Atl. 249 (husband's intent in handing money to wife);
Florida: 1902, Lane v. State, 44 Fla. 105, 32 So. 896 (accused's belief as to danger calling for self-defence); 1904, Eatman v. State, 48 Fla. 21, 37 So. 576 (embezzlement; defendant allowed to speak as to his belief in his right to the money);
Georgia: 1902, Acme Brewing Co. v. Central R. & B. Co., 115 Ga. 494, 42 S. E. 8 (by a purchaser, as to his good faith in paying); 1903, Alexander v. State, 118 Ga. 26, 44 S. E. 851 (murder; by a co-indictee, that he did not intend violence);
Illinois: 1866, Miner v. Phillips, 42 Ill. 131 (by a debtor, as to his good faith in making a sale alleged to be fraudulent); 1894, Wohlford v. People, 148 Ill. 296, 298, 36 N. E. 107 (assault; by defendant, whether he intended to act in self-defence); 1894, Pope v. Hanke, 155 Ill. 617, 40 N. E. 839, *semble* (by one buying or selling stocks on a margin, as to his intent to take or give delivery); 1914, People v. Peters, 265 Ill. 122, 106 N. E. 513 (defendant's intention in bribery); 1918, People v. Scott, 284 Ill. 465, 120 N. E. 553 (homicide; by a defendant, whether he believed he be acting in his father's or his own defence, held allowable);
Indiana: 1864, Zimmerman v. Marchland, 23 Ind. 474 (grantee's intent, properly immaterial, but testimony excluded improperly on the present ground; practically repudiated in the ensuing cases); 1876, Greer v. State, 53 Ind. 420 (by one indicted for assault with intent to rape, as to his intention); 1876, White v. State, 53 Ind. 595 (by one indicted for larceny, as to his intention at the time of taking); 1880, Shockey v. Mills, 71 Ind. 288 (by a debtor, as to his intent in selling property alleged to have been transferred in fraud of creditors); 1881, Bidinger v. Bishop, 76 Ind. 244, 255 (by the alleged dedicator of a street, as to his intention); 1883, Parrish v. Thurston, 87 Ind. 440 (by a purchaser, as to his belief in the representations of the seller); 1883, Sedgwick v. Tucker, 90 Ind. 271, 281 (by a debtor, as to his intent in an alleged fraudulent conveyance); 1885, Over v. Schiffling, 102 Ind. 193, 26 N. E. 91 (the precise kind of intent does not appear); 1885, Heap v. Parrish, 104 Ind. 36, 39, 3 N. E. 549 (by the defendant in an action for malicious prosecution, as to his motive in prosecuting); 1888, Ross v. State, 116 Ind. 497, 19 N. E. 451 (by one accused of selling liquor unlawfully to a minor, as to his good faith); 1883, Sedgwick v. Tucker, 90 Ind. 281 (by a debtor, as to his intent in a transfer alleged to be fraudulent);
Iowa: 1865, Watson v. Cheshire, 18 Ia. 202, 211 (by an indorser, as to his belief in the truth of his representations); 1878, Selz v. Belden, 48 Ia. 451 (by a debtor, as to his intent in an alleged fraudulent conveyance, if relevant); 1885, Frost v. Rosecrans, 66 Ia. 495, 23 N. W. 895 (mortgagee, as to his knowledge of debtor's intent to defraud); 1886, Browne v. Hickle, 68 Ia. 330, 333, 27 N. W. 276 (general principle; see quotation *infra*); 1897, Zimmerman v. Brannon, 103 Ia. 144, 72 N. W. 439 (admissible where intent is relevant; but intent of a promisor in a guaranty is not); 1897, Counselman v. Reichart, 103 Ia. 430, 72 N. W. 490 (intent not to make actual purchases, as constituting a gambling contract); 1899, Kruse v. S. & W. Lumber Co., 108 Ia. 352, 79 N. W. 118 (by a creditor, that he did not accept a note in payment of a claim against the defendant); 1899, Chew v. O'Hara, 110 Ia. 81, 81 N. W. 157 (extortion; defendant's belief in the charges); 1900, Bartlett v. Falk, 110 Ia. 346, 81 N. W. 602 (by a person deceived, as to his reliance upon the false representations); 1902, Flam v. Lee, 116 Ia. 289, 90 N. W. 71 (by one imprisoned, as to his mental suffering); 1902, McDermott v. Mahoney, 119 Ia. 470, 93 N. W. 499 (by an intending purchaser, in an action by the broker against his employer for services, whether the witness was ready and willing to buy); 1906, Huggard v. Glucose S. R. Co., 132 Ia. 724, 109 N. W. 475 (to an employee, whether he relied on a promise to repair, allowed); 1906, Helm v. Anchor F. Ins. Co., 132 Ia. 177, 109 N. W. 605 (fraud in insurance, by the plaintiff, that he had no intent to deceive the defendant, admitted); 1909, Larson v. Thoma, 143 Ia. 338, 121 N. W. 1059 (intent to purchase); 1914, Pooley v. Dutton, 165 Ia. 745, 147 N. W. 154 (alienation of affections; the wife's testimony to the effect of letters on her affections); 1916, State v. Menilla, 177 Ia. 283, 158 N. W. 645 (murder of defendant's husband; that defendant "believed her son's life was in imminent danger", allowed);
Kansas: 1890, Gardom v. Woodward, 44 Kan. 758, 761, 25 Pac. 199 (by a debtor, as to the intent of an alleged fraudulent conveyance; good opinion, by Valentine, J.); 1901, State v. Kirby, 62 Kan. 436, 63 Pac. 752 (by a defendant, as to the meaning of his remark); 1911, State v. Hetrick, 84 Kan. 157, 113 Pac. 383

1867, SANDERSON, J., in *People* v. *Farrell*, 31 Cal. 576, 582: "If under the new rule [of competency] parties are to be kept in harness and not allowed to explain their actions and words, when they admit of explanation and when explanation is needed in order to exhibit the whole truth, but half the evil which was felt under the old rule has been removed. It is no answer to say that this enables a party to substitute a false motive for the true one or to convert words spoken in one sense into another. If the argument proves anything it

(false pretences; whether the cashier would have paid if he had not believed the defendant to be the party personated, allowed);
Louisiana: 1888, State *v.* Wright, 40 La. An. 589, 592, 4 So. 486 (accused's intent just before the affray); 1896, State *v.* Dillon, 48 La. An. 1365, 20 So. 913 (by a defendant in larceny, as to his intent in taking the goods);
Maine: 1836, Corinna *v.* Exeter, 13 Me. 328 (by an officer, whether an act was done in good faith); 1857, Edwards *v.* Currier, 43 Me. 484 (by a purchaser, as to his motives in a purchase alleged to be in fraud of creditors); 1857, Wheelden *v.* Wilson, 44 Me. 18 (same); 1897, Cushing *v.* Friendship, 89 Me. 523, 36 Atl. 1001 (one's intent in removing, as affecting domicile); 1906, State *v.* Morin, 102 Me. 290, 66 Atl. 650 (intention in taking a Federal liquor-license); 1907, Pelkey *v.* Hodgdon, 102 Me. 426, 67 Atl. 218 (motive in placing a mortgage, admitted; quoting the above text);
Maryland: 1875, Roddy *v.* Finnegan, 43 Md. 490, 501 (by one arrested, as to his intention in the act charged as illegal and as justifying the arrest); 1884, Fenwick *v.* State, 63 Md. 239 (by a defendant, as to his purpose in getting the weapon in question; good opinion, by Yellott, J.); 1902, Gambrill *v.* Schooley, 95 Md. 260, 52 Atl. 500 (intent to resume distilling); 1915, Bavington *v.* Robinson, 127 Md. 46, 95 Atl. 1067 (slander; plaintiff's testimony to effect upon his feelings, admitted);
Massachusetts: 1857, Fisk *v.* Chester, 8 Gray 508 (intent of residence of one whose domicil is in question); 1863, Thacher *v.* Phinney, 7 All. 149 (by a debtor, as to the intent of a transfer); 1863, Lombard *v.* Oliver, 7 All. 157 (intent as to residence); 1870, Reeder *v.* Holcomb, 105 Mass. 94 (same); 1874, Snow *v.* Paine, 114 Mass. 526 (fraudulent transfer); 1876, Safford *v.* Grant, 120 Mass. 20, 21, 26 (by a creditor, as to his reliance upon false representations); 1885, Chesley *v.* Thompson, 137 Mass. 136 (slander; defendant's testimony to his own mental suffering, admitted); 1890, Stevens *v.* Stevens, 150 Mass. 557, 559, 23 N. E. 378 (by the maker of a deed, as to its delivery with intent to pass title); 1895, Crandell *v.* White, 164 Mass. 54, 41 N. E. 204 (by one selling stocks on margin, that he had no intention to take delivery, under a statute making this material); 1900, Pollock *v.* Morrison, 172 Mass. 83, 57 N. E. 326 (intent to build a permanent fence); 1900, Faxon *v.* Jones, 176 Mass. 206, 57 N. E. 359 (malice as affecting damages); 1874, Knight *v.* Peabody, 116 Mass. 362 (false representations; "What induced you to sign, etc.?" allowed); 1906, Toole *v.* Crafts, 193 Mass. 110, 78 N. E. 775 (false representations inducing a waiver by defendant; defendant's testimony to his state of mind as to knowledge, allowed); 1912, Kapigian *v.* Der Minassian, 212 Mass. 412, 99 N. E. 264 (intent as to domicile);
Michigan: 1869, Watkins *v.* Wallace, 19 Mich. 75 (intent of a debtor as to an assignment alleged to be fraudulent); 1883, People *v.* Quick, 51 Mich. 547, 18 N. W. 375 (by a defendant in larceny, as to his intent in touching the owner of the goods); 1885, Spalding *v.* Lowe, 56 Mich. 366, 374, 23 N. W. 46 (by the defendant, as to his own belief and motive, in an action for malicious prosecution); 1912, Isbell *v.* Anderson C. Co., 170 Mich. 304, 136 N. W. 457 (good faith in declaring a forfeiture);
Minnesota: 1872, Hathaway *v.* Brown, 18 Minn. 423 (fraudulent transfer; the Court doubted as to the propriety of receiving the debtor's testimony as to his own intention; but the question was not involved); 1875, Berkey *v.* Judd, 22 Minn. 287, 297 (purchase, on the faith of false representations; the purchaser, as to his own belief and reliance, admitted; repudiating the doubt in Hathaway *v.* Brown); 1877, Garret *v.* Mannheimer, 24 Minn. 193 (by a defendant in malicious prosecution, whether he believed his claim valid; approving Berkey *v.* Judd); 1898, Albion *v.* Maple Lake, 71 Minn. 503, 74 N. W. 282 (pauper's intent in residence); 1903, State *v.* Ames, 90 Minn. 183, 96 N. W. 330 (receipt of bribe; by the person bribing, as to her purpose in paying money, admitted); 1905, Grout *v.* Stewart, 96 Minn. 230, 104 N. W. 966 (intent in delivering a deed in performance of a contract, allowed); 1920, Collins *v.* Joyce, 146 Minn. 233, 178 N. W. 503 (services rendered; defendant's testimony that he performed the services on the credit of J., not of B., admitted);
Mississippi: 1894, Ferguson *v.* State, 71 Miss. 805, 813, 15 So. 66 (by a seduced woman, that she yielded in reliance on a promise of marriage); 1910, Oakes *v.* State, 98 Miss. 80, 54 So. 79 (by a defendant in libel, what was his motive in publishing, allowed);
Missouri: 1878, Van Sickle *v.* Brown, 68 Mo. 627, 634 (by the defendant in malicious prosecution, as to his good faith and lack of malice in the prosecution); 1881, State *v.* Banks, 73 Mo. 592, 595 ("'A fortiori' the rule ought to apply in criminal causes also, where the intent which prompts an act is always vitally important");
Montana: 1896, Gassert *v.* Noyes, 18 Mont.

proves too much, and shows that the radical change which has been made is in all respects founded in folly rather than in wisdom. For the truthfulness of the parties when upon the witness stand we must depend, as in the case of other witnesses, upon the obligations of their oath and their reputation for truth and veracity. If these can be relied upon for the truth of statements made in reference to acts and words of which the eye and ear may take notice, they may for the same reason be accepted as guarantees for the truth of statements

216, 44 Pac. 959 (intention as to non-abandonment of user of a water-right);
Nebraska: 1903, Hackney *v.* Raymond B. C. Co., 68 Nebr. 624, 94 N. W. 822 (by a creditor, as to his intent in a transfer); 1903, McCormick Harv. M. Co. *v.* Hiatt, — Nebr. —, 95 N. W. 627 (waiver of breach of warranty; the plaintiff's testimony to his motive in conduct apparently a waiver);
Nevada: 1877, State *v.* Harrington, 12 Nev. 135 (by a defendant, on a trial for murder, as to whether he believed he was in danger);
New Hampshire: 1860, Gale *v.* Ins. Co., 41 N. H. 175 (general statement); 1860, Blodgett Paper Co. *v.* Farmer, 41 N. H. 402 (intent, as to title and as to good faith of creditors, of parties to a sale); 1861, Severance *v.* Carr, 43 N. H. 67 (intent with which property, alleged to have been stolen, was taken); 1864, Graves *v.* Graves, 45 N. H. 323 (by a debtor, as to his motive in a transfer alleged to be in fraud of creditors); 1864, Hale *v.* Taylor, 45 N. H. 406 (intent of a buyer in taking away goods which he subsequently refused to accept in satisfaction of the contract of sale); 1868, Delano *v.* Goodwin, 48 N. H. 205 (in general); 1880, Homans *v.* Corning, 60 N. H. 419 (intent of a corporation officer as to the liability for improvements charged by him on the corporation); 1884, Downes *v.* Society, 63 N. H. 152 (intent in a gift);
New Jersey: 1871, Mulford *v.* Tennis, 35 N. J. L. 256, 260 (intent as to transfer attacked by creditors);
New York: 1827, People *v.* Ferguson, 8 Cow. 107 (voter's intent; see quotation *supra*); 1833, Cunningham *v.* Freeborn, 11 Wend. 244, *semble* (by a debtor, as to his motive in making a transfer alleged to be in fraud of creditors); 1856, Seymour *v.* Wilson, 14 N. Y. 567 (same); 1860, Griffin *v.* Marquardt, 21 N. Y. 122 (same); 1862, Forbes *v.* Waller, 25 N. Y. 439 (same); 1864, McKown *v.* Hunter, 30 N. Y. 625 (by a defendant, in an action for malicious prosecution for perjury, as to his belief in the materiality of the testimony said to involve perjury; see quotation *supra*); 1866, Bedell *v.* Chase, 34 N. Y. 388 (by a purchaser, as to his motive in a sale alleged to be in fraud of creditors); 1867, Osborn *v.* Robbins, 36 N. Y. 375 (whether a note was intended to be given to procure release from unlawful imprisonment); 1868, Thurston *v.* Cornell, 38 N. Y. 287 (a lender, as to whether the charge for the loan was intended as usurious compensation); 1870, Dillon *v.* Anderson, 43 N. Y. 236 (approving the preceding instances); 1870, Cortland Co. *v.* Herkimer Co., 44 N. Y. 22 (the motive in removing a pauper, by one who took part in doing so; removal with intent, etc., being penalized); 1872, Fiedler *v.* Darrin, 50 N. Y. 443 (usury); 1875, Kerrains *v.* People, 60 N. Y. 228 (defendant, in a prosecution for assault with intent to kill, as to his purpose in taking up the weapon); 1876, Turner *v.* Keller, 66 N. Y. 66 (one's knowledge of his authority as an agent being relevant, his statement as to his belief that he had it was received); 1880, Bayliss *v.* Cockcroft, 81 N. Y. 363, 371 (usury); 1882, Starin *v.* Kelly, 88 N. Y. 420 (the general doctrine as to intent affirmed; a purchaser from a debtor allowed to answer as to his intention to defraud creditors, although notice of the debtor's fraud was alone legally necessary, so far as the purchaser was concerned, to avoid the transfer); 1884, People *v.* Baker, 96 N. Y. 340, 349 (by a defendant, as to his intent, on a charge of obtaining money fraudulently); 1887, Crook *v.* Rindskopf, 105 N. Y. 482, 12 N. E. 174 (fraudulent transfer); 1890, Hard *v.* Ashley, 117 N. Y. 617, 23 N. E. 177 (whether a party to a compromise relied on the other's representations); 1899, Davis *v.* Marvine, 160 N. Y. 269, 54 N. E. 704 (intent as to purpose of an alleged usurious loan); 1912, Noonan *v.* Luther, 206 N. Y. 105, 99 N. E. 178 (defendant's intent in expelling a licensee);
North Carolina: 1882, King, 86 N. C. 603, 606 (general principle, applied to accused persons); 1888, Phifer *v.* Erwin, 100 N. C. 59, 63, 6 S. E. 672 (by a debtor, as to his intent in an alleged fraudulent mortgage); 1890, Nixon *v.* McKinney, 105 N. C. 23, 28, 11 S. E. 154 (similar); 1900, Autry *v.* Floyd, 127 N. C. 186, 37 S. E. 208 (by a defendant, as to his lack of malice in prosecuting plaintiff); 1903, Bright *v.* Tel. Co., 132 N. C. 317, 43 S. E. 841 (by the addressee of a telegram, that he would have done certain things had he received the message in ample time); 1903, State *v.* Hall, 132 N. C. 1094, 44 S. E. 553 (by a defendant, as to his purpose in going to the place of the homicide); 1921, State *v.* Jessup, 181 N. C. 548, 106 S. E. 833 (larceny; defendant's testimony to lack of intent by himself and by M. jointly indicted, admissible);
North Dakota: 1903, State *v.* Tough, 12 N. D. 425, 96 N. W. 1025 (by a defendant, as to his belief of ownership in entering a railroad car having coal of another person);
Ohio: 1866, White *v.* Tucker, 16 Oh. St. 468, 470 (by the defendant in malicious prosecution, as to his belief in the charge made against

made in respect to motives and intents of which the mind or inner man alone can take cognizance. Nor is there, in our judgment, any well-grounded reason for apprehending that this rule will obstruct rather than advance the ends of justice. There is no more danger of imposing upon the jury falsehood or pretence in respect of motives and intents than there is of doing the like in respect to visible or external circumstances. The jury can as readily distinguish between the false and the true in respect to the former as to the latter. If the motive or intent assigned is inconsistent with the external circumstances, it must be dis-

the plaintiff; good opinion by Day, J.); 1896, Grever *v.* Taylor, 53 Oh. St. 621, 42 N. E. 829 (goods fraudulently bought; by the vendor, as to whether he relied on the false representations);
Pennsylvania: 1883, Juniata Bldg. Ass'n *v.* Hertzel, 103 Pa. 507, 511 (admissible "wherever the character of the transaction depends on the intent of the party"); 1896, Com. *v.* Julius, 173 Pa. 322, 34 Atl. 21 (whether a release was signed on the faith of representations); 1896, Weaver *v.* Cone, 174 Pa. 104, 34 Atl. 551 ("What induced you to sell for $80?");
Rhode Island: 1902, Charbonnel *v.* Seabury, 23 R. I. 543, 51 Atl. 208 (by one suing for deceit, as to his reliance on the representations);
South Carolina: 1900, McGhee *v.* Wells, 57 S. C. 280, 35 S. E. 529 (deed in fraud of creditors);
South Dakota: 1920, Warner *v.* Hopkins, 42 S. D. 613, 176 N. W. 746 (intention to abandon a homestead);
Texas: 1886, Hamburg *v.* Wood, 66 Tex. 176, 18 S. W. 623 (transfer in fraud of creditors; by the transferee, as to his motive in accepting the property transferred);
Utah: 1875, Conway *v.* Clinton, 1 Utah 215, 221 (by one charged with malicious destruction of property, as to his motive); 1895, People *v.* Hughs, 11 Utah 100, 39 Pac. 492 (accused's intent);
Vermont: 1865, Hulett *v.* Hulett, 37 Vt. 581 (by one whose domicil was in question; see quotation *supra*); 1886, Stearns *v.* Gosselin, 58 id. 38, 3 Atl. 193 (by a debtor, as to his intent in an alleged fraudulent transfer); 1908, Taplin *v.* Marcy, 81 Vt. 428, 71 Atl. 72 (intent of a vendor in taking lien notes on lumber, allowed);
Virginia: 1898, Jackson *v.* Com., 96 Va. 107, 30 S. E. 452 (by a trespasser, as to his malice); 1903, Litton *v.* Com., 101 Va. 833, 44 S. E. 923 (murder; by the accused, as to his intent to shoot, allowed);
West Virginia: 1889, State *v.* Evans, 33 W. Va. 417, 424, 425, 10 S. E. (by the accused, as to his belief of the necessity of shooting, and his malice); 1914, State *v.* Alderson, 74 W. Va. 732, 82 S. E. 1021 (accused's intent as to shooting, etc.); 1919, State *v.* Panetta, 85 W. Va. 212, 101 S. E. 360 (by the accused, why she shot the deceased, allowed); 1921, State *v.* Arrington, 88 W. Va. 152, 106 S. E. 445 (murder: "What was your purpose in firing the gun?" allowed);
Wisconsin: 1874, Wilson *v.* Noonan, 35 Wis. 321, 355, 363 (libel; malice or intent being material on the question of damages, the defendant may testify on the subject, "wherever the act complained of is not clearly and necessarily inconsistent with the supposition that such bad intent or malice did not or may not have existed"; *quære* as to this limitation, which ought to apply, if at all, equally to other sorts of evidence); 1881, Sherburne *v.* Rodman, 51 Wis. 474, 478, 8 N. W. 414 (by a defendant in malicious prosecution, as to his belief and good faith in his claim); 1885, Plank *v.* Grimm, 62 Wis. 251, 22 N. W. 470 (by one sued for assault, as to intent in approaching the plaintiff); 1885, Arnold *v.* White, 62 Wis. 401 (by a debtor, as to the alleged fraudulent intent in contracting); 1894, Commercial Bank *v.* Ins. Co., 87 Wis. 297, 303, 58 N. W. 391 (by an insured, as to his intent to defraud in altering books); 1896, Emery *v.* State, 92 Wis. 146, 65 N. W. 848 (by a defendant, as to his intent in making a threat); 1898, Fischer *v.* State, 101 Wis. 23, 76 N. W. 594 (intent of defendant as to intimidating another person); 1901, Yerkes *v.* Northern Pacific R. Co., 112 Wis. 184, 88 N. W. 33 (that the plaintiff relied on the defendant's promise to repair machinery, allowed; but that he would not have continued at work except for the promise, excluded on the theory of the opinion rule, — a vain and quibbling distinction); 1904, Strasser *v.* Goldberg, 120 Wis. 621, 98 N. W. 454 (estoppel; whether the other party relied on the statement, allowed); 1906, Brown *v.* State, 127 Wis. 193, 106 N. W. 536 (rape; to the prosecutrix, "Was it against your will?", allowed); 1916, Ertel *v.* Milwaukee El. R. & L. Co., 164 Wis. 380, 160 N. W. 263 (collision; "whether you thought you could pass over the track safely or not", allowed).

In the following rulings, the testimony was excluded, on perhaps the present grounds, but the rulings may be otherwise supported: 1896, Harris *v.* Lumber Co., 97 Ga. 465, 25 S. E. 519 (by an alleged promisor, as to his own intent to buy); 1892, Vawter *v.* Hultz, 112 Mo. 633, 640, 20 S. W. 689 (by a defendant, that he shot to protect his life).

Compare the cases cited *post*, § 1963 (opinion rule).

The admission of *hearsay declarations of intention* (*post*, §§ 1725 ff.) is another application of the foregoing principle.

carded as false. If on the contrary they are consistent, there is no reason why they may not be true."

1876, NIBLACK, J., in *White* v. *State*, 53 Ind. 596: "Because the intent is a fact which cannot in the nature of things be positively known to others, and is hence a matter about which other witnesses cannot directly testify, does not in our opinion affect the rule."

It is to be regretted, however, that, by a misunderstanding of the history of the rule, an unnecessary concession has sometimes been made, by a few judges, to the argument in its favor. This concession is that there once was some sort of a rule by which "the intent must be inferred from the acts and words of the party", and that its cessation is due to the fact that it is now impliedly "removed by the abrogation of the rule which created it", namely, of the party's disqualification.[4] The truth is, however, that even while parties were entirely disqualified the question was presented, in the shape of testimony to his own intent by a third person, not a party, whose intent was material under the issue, — for example, a voter or a debtor, — and that, in that shape, the question was answered plainly in the negative by several Courts.[5] There was, then, already established a doctrine that a person might properly testify to his own intent, whenever it was material. There was, also, no rule that parties in particular might not testify to their own intent, but merely a general rule disqualifying parties altogether; and thus, when the latter rule was abolished altogether, parties became qualified to testify to whatever other persons had been qualified to testify to, including the fact of their own intent. Thus the statutory changes had nothing to do with the validity or origin of the present rule; they simply made it possible to raise, against parties, a question which had no occasion to be raised against them before that time. It had been raised for other persons, and settled; and it now remained merely to raise it and settle it in a particular new application. The statutory abolition of parties' disqualification is not the source of validity for the present rule, but merely explains the subsequent frequency of a ruling which in that application was before that time unnecessary.

In only one jurisdiction has any clear sanction been given to a rule that parties or other persons are disqualified to testify to their own intent or motive.[6] In all others where the question has been raised there is a general repudiation of that notion in all its aspects.

It remains to be noted that this sort of testimony, or any other whatever, to the fact of a person's intent or motive, is of course receivable only on the assumption that *the intent or motive is a fact permissible to be proved under the substantive law* involved in the case. This assumption conditions the

[4] *E.g.* by Sanderson, J., in People *v.* Farrell, 31 Cal. 576, quoted *supra*.

[5] As in People *v.* Ferguson, N. Y., quoted *supra*, and in other cases cited *supra*.

[6] This is in Alabama. The rulings are collected *post*, § 1966, in order to distinguish them from others concerning *testimony to a third person's intent*, and the like; the rulings in that jurisdiction on these topics are in hopeless confusion and exhibit an unprecedented narrow artificiality.

admissibility of all evidence (*ante*, § 2) and of this sort in particular. Hence, if for any reason of substantive law the person's intent or motive is not provable at all, it is not provable by such testimony. But rulings of that tenor are not rulings upon a question of evidence: [7]

1886, REED, J., in *Browne* v. *Hickle*, 68 Ia. 330, 333, 27 N. W. 276: "When it is material to determine the motive or intention with which an act was done, the testimony of the one doing the act, as to his motive or intention, is competent evidence. But . . . the questions to be determined [in this case] were whether the parties entered into a contract for the termination of the lease, and, if so, what were the terms and conditions of their agreement. These questions must be determined from the conduct and language of the parties during the agreement. If an agreement was entered into by the parties, the undertaking of the plaintiff therein must be determined alone from what was said and done by him at the time. His secret motives or intentions are entirely immaterial. We think, therefore, that the Court properly excluded the evidence."

From the present question of evidence are also to be distinguished two other questions of evidence: (1) whether a person may testify to *another person's intent* or state of mind in general; this involves the principle of adequacy of sources of knowledge, examined elsewhere (*post*, § 661); (2) whether a person's testimony to *another's intent* or meaning or state of mind in general is excluded by reason of the *Opinion rule;* this is a question of complicated bearings, and is dealt with under the Opinion rule (*post*, § 1962).

§ 582.] **Testamentary Attesting-Witness' Competency.** Whether the person attesting a will is eligible to act as such is purely a question of the substantive law applicable to the validity of wills. The object of the statute is not to determine the competency of persons called to testify to the will, but to secure the execution of the will under formalities of a specified sort.[1] The

[7] The following cases will serve as examples of the various ways in which a rule of substantive law may affect the solution: 1871, Columbus *v.* Dahn, 36 Ind. 334 (rejecting testimony by the alleged dedicator of a street as to his intention); 1888, Ross *v.* State, 116 Ind. 497, 19 N. E. 451 (rejecting testimony as to one's intent to violate the law); 1902, Donovan *v.* Driscoll, 116 Ia. 339, 90 N. W. 60 (by a son working for his father, as to his own expectation of pay, excluded); 1859, Quimby *v.* Morrill, 47 Me. 470 (the intention of a promisor to be bound was allowed to be asked about by the opponent); 1844, Jones *v.* Howland, 8 Metc. 385 (whether in addition to the fact of knowledge of insolvency by the debtor, a distinct element, the intent to make a preference, need be shown); 1877, Perry *v.* Porter, 121 Mass. 523 (admitting evidence of a grantor's intent, the issue being whether she had been fraudulently misled into signing); 1895, Nash *v.* Minn. T. I. & T. Co., 163 Mass. 574, 40 N. E. 1039 (whether one making false representations intended to state a falsity); 1844, Hibbard *v.* Russell, 16 N. H. 417 (excluding the secret intent of a person promising in words to pay a note); 1860, Gale *v.* Ins. Co., 41 N. H. 174 (an uncommunicated intent to choose between two policies covering the same risk, excluded); 1860, People *v.* Saxton, 22 N. Y. 309 (rejecting testimony, by one casting an ambiguous ballot, as to his intention); 1870, Dillon *v.* Anderson, 43 N. Y. 236 (excluding an uncommunicated intent, with reference to a contract made).

Add to these illustrations the cases which involve the question whether one charged with *slanderous or libellous utterances* may testify to his meaning intended: 1890, Townshend, Slander & Libel, 4th ed., § 139; 1881, Odgers, Libel & Slander, 1st Am. ed., p. 93; 1898, Newell, Libel & Slander, 2d ed., c. 15, § 22.

Compare also the analogous illustrations arising under the limitations of the *opinion* rule and the *parol evidence* rule, *post*, § 1971, and §§ 2400–2478.

§ 582. [1] This was amply established in an early period of the statute's application, in luminous and classical opinions: 1746, Wyndham *v.* Chetwynd, 1 Burr. 425; 1765, Doe *v.* Hindson, Hinds *v.* Kersey (Eng.), 1 Day 41, note; 1845, Taylor *v.* Taylor, 1 Rich. L. 531, 534.

will is required to be contained in writing, to be signed by certain persons, and to be signed in the presence of certain persons; if these rules are followed, the will is valid in form, and no one of the rules is more a rule of evidence than another (*post*, § 2456).

Certain corollaries ensue from this principle and illustrate it. In the first place the rule of validity, requiring *attestation by certain persons*, remains to be satisfied, whether or not any one of those persons appears as a witness. For example, the rule that certain of these persons must be called in preference to others to testify (*post*, § 1290) is a rule of evidence independent of the rule of validity, and may be dispensed with while the latter remains in full force. Secondly, if one of them, appearing as a witness on the stand, is entirely *qualified at the time of testifying*, still his incompetency at the time of attesting renders the will invalid; though this part of the doctrine has been usually changed by statute.[2] Finally, if one of these persons, when called to testify, is incompetent to do so, but was competent under the statute *at the time of attesting*, the will is nevertheless valid;[3] the statute's object is satisfied when the execution takes places with the specified formalities; *i.e.* it prescribes a rule of substantive law, not of evidence. The consideration of these statutes, therefore, involving as they do the theory of the substantive law as to the validity of wills, would here be out of place.[4]

§ 583. **Voir Dire; Mode of Ascertaining Disqualification**: (1) **Time of Interest that Disqualifies.** The doctrine of disqualification by Interest is now of little practical consequence. It is applicable solely, and that only in a modified degree, to the statutory class of persons disqualified as survivors to testify against an opponent deceased or incapable, and even then in some only of the jurisdictions (*ante*, § 578). So far as the details of the old rule are concerned, by which are determined the time when the disqualifying interest is to exist and the mode in which its existence is to be ascertained, it will therefore suffice, for to-day's purpose, to call attention to the principles

[2] Sometimes, as in Arizona, this is done by making a real rule of evidence, as by requiring corroboration: *post*, § 2066.

[3] 1865, Sparhawk *v.* Sparhawk, 10 All. 155.

[4] The statutes affecting the subject may be found by consulting the citations *post*, §§ 1290, 1310, 1510, 2049–2051.

Consult the following opinions: *Del.* 1915, Hudson *v.* Flood, 28 Del. 450, 94 Atl. 760; *Ill.* 1907, Gump *v.* Gowans, 226 Ill. 635, 80 N. E. 1086; 1909, Jones *v.* Griesler, 238 Ill. 183, 87 N. E. 295 (executor); 1909, Fearn *v.* Postlethwaite, 240 Ill. 626, 88 N. E. 1057 (wife of executor); *Ind.* 1908, Hiatt *v.* McColley, 171 Ind. 91, 85 N. E. 772; 1909, Wisehart *v.* Applegate, 172 Ind. 313, 88 N. E. 501; 1920, Pfaffenberger *v.* Pfaffenberger, 189 Ind. 507, 127 N. E. 766; *Kan.* 1904, Lanning *v.* Gay, 70 Kan. 353, 78 Pac. 810, 85 Pac. 407; *Ky.* 1903, Savage *v.* Bulger, — Ky. —, 76 S. W. 361, 77 S. W. 717; *Mass.* 1903, O'Connell *v.* Dow, 182 Mass. 541, 66 N. E. 788; *Miss.* 1908, Swanzy *v.* Kolb, 94 Miss. 10, 46 So. 549 (opinion by Whitfield, C. J.); *Mo.* 1905, Mann *v.* Balfour, 187 Mo. 290, 86 S. W. 103; 1920, Yant *v.* Charles, — Mo. —, 219 S. W. 572; *Pa.* 1915, Johnson's Estate, Thompson's Appeal, 249 Pa. 339, 94 Atl. 1082; *Vt.* 1094, Wheelock's Will, 76 Vt. 235, 56 Atl. 1013; *Wis.* 1920, Johnson's Estate, 170 Wis. 436, 175 N. W. 917.

Compare also the cases cited *post*, § 1510, n. 4 ("credible" attesting witnesses).

In a number of States, the statutes removing the common-law disqualifications of witnesses at trials are particular to distinguish the present subject, and go on to provide (but superfluously) that "the provisions of the preceding sections shall not affect the law relating to the attestation of the execution of last wills and testaments or any other instrument"; *e.g.* Vt. Gen. L. 1917, § 1900.

already examined (*ante*, §§ 483–487) for testimonial qualifications in general, and to set forth summarily their application to the present subject by approved passages of exposition from the period when the rules of interest were in full force. And, first, of the

(1) *Time of Interest that Disqualifies.* Ordinarily, the time when the witness is called upon *to testify* is the time when his qualification must exist. But, in order to avoid the abuse of the rule against interested witnesses, exceptions to that principle were here recognized:

1842, Professor *Simon Greenleaf*, Evidence, § 418: "It has been laid down in general terms, that where one person becomes entitled to the testimony of another, the latter shall not be rendered incompetent to testify, by reason of any *interest subsequently acquired* in the event of the suit.[1] But though the doctrine is not now universally admitted to that extent, yet it is well settled and agreed, that in all cases where the interest has been subsequently created by the fraudulent act of the adverse party, for the purpose of taking off his testimony, or by any act of mere wantonness, and aside from the ordinary course of business, on the part of the witness, he is not thereby rendered incompetent. And where the person was the original witness of the transaction or agreement between the parties, in whose testimony they both had a common interest, it seems also agreed, that it shall not be in the power either of the witness, or of one of the parties, to deprive the other of his testimony, by reason of any interest subsequently acquired, even though it were acquired without any such intention on the part of the witness, or of the party.[2] . . . If the subsequent interest has been created by the agency of the party producing the witness, he is disqualified; the party having no right to complain of his own act."[3]

§ 584. **Same: (2) Burden of Proving Disqualification.** The burden of proving disqualification by interest is upon the party objecting to the witness. This was never doubted.[1] Although the state of the record might of itself serve to show the interest, still, so far as anything whatever needed to be done to make the interest apparent, it must be done by the objector.

§ 585. **Same: (3) Mode of Proving Disqualification.** So far as a mere reference to the record of the cause does not suffice, the objector finds two sources of evidence available, first, evidence of the ordinary sort (from other persons), and secondly, the witness' own answers, either on his general examination or on a special preliminary examination ("*voir dire*") had for the purpose:

1746, L. C. HARDWICKE, in *Lord Lovat's Trial*, 18 How. St. Tr. 585, 597, 730: "The party objecting may either put it to the oath of the witness produced or call witnesses to prove it. If he puts it to the oath of the witness produced, then he is concluded as to the point of competency by the answer he gives, unless the other side consents to waive that."

§ 583. [1] "See Bent *v.* Baker, 3 T. R. 27, per Ld. Kenyon, and Ashhurst, J.; Barlow *v.* Vowell, Skin. 586, per Ld. Holt; Cowp. 736; Jackson *v.* Rumsey, 3 Johns. Cas. 234, 237."

For a *deposition*, the time of taking it is the material time, and subsequent interest acquired before trial does not exclude: 1862, Cameron *v.* Cameron, 15 Wis. 1, 5 (subsequent marriage to a party).

Compare the cases cited *post*, § 1409 (deponent disqualified by interest).

[2] "Forrester *v.* Pigou, 3 Campb. 381; 1 Stark. Evid. 118; Long *v.* Bailie, 4 S. & R. Pa. 222; 14 Pick. Mass. 47; Phelps *v.* Riley, 3 Conn. 266, 272; R. *v.* Fox, 1 Stra. 652."

[3] "Hovill *v.* Stephenson, 5 Bing. 493."

§ 584. [1] 1843, Densler *v.* Edwards, 5 Ala. 34 (citing cases); 1886, Hill *v.* Helton, 80 id. 532, 1 So. 340; 1903, Terr. *v.* Cheong Kwai, 15 Haw. 280 (wife).

1801, Mr. *Peake*, Evidence, 186: "When a witness was liable to any objection on account of interest, etc., the old rule was to examine upon the 'voire dire' as to his situation or call other witnesses to prove the fact which rendered him incompetent. The party against whom he was produced had his election which of these modes he would pursue; but he could not adopt both; and if the witness denied his interest, no other evidence could afterwards be produced to prove it, for the purpose of rendering him incompetent."

1842, Professor *Simon Greenleaf*, Evidence, §§ 424, 423: "A witness is said to be examined upon the 'voire dire', when he is sworn and examined as to the fact whether he is not a party interested in the cause.[1] And though this term was formerly and more strictly applied only to the case where the witness was sworn to make true answers to such questions as the Court might put to him, and before he was sworn in chief, yet it is now extended to the preliminary examination to his interest, whatever may have been the form of the oath under which the inquiry is made. . . . The mode of proving the interest of a witness is either by his own examination, or by evidence 'aliunde.' But whether the election of one of these modes will preclude the party from afterwards resorting to the other, is not clearly settled by the authorities. If the evidence offered 'aliunde' to prove the interest is rejected, as inadmissible, the witness may then be examined on the 'voir dire.'[2] And if the witness on the 'voir dire' states that he does not know, or leaves it doubtful whether he is interested or not, his interest may be shown by other evidence.[3] It has also been held, that a resort to one of these modes, to prove the interest of the witness on one ground, does not preclude a resort to the other mode, to prove the interest on another ground.[4] And where the objection to the competency of the witness is founded upon the evidence already adduced by the party offering him, this has been adjudged not to be such an election of the mode of proof, as to preclude the objector from the right to examine the witness on the 'voir dire.'[5] But, subject to these modifications, the rule recognized and adopted by the general current of authorities is, that where the objecting party has undertaken to prove the interest of the witness, by interrogating him upon the 'voir dire', he shall not, upon failure of that mode, resort to the other to prove facts, the existence of which was known when the witness was interrogated.[6] The party, appealing to the conscience of the witness, offers him to the Court as a credible witness; and it is contrary to the spirit of the law of evidence, to permit him afterwards to say, that the witness is not worthy to be believed. It would also violate another rule, by its tendency to raise collateral issues.[7] Nor is it deemed rea-

§ 585. [1] "Termes de la Ley, Verb. *Voyer dire*. And see Jacobs *v.* Laybourn, 11 M. & W. 685, where the nature and use of an examination upon the *voir dire* are stated and explained by Ld. Abinger, C. B."

[2] "Main *v.* Newson, Anthon's Cas. 13. But a witness cannot be excluded by proof of his own admission that he was interested in the suit: Bates *v.* Ryland, 6 Alabama R. 668; Pierce *v.* Chase, 8 Mass. 487, 488; Commonwealth *v.* Waite, 5 Mass. 261; George *v.* Stubbs, 13 Shepl. 243."

[3] "Shannon *v.* The Commonwealth, 8 S. & R. 444; Galbraith *v.* Galbraith, 6 Watts 112; Bank of Columbia *v.* Magruder, 6 Har. & J. 172." The Court may hear additional evidence; 1903, White Memorial Home *v.* Haeg, 204 Ill. 422, 68 N. E. 568.

[4] "Stebbins *v.* Sackett, 5 Conn. 258."

[5] "Bridge *v.* Wellington, 1 Mass. 221, 222."

[6] "In the old books, including the earlier editions of Mr. Starkie's and Mr. Phillips's Treatises on Evidence, the rule is clearly laid down, that after an examination upon the 'voir dire', no other mode of proof can in any case be resorted to; excepting only the case, where the interest was developed in the course of trial of the issue. But in the last editions of those works it is said, that 'if the witness discharge himself on the "voir dire", the party who objects, may still support his objection by evidence'; but no authority is cited for the position: 1 Stark. Evid. 124; Phil. & Am. on Evid. 149; 1 Phil. Evid. 154. Mr. Starkie had previously added these words — 'as part of his own case' (see 2 Stark. Evid. p. 756, 1st ed.); and with this qualification the remark is supported by authority, and is correct in principle. The American Courts have followed the old English rule, as stated in the text: Butler *v.* Butler, 3 Day 214; Stebbins *v.* Sackett, 5 Conn. 258, 261; Chance *v.* Hine, 6 Conn. 231; Welden *v.* Buck, Anthon's Cas. 9; Chatfield *v.* Lathrop, 6 Pick. 418; Evans *v.* Eaton, 1 Peters C. C. 322."

[7] "The question of competency is a collateral question; and the rule is, that when a witness is asked a question upon a collateral point, his answer is final, and cannot be contradicted; that is, no collateral evidence is

sonable to permit a party to sport with the conscience of a witness, when he has other proof of his interest. But if evidence of his interest has been given 'aliunde', it is not proper to examine the witness, in order to explain it away."[8]

§ 586. **Same: (4) Time of Making Objection.** The general principle (*ante*, §§ 18, 486) is that an opponent must object *at the time of the offering* of the witness, and that if he allows this time to go by, though aware of the ground for objection, he should be treated as waiving the objection. This principle, as applied to interested witnesses, seems to have been substantially repudiated in modern times in England, so that no limitation of time remains for the objection, so long at least as the witness is still on the stand. But the orthodox principle was preserved by the American Courts:

1801, Mr. *Peake*, Evidence, 186: "[The old rule was that] if he appeared to be incompetent, either by his own examination on the 'voire dire' or by other evidence, the objection was immediately made; for if not taken before he was sworn in chief, it was considered as too late after he had been examined by the party calling him and cross-examined by the other side. But the modern practice is to swear the witness in chief in the first instance, and if at any time during the trial it be discovered that he is in a situation which renders him incompetent, it is then time to take the objection."

1843, L. C. B. ABINGER, in *Jacobs* v. *Layborn*, 11 M. W. 685, 692: "A counsel who knows of an objection to the competency of a witness may very fairly say, 'I will lie by, and see whether he will speak the truth; if he does not, I will exclude his evidence.' I see no hardship or injustice at all in that course. . . . In other words, an examination on the 'voir dire' may be instituted at any period of the examination."

1842, Professor *Simon Greenleaf*, Evidence, § 421. "In regard to the time of taking the objection to the competency of a witness on the ground of interest, it is obvious that, from the preliminary nature of the objection, it ought in general to be taken before the witness is examined in chief. If the party is aware of the existence of the interest, he will not be permitted to examine the witness, and afterwards to object to his competency, if he should dislike his testimony. He has his election, to admit an interested person to testify against him, or not; but in this, as in all other cases, the election must be made as soon as the opportunity to make it is presented; and, failing to make it at that time, he is presumed to have waived it forever.[1] But he is not prevented from taking the objection at any time during the trial, provided it is taken as soon as the interest is discovered.[2] Thus, if discovered during the examination in chief by the plaintiff, it is not too late for the defendant

admissible for that purpose. But if the evidence, subsequently given upon the matter in issue, should also prove the witness interested, his testimony may well be stricken out, without violating any rule: Brockbank *v.* Anderson, 7 Man. & Gr. 295, 313."

[8] "Mott *v.* Hicks, 1 Cowen 513; Evans *v.* Gray, 1 Martin N. S. 709"; 1902, Dowdy *v.* Watson, 115 Ga. 42, 41 S. E. 266.

For the rule that the *original of a document* showing interest need not be produced on the *voir dire*, see *post*, § 1258.

§ 586. [1] "Donelson *v.* Taylor, 8 Pick. 390, 392; Belcher *v.* Magnay, 1 New Pr. Cas. 110"; but see Jacobs *v.* Laybourn, *supra*, for the modern English rule *contra*.

For modern American applications of the rule, see the following: 1892, Benson *v.* U. S. 146 U. S. 325, 332; 1863, Leslie *v.* Sims, 39 Ala. 101; 1882, Binford *v.* Dement, 72 Ala. 491; 1909, Chicago Title & T. Co. *v.* Sagola L Co., 242 Ill. 468, 90 N. E. 282; 1903, Slattery *v.* Slattery, 120 Ia. 717, 95 N. W. 201; 1898, State *v.* Downs, 50 La. An. 694, 23 So. 456; 1903, Summerlin *v.* R. Co., 133 N. C. 550, 45 S. E. 898; 1895, Pillow *v.* Impr. Co., 92 Va. 144, 23 S. E. 32; 1897, Spence *v.* Repass, 94 Va. 716, 27 S. E. 583.

[2] "Stone *v.* Blackburn, 1 Esp. 37; 1 Stark. Evid. 124; Shurtliff *v.* Willard, 19 Pick. 202. Where a party has been fully apprised of the grounds of a witness's incompetency by the opening speech of counsel, or the examination in chief of the witness, doubts have been entertained at nisi prius, whether an objection to the competency of a witness can be postponed: 1 Phil. Evid. 154, note (3)."

to take the objection.[3] But if it is not discovered until after the trial is concluded, a new trial will not, for that cause alone, be granted;[4] unless the interest was known and concealed by the party producing the witness.[5] The rule on this subject, in criminal and civil cases, is the same.[6] Formerly, it was deemed necessary to take the objection to the competency of a witness on the 'voir dire'; and if once sworn in chief, he could not afterwards be objected to, on the ground of interest. But the strictness of this rule is relaxed; and the objection is now usually taken after he is sworn in chief, but previous to his direct examination. It is in the discretion of the Judge to permit the adverse party to cross-examine the witness, as to his interest, after he has been examined in chief; but the usual course is not to allow questions to be asked upon the cross-examination, which properly belong only to an examination upon the 'voir dire.'[7] But if, notwithstanding every ineffectual endeavor to exclude the witness on the ground of incompetency, it afterwards should appear incidentally, in the course of the trial, that the witness is interested, his testimony will be stricken out and the Jury will be instructed wholly to disregard it.[8] The rule in Equity is the same as at Law;[9] and the principle applies with equal force to testimony given in a deposition in writing, and to an oral examination in Court. In either case, the better opinion seems to be, that if the objection is taken as soon as may be after the interest is discovered, it will be heard; but after the party is 'in morâ', it comes too late.[10] One reason for requiring the objection to be made thus early is, that the other party may have opportunity to remove it

[3] "Jacobs *v.* Laybourn, 11 M. & W. 683. And see Yardley *v.* Arnold, 10 M. & W. 141; 6 Jur. 718."

[4] "Turner *v.* Pearte, 1 T. R. 717; Jackson *v.* Jackson, 5 Cowen 173."

[5] "Niles *v.* Brackett, 13 Mass. 378."

[6] "Commonwealth *v.* Green, 17 Mass. 538; Roscoe's Crim. Evid. 124."

[7] "Howell *v.* Lock, 2 Camp. 14; Odiorne *v.* Winkley, 2 Gallis. 51; Perigal *v.* Nicholson, 1 Wightw. 64. The objection that the witness is the real plaintiff, ought to be taken on the *voir dire:* Dewdney *v.* Palmer, 4 M. & W. 664; 7 Dowl. 177, s. c."; 1905, Vickery *v.* State, 50 Fla. 144, 38 So. 907 (the trial Court in discretion may let all the witnesses be sworn to testify, and postpone their '*voir dire*' examination till each one is called).

[8] "Davis *v.* Barr, 9 S. &. R. 137; Schillenger *v.* McCann, 6 Greenl. 364; Fisher *v.* Willard, 13 Mass. 379; Evans *v.* Eaton, 1 Peters C. C. 338, 4 Fed. 559; Butler *v.* Tufts, 1 Shepl. 302; Stout *v.* Wood, 1 Blackf. 71; Mitchell *v.* Mitchell, 11 G. & J. 388.

"The same rule seems applicable to all the instruments of evidence, whether oral or written; Scribner *v.* M'Laughlin, 1 Allen 379; and see Swift *v.* Dean, 6 Johns. 523, 536; Perigal *v.* Nicholson, Wightw. 63; Howell *v.* Lock, 2 Campb. 64; Needham *v.* Smith, 2 Vern. 464.

"In one case, however, where the examination of a witness was concluded, and he was dismissed from the box, but was afterwards recalled by the Judge, for the purpose of asking him a question, it was ruled by Gibbs, C. J., that it was then too late to object to his competency: Beeching *v.* Gower, 1 Holt's Cas. 313; and see Heely *v.* Barnes, 4 Denio 73.

"And in Chancery it is held, that where a witness has been cross-examined by a party, with full knowledge of an objection to his competency, the Court will not allow the objection to be taken at the hearing: Flagg *v.* Mann, 2 Sumn. 487."

[9] "Swift *v.* Dean. 6 Johns. 523, 538; Needham *v.* Smith, 2 Vern. 463; Vaughan *v.* Worrall, 2 Swanst. 400. In this case, Lord Eldon said, that no attention could be given to the evidence, though the interest were not discovered until the last question, after he has been 'cross-examined to the bone.'

"See Gresley on Evid. 234–236; Rogers *v.* Dibble, 3 Paige 238; Town *v.* Needham, id. 545, 552: Harrison *v.* Courtauld, 1 Russ. & M. 428; Moorhouse *v.* De Passou, G. Cooper, Ch. Cas. 300; 19 Ves. 433, s. c. See also Jacobs *v.* Laybourn, 7 Jur. 562, 11 M. & W. 685."

[10] "Donelson *v.* Taylor, 8 Pick. 390. Where the testimony is by deposition, the objection, if the interest is known, ought regularly to be taken 'in limine'; and the cross-examination should be made 'de bene esse', under protest, or with an express reservation of the right of objection at the trial; unless the interest of the witness is developed incidentally, in his testimony to the merits. But the practice on this point admits of considerable latitude, in the discretion of the Judge: United States *v.* One Case of Hair Pencils, 1 Paine 400, 15 Fed. 924; Talbot *v.* Clark, 8 Pick. 51; Smith *v.* Sparrow, 11 Jur. 126; The Mohawk Bank *v.* Atwater, 2 Paige 54; Ogle *v.* Pelaski, 1 Holt's Cas. 485; 2 Tidd's Pr. 812."

In Missouri, a cross-examination is a waiver as to new matter only: 1907, McCune *v.* Goodwillie, 204 Mo. 306, 102 S. W. 997.

"As to the mode of taking the objection in Chancery, see 1 Hoffm. Chan. 489, Gass *v.* Stinson, Sumn. 605."

by a release; which is always allowed to be done, when the objection is taken at any time before the examination is completed.[11] It is also to be noted as a rule, applicable to all objections to the reception of evidence, that the ground of objection must be distinctly stated at the time, or it will be held vague and nugatory." [12]

1877, STAPLES, J., in *Hord* v. *Colbert*, 28 Gratt. 49, 54: "The authorities leave no room for doubt; they hold that if the party be aware of the existence of the interest, he will not be permitted to examine the witness and afterwards to object to his incompetency if he should dislike his testimony."

§ 587. **Same: (5) Judge, not Jury, to determine Disqualification.** The following passage has no doubt often served to influence judicial rulings:

1842, Professor *Greenleaf*, Evidence, § 425: "The question of interest, though involving facts, is still a preliminary question, preceding, in its nature, the admission of the testimony to the Jury. It is therefore to be determined by the Court alone, it being the province of the Judge, and not of the Jury, in the first instance, to pass upon its sufficiency.[1] . . . In determining the question of interest, where the evidence is derived 'aliunde', and it depends upon the decision of intricate questions of fact, the Judge may, in his discretion, take the opinion of the Jury upon them. And if a witness, being examined on the 'voir dire', testifies to facts tending to prove that he is not interested, and is thereupon admitted to testify; after which opposing evidence is introduced, to the same facts, which are thus left in doubt, and the facts are material to the issue; the evidence must be weighed by the Jury, and if they thereupon believe the witness to be interested, they must lay his testimony out of the case." [2]

But it is necessary to point out that the doctrine of the last sentence in this passage is unsound. When the judge has ruled upon admissibility, all question of a rule of law is at an end.[3] The jury cannot again apply the rule of admissibility. If they reject a witness' testimony, it is not because they find him to be ineligible by the technical rules of interest, but merely because on the whole they do not believe him. The fallacy of the above doctrine has been elsewhere sufficiently considered in other applications (*ante*, §§ 487, 497; *post*, §§ 861, 1451, 2550).

[11] "Tallman *v.* Dutcher, 7 Wend. 180; Doty *v.* Wilson, 14 Johns. 378; Wake *v.* Lock, 5 C. & P. 454."

[12] "Camden *v.* Doremus, 3 Howard 515, 530; Elwood *v.* Deifndorf, 5 Barb. S. C. R. 398; Carr *v.* Gale, Daveis, R. 337, 2 Fed. 434."

For *depositions*, see the additional cases cited under the general principle *ante*, § 18.

§ 587. [1] "Harris *v.* Wilson, 7 Wend. 57."

[2] "Walker *v.* Sawyer, 13 N. H. 191"; 1902, Dowdy *v.* Watson, 115 Ga. 42, 41 S. E. 266 (the trial judge, on objection, should determine the facts by a preliminary examination, though he may in his discretion submit the question to the jury).

[3] 1843, L. C. B. Abinger, in Jacobs *v.* Laybourn, 11 M. & W. 685, 691 ("When a man is examined on the *voir dire*, the examination is only to satisfy the conscience of the judge, the jury having nothing to do with it").

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

TOPIC III (*continued*): EMOTIONAL CAPACITY

SUB-TOPIC B: MARITAL RELATIONSHIP AS A TESTIMONIAL DISQUALIFICATION

CHAPTER XXIV

1. In General

2. Who is excluded as a Spouse?

3. On whose behalf is a Spouse excluded?

4. Exceptions to the Rule

5. Statutory Abolition

1. In General

§ 600. History of the Rule; No other Family Relationship disqualifies. The history of the disqualification by marital relationship can better be examined at the same time with the privilege based on the same relationship (*post*, § 2227). It suffices to observe here that the disqualification first comes into notice about or just before the recognition of interest in general as a disqualification, — that is, the time of Sir Edward Coke's First Institute, 1628. It is easy to see that whatever considerations were then moving to create the one disqualification might coöperate to cause the other, — although no directly common origin or association appears in the precedents.

But the singularity is that other grounds of disqualification which would naturally be linked with the present one, and were recognized as unquestionably united with it in the two other legal systems of the time — the Roman civil

and the ecclesiastical law [1] — failed wholly of recognition in any respect in our own law, namely, the ground of filial or paternal relationship and of domestic dependency. That *servant* and *master* were admissible for each other was always the law.[2] That *father* and *son*, as well as other family relations, were admissible for each other was never doubtful; though the objection was in the beginning frequently raised (upon the analogy, probably, of the civil and the ecclesiastical rules).[3] This anomaly is difficult to explain. It may perhaps be attributable to nothing more than the scholastic reasoning, peculiar to the times, which sufficed for Coke's mind, namely, the legal identity of the two spouses (*post*, § 601). This theory, which of course did not apply to the parental relationship, assimilated the wife to the husband, and thus made her share his disqualification (*ante*, § 575).

§ 601. **Policy of the Rule.** In considering the reasons upon which the rule rests and the policy of altering it, the distinction must be kept in mind between the *incapacity* of the one spouse to testify *for* the other and the *privilege* not to testify *against* the other. This distinction (more amply examined *post*, § 2228) warns us that we are here considering only the reasons for disqualifying them when voluntarily coming forward in favor of each other, — reasons quite independent of those affecting the privilege of not being compellable or allowable to testify against each other.

(1) The earliest reason to be met is a piece of metaphysical fiction, and calls for no attempt to answer it:

1628, Sir *Edward* COKE, Commentary upon Littleton, 6 *b*: "It hath been resolved by the justices that a wife cannot be produced either for or against her husband, *quia sunt duæ animæ in carne una*."

(2) A second reason, later advanced, was the *marital identity* of *interest*, *i.e.* the same reason that sufficed for interested persons in general:

Ante 1726, Chief Baron GILBERT, Evidence, 133: "'The second corollary to this general rule [of exclusion from interest] is that husband and wife cannot be admitted to be witnesses for or against each other; for if they swear for the benefit of each other, they are not to be believed, because their interests are absolutely the same, and therefore they can gain no more credit when they attest for each other than when any man attests for himself."

§ 600. [1] For these rules, see the quotations *ante*, § 575, n. They obtained in Louisiana, as a follower of the civil law, under the original code of that State (§ 2260); but have since been abolished; Rev. Civ. C. 1920, § 2282, Rev. L. 1915, § 1191.

[2] Citations *ante*, § 575, *passim* (history of disqualification by Interest).

[3] *England:* 1630, Moor's Case, Hetley 137 ("Hutton said, there can be no exception to the witness who is cozen to the party, to hinder his evidence in our law; to which all agreed"); *Ante* 1635, Hudson, Treatise of the Star Chamber, pt. III, § 21, in Hargr. Collect. Jurid. 205 ("The son may be a witness for the father"); *Ante* 1726, Gilbert, Evidence, 133 ("But no other relation is excluded, because no other relation is absolutely the same in interest. But by the civil law, servants and children were excluded because the parents and masters had absolute power over them, and therefore under that law they swore with manifest interest to themselves"); 1727, Dalton, The Country Justice, 2d ed., c. 164; 1752, R. *v.* Oakhampton, 1 Wilson 332, Sayer 45, McNally, Evidence, 182 ("Mere relationship, how near soever the relation may be, does not go to the competency of a witness").

United States: 1904, Brown *v.* State, 142 Ala. 287, 38 So. 268 (father); 1848, N. Y. Commissioners' Report (quoted *ante*, § 576).

This reason is a plausible one, and serves well enough for most situations at common law, where the wife's property interests in her husband's estate would place her equally under the disqualification of an interested person, and 'vice versa.' But the theory fails when pushed to extremities; for the disqualification prevailed, by general acceptance, even where their property interests were wholly independent (*post*, § 603).

(3) There must be, then, some further reason; and this, naturally, is the supposed *bias of affection*, — that partisanship which may, ordinarily, be assumed from the very existence of the marital relation:

1854, SAMUELS, J., in *Johnston* v. *Slater*, 11 Gratt. 321, 323: "From the intimate relation between husband and wife, and from the strong bias of feeling towards each other, the law has provided that neither shall be a witness in regard to any subject in which the other is interested."

(4) But still a fourth reason — fantastic enough — has been advanced, analogous to that which has been advanced for the privilege (*post*, § 2228) and yet different in its origin, namely, the danger of that *disturbance* of *marital peace* which might occur if the wife, being available for the husband, should be expected by him to come forward and perjure herself:

1860, SARGENT, J., in *Kelley* v. *Proctor*, 41 N. H. 139, 142: "We believe that the true reason why a wife should not be allowed to testify either for or against her husband at common law has always been a sort of compound reason, founded partly in interest, to be sure, and the identity of the persons, but partly also upon conditions of public policy. . . . We think that considerations of public policy — the fear of sowing dissensions between man and wife, and of occasioning perjury . . . — are equally satisfactory reasons why they should not be allowed to testify in each other's favor. It is to be feared that in some instances, if not in many, if it were understood that a wife could testify for her husband but not against him, where the husband has the misfortune to be litigious and the still greater misfortune to be unprincipled, that the wife would find herself called upon too often to choose between her duty to her God and the requirements of (not to say her duty to) her husband, — between violating the obligations of her oath and incurring the displeasure of him whom she has promised to love, honor, and obey."

(5) And, finally, since a wife, if called by her husband, must be subjected to a cross-examination which might call for truths unfavorable to his cause, the same danger (whatever it amounts to) here recurs again, with such added and similar dangers (from telling the truth against him) as the privilege (*post*, § 2228) is designed to forefend.

What, then, of these various reasons? Is there any soundness in them?

As to the first, no one has ever thought it worth either defending or answering.

The second does not even adequately explain the law; but, so far as it does, it stands or falls by its prototypes, the reasons for disqualification by interest in general, which are now universally repudiated (*ante*, § 576).

The third reason is nothing more than the second in another variety — *i.e.* the supposed danger of falsification by a witness subject to the bias of marital affection, instead of the bias of pecuniary interest; and it can hardly be

contended that the danger in this form is different enough in degrèe to override the arguments applicable in opposition to the other form (*ante*, § 576). In short, the possibility of falsification by wife or husband is no more a reason for exclusion than the same possibility by a person pecuniarily interested; and the objectionable inconsistencies and irrational quibbles which disfigured the rule are as much apparent in the one form as in the other.

The fourth argument, based on the ground of possible dissension, is open to the objections, first, that it is a mere apprehension, not worthy of consideration as appreciable; secondly, that it deprives honest causes of upright testimony for the sake of preventing dishonest causes from using false testimony; thirdly, that it attempts to distort the natural rules of testimony for the sake of preventing marital infelicities which either ought to be otherwise and more directly remedied, or else rest upon such deep-seated causes that it is useless to expect to remedy them by legal interference. In other words, where the husband of the supposed unprincipled sort exists, the attempt to regulate his daily domestic tyranny by the casual application of a rule of evidence is ridiculous; and, beyond this, to build up, for all families not so afflicted, a rule of universal deprivation having this abnormal type of masculine Borgia for its basis, is to go to fantastic extremes of caution.

Finally, the possibility of adverse testimony on cross-examination is an objection which need not be entertained on behalf of one who has himself — by hypothesis — called his wife in his favor; he desires to use her testimony, and may be therefore supposed to accept the risk of unwelcome results on cross-examination. The law cannot properly refuse him the right to her testimony on account of a risk which he himself is willing to assume. Add to all this, that the rule is equally open to all those general objections which weigh against the rule of disqualification by interest (*ante*, § 576).

In the following passages are expounded the chief of the foregoing answers:[1]

1852, Erle, J., in *Stapleton* v. *Crofts*, 18 Q. B. 367, 377: "If the question be considered with reference to the interest of truth, it is clear the exclusion of essential information as a means for finding truth is absurd. It is not doubted that wives often possess essential information as to matters within the usual province of a wife, and as to those conducted by her as agent for her husband, and as to those which she happened to witness. If essential witnesses are excluded, there is the certain evil of deciding without knowledge, and there is the probable evil of shaking confidence in the law. . . . The idea that husbands would generally suborn their wives to perjury, and persecute them if they spoke truth, is to my mind unworthy of the time. There is no reason to suppose that wives, if admitted, would be worse treated in respect of their testimony than in respect of any other part of their conduct, or be more prone to untruth than any other class of witnesses; and if, by reason of the exclusion of the wife, the husband has to suffer an adverse judgment contrary to the truth, and [therefore to suffer] the consequent loss, he would dissent with much reason from the zealous declarations that such a mean for pro-

§ 601. [1] The arguments are more fully presented in the following works: 1828, Bentham, Rationale of Judicial Evidence, book IX, pt. IV, ch. V, § 4 (Works, Bowring's ed., vol. VII, p. 480); *Circa* 1823, Livingston, Introductory Report to the Code of Evidence (Works, ed. 1872, I, 452 ff.); 1860, Appleton, Evidence, c. IX.

tecting the peace of his family and the sanctity of his marriage was better than administering the law according to truth."

1853, *English Common Law Practice Commission*, Second Report, 11: "The highly satisfactory result of these more enlarged views [represented by the abolition of disqualification by interest in general] induces us to consider whether an exception preserved by the late statute, namely, the exclusion of husband and wife as witnesses for or against each other, may not be abolished. . . . The incompetency of husband and wife to be witnesses for one another is said to rest on three grounds: 1st, Identity of interest; 2d, the consequent danger of perjury; 3d, the policy of the law, which, as it is said, 'deems it necessary to guard the security and confidence of private life, even at the risk of an occasional failure of justice', and which rejects such evidence, because its admission would lead to domestic disunion and unhappiness. The first two grounds are manifestly no longer tenable, since the parties to suits have been themselves made competent to give evidence. It remains to be considered how far the third ground should be allowed to exclude testimony which may be essential to justice. In the first place, it seems clear that no disturbance of domestic happiness need be apprehended from permitting husband and wife to call one another as witnesses. The evidence may in many cases be indispensable. A wife often keeps her husband's books, conducts his business in his absence, pays or receives money for him. Even in matters in which she may take a less active part, her testimony may be the only one to prove facts essential to the vindication of her husband's rights, or it may be valuable as confirmatory of the evidence of other witnesses: so, the testimony of the husband may be material to the wife in matters relating to her separate estate, to the proof of her coverture, if sued as a feme sole, and the like. It seems difficult to assign any reason why the law should be more tender of the domestic happiness of married persons than they are themselves disposed to be; the only danger that can be suggested is, that evidence might be extracted from the witness, by the adverse party, prejudicial to the interest of the married plaintiff or defendant, and that some bitterness of feeling might arise in consequence; but of the probability of such a result the married couple are themselves the best judges. Should any fact be thus brought to light which would otherwise have remained unproved, the interests of truth will be thereby promoted, and any transient interruption of conjugal harmony from such a circumstance, or from disappointment occasioned by the evidence falling short of what was expected, would be a trifling evil compared to the mischief which must result from the exclusion of testimony essential to the ends of justice and truth."

§ 602. **Same: Statutory Alterations.** The validity of this misguided rule of the common law could not long have remained unquestioned, as soon as any discussion was raised regarding the propriety of the general rules for competency of witnesses.

In England, Bentham launched against the rule his well-merited invectives, and in this country they were presented in the treatises of Livingston and of Appleton. The first step was taken in England as early as 1846, when husband and wife were made admissible in the county courts.[1] Then in 1853, after parties and interested persons had been made competent,[2] husbands and wives were made admissible in civil cases, except for proceedings founded on adultery.[3] This exception in civil cases was removed in 1869;[4] and finally, the incompetency in criminal cases was abolished in 1898.[5]

§ 602. [1] St. 9 & 10 Vict. c. 95.

[2] The statute of 1851, 14 & 15 Vict. c. 99, §§ 2, 3, had been held not to remove by implication the marital incompetency.

[3] St. 16 & 17 Vict. c. 83, § 4.

[4] St. 32 & 33 Vict. c. 68, § 3.

[5] St. 61 & 62 Vict. c. 36, § 1. All these statutes are set forth *ante*, § 488.

In Canada, marital disqualification is removed, for criminal cases throughout the Dominion, and for civil cases in most of the jurisdictions.

In the United States, the progress has been, in most jurisdictions, equally slow, and in some even slower. Furthermore, it has been made in very similar stages, — that is, the marital disqualification has usually not been recognized as outgrown until after the disqualification of parties and interested persons had been removed, and the recognition has been given force in civil cases earlier than in criminal cases. These distinctions seems to be somewhere obscurely rooted in the subject, so that the instant apprehension of the unsoundness of all of these limitations has seldom been found.

No vestige of these outworn rules now remains, in most jurisdictions. In a few, the common law rule is still sanctioned by statute for civil cases only; and a few show the "bad eminence" of preserving this cruel antiquated injustice in criminal cases.[6]

It is therefore necessary to consider, under each part of the subject, first, the scope of the rule at common law, and, secondly, the effect of statutory alterations.

§ 603. **Theory of the Common-Law Rule; Relationship, not Property Interest, excludes.** The fundamental theory of the common-law rule was that the *relationship*, not the pecuniary interest, caused the disqualification; hence, the rule applied even where the witness offered had no interest in the estate of the spouse who was a party to the suit:

1855, LEE, J., in *William & Mary College* v. *Powell*, 12 Gratt. 372, 383: "Thomas J. Powell is offered as a witness [for his wife's estate] in support of the settlement made by him upon his wife, [which is now sought to be set aside as void against creditors, husband being insolvent]. For this purpose he was clearly incompetent. . . . That he was not himself personally interested because he was bound for the college debt in any case, or that his interest was the same either way, does not vary the case. The authorities cited show that his incompetency does not rest upon the narrow ground of a personal and direct interest, but upon other and different principles. Indeed, the incompetency has been maintained even where the husband's interest was the other way. Thus, in an action by the trustee for a wife against the sheriff for taking goods which were her separate property, under an execution against the husband, the husband was held to be an incompetent witness for the plaintiff (the wife being regarded as the real plaintiff), although he had an interest on the other side, in having his debt satisfied by the levy of the execution."

This theory was maintained, without dissent, whenever occasion arose.[1]

[6] These statutes are set out *ante*, § 488.

§ 603. [1] 1792, Davis *v.* Dinwoody, 4 T. R. 678 (action for value of goods, seized on execution against L., by executrix of trustee under a marriage-settlement on L.'s wife; L. not admitted for the plaintiff, although he would be liable if his wife's goods were not); 1830, Terry *v.* Belcher, 1 Bail. s. c. 568, 571 ("in law they are identical, notwithstanding any contract that may exist between them"); 1844, Osborn *v.* Black, Speers Eq. s. c. 431, 435; 1860, McDuffie *v.* Greenway, 24 Tex. 625, 629; 1855, William & Mary College *v.* Powell, 12 Gratt. Va. 372, 382 (see quotation *supra*); 1873, Murphy *v.* Carter, 23 id. 477, 488; 1881, Fink *v.* Denny, 75 Va. 663, 669; 1886, Mills *v.* Spencer, 81 Va. 751, 755.

In particular, the husband was disqualified even in suits concerning the wife's *separate estate:* 1838, Trenton B. Co. *v.* Woodruff, 2 N. J. Eq. 117, 131; 1835, Warner *v.* Dyett, 2 Edw. Ch. N. Y. 497; 1840, Hosack *v.* Rogers,

Nevertheless, it was not always consistently carried out to its complete extent. Furthermore, it was applied, not in spirit, but only in technical strictness, *i.e.* the fact of bias was not looked for anew in each case and the rule applied wherever such bias was to be presumed; but the principle, though placed upon the above ground, was once for all reduced to a rule, framed for the specific and limited case of a wife or husband testifying for the other's interest, and was then enforced on those technical lines. Thus it often admitted persons in situations where such a bias would in fact be equally likely, and excluded them in situations where such a bias would be by no means likely. These peculiarities may be further noticed in dealing with the details.

The classes of questions that arise fall naturally under four heads: Who is excluded as being a spouse? On whose behalf is a spouse excluded? What exceptions exist, at common law or by statute? How far have statutes abolished the general rule?

§ 604. **Waiver; Sundry other Principles discriminated.** (1) The doctrine of *waiver* applies exclusively to Privilege (*post*, § 2242); a disability cannot be waived. One spouse, therefore, cannot by any attempted waiver be enabled to call for the favoring testimony of the other.[1]

(2) The question of pleading in chancery, whether the *answer* of wife or husband can be used for the other as co-party, rests on other principles than the present rule of evidence.[2]

(3) The use of *hearsay statements* of a wife or husband, admissible under recognized exceptions to the Hearsay rule, seems never to have been regarded as limited by the present disqualification.[3]

(4) Whether one may testify to his *own marriage* involves usually no other question than perhaps the interest-disqualification, and, when that prevailed, was answered in the affirmative.[4]

8 Paige N. Y. 229, 242: 1845, Burrell v. Bull, 3 Sandf. Ch. N. Y. 15, 24.

The rule has been applied in other than the ordinary tribunals: 1898, Seaton v. Kendall, 171 Ill. 410, 49 N. E. 561 (wife incompetent, in arbitration proceedings between husband and third person).

§ 604. [1] There cannot be the slightest doubt upon principle, but the few rulings are not satisfactory, partly owing to the usual statutory regulation, in the same section (*e.g.* Cal. C. C. P. § 1881), of both the disqualification and the privilege, the language of the one being in truth inappropriate for the other: 1852, Barbat v. Allen, 7 Exch. 609 (waiver not allowed, because the consent was not given till after the judge's ruling of exclusion; whether it could have sufficed, if made before, was the subject of difference of opinion); 1898, Falk v. Witham, 120 Cal. 479, 52 Pac. 707 (incapacity of the other spouse to consent does not allow an examination); 1862, Russ v. Steamboat War Eagle, 14 Ia. 363, 375 (waiver allowable under a statute expressly sanctioning a waiver: the rule being applicable in practice to the case of a husband objecting to his co-party calling the wife); 1865, Blake v. Graves, 18 Ia. 312, 318 (same: by a majority); 1901, Murphy v. Ganey, 23 Utah 633, 66 Pac. 190 (an implied consent suffices, under Rev. St. § 3412).

Supposing, however, that by statute the disqualification is removed, the question may arise whether the spouse has *waived the right* to call the other: 1890, Wolford v. Farnham, 44 Minn. 159, 46 N. W. 295 (wife's objection to husband's being called against her is not a waiver preventing her from calling him later in her behalf).

[2] See Frank v. Lilienfeld, 1880, 33 Gratt. 377, 380.

[3] Examples may be found *post*, in §§ 1718, 1730 (wife's declarations of affection, etc.), 747, 1772 ff.

[4] 1736, Stapleton v. Stapleton, Lee temp. Hardwicke 277. For cases where the present principle is genuinely involved, see *post*, § 607.

2. Who is excluded as a Spouse?[1]

§ 605. **Mistress; Bigamous Marriage.** The rule excluded such a person only as fulfilled the technical definition of lawful husband or wife. No doubt this was an absurd limitation; because, on the orthodox theory of marital bias (*ante*, § 603), the existence or absence of the bias would probably not depend on the technical validity of the relation. Nevertheless, it is needless to complain of a minor absurdity in a rule which had its very foundation upon a fallacious notion of testimonial principles.

It followed that a *mistress* or concubine, being not a legal wife, was admissible.[2] It followed also that, if there had been a *bigamy*, the first spouse alone, being the only lawful one, was inadmissible;[3] though here some uncertainty existed as to the extent to which the proof of the first marriage must go in order to qualify the later spouse or disqualify the prior one.[4]

3. On whose behalf is a Spouse excluded?

§ 606. **General Principle.** Husband or wife is excluded from testifying for the other. What is it, then, to testify *for* the other? Is it merely to speak favorably for the other in any sense, — for example, by speaking to the other's credit as a witness, or by corroborating his testimony, or by contributing any fact whatever which palpably redounds to the advantage of the other in any respect whatever?

If the theory of marital bias (*ante*, § 603) were to be carried out in the fullest intent, such would be the effect of the principle; for the supposed marital bias would affect any and every topic of testimony. But that theory is not logically carried out. It is limited (as already noted in § 603) by a strictly technical definition of advantage or profit. To speak *for* another is understood in the narrow sense of speaking *for his legal interest in the cause in hand*. No other advantage or profit or credit which may be favored by the testimony is

§ 605. [1] The word "spouse" will here be employed, to avoid the cumbrousness, not to say confusion, which the use of "husband and wife" involves. We need such a single word for purposes of scientific legal discussion. It exists in the Continental law and in our own Louisiana law.

[2] 1889, R. *v.* Nan-e-quis-a-ka, 1 N. W. Terr. 211 (an Indian marriage, held sufficient on the facts); 1867, Flanagin *v.* State, 25 Ark. 92; 1876, Rickerstricker *v.* State, 31 Ark. 207; 1871, Hill *v.* State, 41 Ga. 484, 496, 503; 1811, Meunier *v.* Couet, 2 Mart. La. 56; 1854, Johnson *v.* Melville, 9 La. An. 308, *semble;* 1870, Dennis *v.* Crittenden, 42 N. Y. 542, 546; 1872, Birdsall *v.* Patterson, 51 N. Y. 43, 47.

[3] 1702, Broughton *v.* Harpur, 2 Ld. Raym. 752 (ejectment; first wife not admitted for defendant to prove a marriage prior to that under which the plaintiff claimed); 1842, State *v.* Patterson, 2 Ired. 346, 354 (second wife admitted).

[4] 1905, State *v.* Wilson, 5 Penn. Del. 77, 62 Atl. 227 (assault with intent; a woman who had signed a bond, etc., as defendant's wife, not excluded); 1898, Lowery *v.* People, 172 Ill. 466, 50 N. E. 165 (if a first marriage is in controversy, a second alleged wife is incompetent); 1899, Clark *v.* People, 178 Ill. 37, 52 N. E. 857 (forgery; alleged second wife admissible, on a showing that the first wife was living and undivorced at the time of the second marriage).

So, also a marriage *since the time* of the transaction or crime will disqualify: 1904, Elmore *v.* State, 140 Ala. 184, 37 So. 156 (wife excluded).

On these points, consult also the precedent *post*, § 2230–2239, under Privilege, where the same question arises and the rulings are more numerous.

regarded as requiring this prohibition. The other person must have an interest in the event of the cause, in order that the spouse's testimony be admissible. This limitation was formed in analogy to the general rule disqualifying interested persons (*ante*, § 576), and it was convenient enough as a test; although a little reflection shows that the adoption of it in the present connection was by no means a necessary logical consequence. In other words, the common law made two distinct assumptions, first, that a specific kind and quantity of interest would probably induce a person to falsify, and, secondly, that precisely the same kind and quantity of interest, no more and no less, must be at stake for that person in order that the person's husband or wife should probably be induced to falsify.

The principle finds application in several aspects:

§ 607. **Interest in the Cause; Nominal Party.** On the one hand, the fact that the one spouse is *interested in the event* of the cause, even though not as a party to the record, serves to exclude the testimony of the other spouse.[1]

§ **607.** [1] In the following cases this rule was applied to *exclude* the witness: *England:* 1701, Tiley *v.* Cowling, 1 Ld. Raym. 744 (carrier's action for trover against person wrongfully taking goods consigned; consignor's wife, not admitted for plaintiff, because the judgment and testimony could be used by the consignor in suing the carrier); 1826, Cornish *v.* Pugh, 8 Dowl. & R. 65 (wife of defendant's bail, excluded);

Ireland: 1824, Corse *v.* Patterson, 6 H. & J. 153 (wife not admitted for husband's mortgagee sued in replevin by another person);

United States: 1824, Griffin *v.* Brown, 2 Pick. Mass. 303, 308 (action against the sheriff for a debtor's escape; debtor's wife not admitted for the defendant to prove the debtor's insolvency, because the judgment would be conclusive as to damages in the sheriff's action against the debtor); 1866, Young *v.* Gilman, 46 N. H. 484, 486; 1829, Leggett *v.* Boyd, 3 Wend. N. Y. 376 (wife of a special bail, excluded); 1814, Snyder *v.* Snyder, 6 Binn. Pa. 483, 487, 492 (against plaintiff heirs, defendant claimed title by administrator's sale; the husband of one who would obtain dower if the sale was set aside, not admitted for plaintiff; but this was put partly on the ground that the verdict would be used in the probate court in distribution proceedings; Yates, J., diss., because her interest was contingent only); 1819, McComb *v.* Dillo, 5 S. & R. Pa. 305, 307 (wife excluded, under analogous circumstances); 1868, Pringle *v.* Pringle, 59 Pa. 281, 288 (administrator's suit; husband of daughter of intestate, not admitted for plaintiff, her interest not being contingent); 1871, Carpenter *v.* Moore, 43 Vt. 392 (wife of heir is inadmissible in a will contest); 1874, Wheeler *v.* Wheeler's Estate, 47 Vt. 637, 646 (an heir in a suit to charge an advancement is a party, though not of record); 1882, Labaree *v.* Wood, 54 Vt. 452 (test is whether the judgment can be used for or against the husband; if so, his wife is incompetent; here, the wife of a grantor was excluded in a suit between his creditor and a grantee); 1873, Murphy *v.* Carter, 23 Gratt. Va. 477, 488; 1878, Warwick *v.* Warwick, 31 Gratt. Va. 70, 76; 1886, Lindsay *v.* McCormick, 82 Va. 479, 481, 5 S. E. 534.

In the following cases this rule was applied to *admit* the witness: *England:* 1670, R. *v.* Parris, 1 Sid. 431 (information against P. for obtaining a judgment against the wife of L. before her marriage, the execution having been extended upon the husband's estate; the Court set aside the judgment, "and principally on the wife's evidence, *quod nota*"; probably because the document on which the judgment was based was obtained from her in private at a tavern by P.); 1788, R. *v.* Cliviger, 2 T. R. 263 (pauper settlement; to prove that M. was not J.'s wife, E. was offered as his first wife to prove the marriage; her interest in charging him with her support, held no objection; in effect discrediting R. *v.* Reading, 1734, Lee cas. temp. Hardw. 79, on this point; compare the rule as to wife's testimony to non-access, *post*, § 2063);

United States: 1904, Lanning *v.* Gay, 70 Kan. 353, 78 Pac. 810, 85 Pac. 407 (husband of a legatee, allowed to testify at probate as a subscribing witness); 1870, Parsons *v.* People, 21 Mich. 509, 513 (adultery with S.; S. admissible for prosecution, though her husband was by statute the necessary complainant); 1830, Richardson *v.* Learned, 10 Mich. 261, 268 (trustee for wife's separate property suing for it; husband admitted for the plaintiff, his interest being contingent only); 1833, Coffin *v.* Jones, 13 Mich. 441, 445 (action against a deceased administrator's surety; administrator's wife admitted for defendant); 1860,

On the other hand, the fact of the one spouse being a *nominal party* to the record, without real interest in the issue, does not exclude the other spouse.[2]

§ 608. **Same: Effect of Statutes qualifying Parties and Interested Persons.** Suppose, now, that by a statute, which does not expressly affect the disqualification of the spouse offered as a witness,[1] the disqualification of parties and interested persons is abolished; what test remains for determining the matters examined in the foregoing section? The test whether one was attempting to testify *for* the other is there seen to be whether the other was legally interested in the cause and thus himself was disqualified; since that interest no longer disqualifies the other, and its definition for that purpose is no longer important, shall it nevertheless remain as the test for the present purpose? To preserve it would seem to be anomalous; and yet to invent any other would be hazardous.

There is a singular dearth of authority; in one jurisdiction the old test of *interest* has been preserved — for example, a wife may not testify for a husband who is interested and yet is himself competent by statute;[2] in another jurisdiction, the husband must be a *party*, in order that the wife may be disqualified.[3] On one point, however, most are properly agreed, namely, that so far as interest has been preserved as a disqualification by statute, *i.e.* in the case of a *survivor against a decedent* (*ante*, § 578), there the survivor's spouse is of course disqualified, in direct obedience to the common-law analogy.[4]

State *v.* Borden, 6 R. I. 495 (assault and battery on the wife by a third person, the husband being liable for costs as prosecutor; wife admissible for the prosecution); 1857, Rutland & B. R. Co. *v.* Lincoln, 29 Vt. 206, 209 (admitting the wife of a husband merely liable on a bond for costs); 1806, Baring *v.* Reeder, 1 Hen. & M. Va. 154, 157, 164, 171, 172 (wife admissible where her husband, though interested, is not a party nor bound by the result; two judges dissenting).

[2] The principle was applied in the following cases: 1738, Cotton *v.* Luttrell, 1 Atk. 451 (husband of a wife made party-defendant without being interested in the event, admitted for her co-parties); 1840, Young *v.* Richards, 2 Curt. Eccl. 371, 374 (wife of an executor, excluded, in probating a will); 1884, Ross *v.* Ross, Can. Sup., Cassels' Dig. 1893, p. 306 (husband of executrix, in a suit for her removal, not admitted); 1888, Beale *v.* Brown, 17 D. C. 574, 576 (wife admitted to testify for herself where the husband was joined as a formal party only); 1872, Ruth *v.* Ford, 9 Kan. 17, 29; 1897, Collins *v.* Wilson, — Ky. —, 39 S. W. 33 (wife admitted where the husband was only next friend suing for a child); 1861, Donnelly *v.* Smith, 7 R. I. 12 (husband and wife suing for wages earned by her before marriage; wife not admitted); 1864, Bonet *v.* Stowell, 37 Vt. 258 (wife of a 'prochein ami', admitted).

§ 608. [1] This aspect of these statutes is discussed *post*, § 619.

[2] 1890, Craig *v.* Miller, 133 Ill. 300, 307, 24 N. E. 431 (repudiating the following case: 1882, Lincoln Ave. & N. C. G. R. Co. *v.* Madaus, 102 Ill. 417, 419); 1904, Schneider *v.* Sulzer, 212 Ill. 87, 72 N. E. 19.

[3] 1877, Higbee *v.* McMillan, 18 Kan. 133.

[4] *Accord: Illinois:* 1886, Treleaven *v.* Dixon, 119 Ill. 548, 553, 9 N. E. 189 (explaining prior cases); 1888, Way *v.* Harriman, 126 Ill. 132, 137; 1889, Shaw *v.* Schoonover, 130 Ill. 448, 455, 22 N. E. 589; 1894, Bevelot *v.* Lestrade, 153 Ill. 625, 631, 38 N. E. 1056; 1895, Pyle *v.* Pyle, 158 Ill. 289, 41 N. E. 999; 1895, Stodder *v.* Hoffman, 158 Ill. 486, 41 N. E. 1082; *Nebraska:* 1905, Hiskett *v.* Bozarth, 75 Nebr. 70, 105 N. W. 990 (distinguishing, but not soundly, between husband and wife as witness); *Pennsylvania:* 1889, Bitner *v.* Boone, 128 Pa. 567, 18 Atl. 404; 1900, Myers *v.* Litts, 195 Pa. 595, 46 Atl. 131; *West Virginia:* 1886, Kilgore *v.* Hanley, 27 W. Va. 451, 454; 1912, Freeman *v.* Freeman, 71 W. Va. 303, 76 S. E. 657; *Wisconsin:* 1896, Valentine's Will, 93 Wis. 45, 67 N. W. 12.

Contra: 1906, Bentley *v.* Jun, — Nebr. —, 107 N. W. 865 (husband of plaintiff admitted, where the plaintiff's success would give her property "in which her husband would have no direct legal interest"); 1906, White *v.* Poole, 74 N. H. 71, 65 Atl. 255; 1906, Guillaume *v.* Flannery, 21 S. D. 1, 108 N. W. 255 (under a statute expressly qualifying husband and wife in general, a wife not pecuniarily interested may testify).

§ 609. **Co-defendants.** Where a person is co-defendant and desires to call for himself the spouse of another defendant, the question arises whether the spouse can be said to be testifying for the other defendant. The latter is a party to the record, and thus ordinarily any testimony given in the cause would be testimony for him. Nevertheless, ways were found at common law for withdrawing him from the record or otherwise removing his actual interest in the issue; and a special group of rules were developed for this situation, where one defendant was desired to be called for a co-defendant. On the general principle already examined (*ante*, § 606), whatever rule defined the other defendant's interest as a disqualifying one would also define the spouse's disqualification. The rules for a co-defendant called on behalf of a defendant have been already examined in detail (*ante*, § 580); it is therefore enough here to note that those rules served equally here to determine the admissibility of the spouse.[1]

These rulings would depend somewhat upon the terms of the survivor-statutes (*ante*, § 578); and for the reasons there stated, no attempt is here made to collect them fully.

§ 609. [1] The rules were applied in the following cases; compare with them the precedents *post*, § 2236, under Privilege, as to calling the spouse *against* a co-defendant:

ENGLAND: 1739, R. *v.* Frederick, 2 Stra. 1095 (co-defendant's wife excluded, "it being a joint trespass and impossible to separate the cases of the two defendants in the account to be given of the transaction"); 1804, R. *v.* Locker, 5 Esp. 107 (conspiracy for procuring a ward to marry one of the defendants; the defendant-husband's wife, the ward, not admitted to exonerate the other defendants); 1826, R. *v.* Smith, Mood. Cr. C. 289 (burglary); 1830, R. *v.* Hood, Mood. Cr. C. 281, 289 (assault); 1843, Hawkesworth *v.* Showler, 12 M. & W. 45 (joint trespass against S. and B.; the trespass by S. being clearly proved, S.'s wife was not allowed to exonerate B.; "where a person who is the defendant upon the record is entirely removed from it, whether by a judgment by default, or by a verdict pronounced in his favor, or by the jury not being charged with his interest at all at the time, in those cases, and in those only, his wife can be examined as a witness"); 1844, R. *v.* Bartlett, 1 Cox Cr. 105 (larceny; co-defendant's wife admitted, with hesitation, where "the defence of each is distinct"); 1847, R. *v.* Denslow, 2 Cox Cr. 230 (horse-stealing; co-defendant's wife not admitted to prove alibi, because this would benefit the husband by impeaching the prosecutor); 1872, R. *v.* Thompson, 12 Cox Cr. 202 (larceny; joint indictment and trial; wife of one excluded).

UNITED STATES: *Federal:* 1868, U. S. *v.* Addatte, 6 Blatchf. 76 ("when trials are separate, the wife may testify in favor of or against any one other than her husband, except in cases where the acquittal of one defendant works the acquittal of the rest, as in cases of conspiracy and the like"); *Alabama:* 1895, Holley *v.* State, 105 Ala. 100, 17 So. 102; *Arkansas:* 1859, Collier *v.* State, 20 Ark. 36, 46; 1881, Casey *v.* State, 37 Ark. 67, 85; 1919, Dean *v.* State, 139 Ark. 433, 214 S. W. 38 (wife of person separately indicted for same offence, excluded, on the facts, for the defendant); *California:* 1883, People *v.* Langtree, 64 Cal. 256, 30 Pac. 813; *Georgia:* 1885, Trowbridge *v.* State, 74 Ga. 431, 434; 1898, Stephens *v.* State, 106 Ga. 116, 32 S. E. 13; *Illinois:* 1898, Gillespie *v.* People, 176 Ill. 238, 52 N. E. 250 (co-defendants jointly tried; wife of one, incompetent, unless the grounds of defence are distinct); 1920, People *v.* Holtz, 294 Ill. 143, 128 N. E. 341 (murder of W. and attempted murder of H. by Mrs. W. and Mrs. H.; H. was called on behalf of Mrs. W., and his testimony would have exonerated both Mrs. H. and Mrs. W.; held inadmissible; a notable example of the shocking absurdity of the ancient law still prevailing in this State, and a proof of the scandalous indifference of the Legislature to the condition of the law); *Kansas:* 1888, Arn *v.* Mathews, 39 Kan. 272, 18 Pac. 65 (defendant's wife not admitted for co-defendant where the defence was joint); *Kentucky:* 1858, Thompson *v.* Com., 1 Metc. Ky. 13, 15 (wife of co-indictee not on trial, admissible); 1861, Cornelius *v.* Com., 3 Metc. Ky. 481, 483 (same); 1904, Henning *v.* Stevenson, 118 Ky. 318, 80 S. W. 1135 (wife of one of several will-contestants, not admissible for the others); 1903, Dovey *v.* Lam., 117 Ky. 19, 77 S. W. 383 (action for battery against five jointly; the wife of one of them, admitted to testify for the other four; cases cited from Idaho and Indiana, but not the preceding ones in this State); 1919, Bailey *v.* Waddy, 184 Ky. 451, 212 S. W. 459 (husband of one of several will-contestants, not admissible for the other contestants, under Civ. C. § 606); *Maine:* 1849, State *v.* Worthing, 31 Me. 62

§ 610. **Death and Divorce.** (1) If the one spouse is *deceased*, the other spouse is qualified to testify on behalf of the estate, the heirs, or any other person succeeding to the deceased's interests; because there is no living person interested to whom the witness bears the relation of spouse. The reason is thus not that "those feelings and influences, supposed to exist during the conjugal estate, have ceased",[1] for they are quite as likely to remain; but merely that the rule of thumb founded on that supposed bias (*ante*, § 603) has ceased to be applicable:[2]

(wife of a co-indictee, not on trial, and defaulted, admitted); *Massachusetts:* 1804, Com. *v.* Easland, 1 Mass. 15 (assault and battery; wife of co-indictee tried jointly, excluded); 1854, Com. *v.* Robinson, 1 Gray 555 (burglary; similar ruling); *Michigan:* 1843, Pullen *v.* People, 1 Doug. Mich. 48 (wife of co-indictee tried separately, inadmissible); 1863, Morrissey *v.* People, 11 Mich. 327, 331, 341 (*contra*, for co-indictee tried jointly, under the statute of 1861; Manning, J., diss.); *Pennsylvania:* 1833, Com. *v.* Manson, Ashm. Pa. 32, 39 (wife of a co-defendant separately tried, admissible); *South Carolina:* 1821, State *v.* Anthony, 1 McC. S. C. 285 (wife of co-indictee, not on trial, admitted for the defendant); 1855, State *v.* Bradley, 9 Rich. 168, 171 (similar; but testimony that would criminate her husband was excluded); 1866, State *v.* McGrew, 13 Rich. 316; 1866, State *v.* Drawdy, 14 Rich. 87, 89 (like State *v.* Anthony); 1881, State *v.* Workman, 15 S. C. 540, 546 (wife of co-defendant on trial, not admitted); 1881, State *v.* Dodson, 16 S. C. 451, 460 (same); *Tennessee:* 1840, Moffit *v.* State, 2 Humph. 99 (wife of a co-indictee separately tried, held admissible); *Vermont:* 1904, State *v.* Sargood, 77 Vt. 80, 58 Atl. 971 (killing of colts; wife of a co-respondent, jointly tried, excluded for the defendant); *Wisconsin:* 1854, Schœffler *v.* State, 3 Wis. 823 (husband not admitted for wife's co-defendant jointly tried); 1874, Heath *v.* Keyes, 35 Wis. 668, 672 (wife of a nominal co-defendant; undecided); 1877, Stewart *v.* Stewart, 41 Wis. 624, 626 (wife of co-defendant, excluded unless the wife is otherwise competent for the husband specifically); 1896, Bartlett *v.* Clough, 94 Wis. 196, 201, 68 N. W. 875 (mechanic's lien; wife of co-defendant having same defence, excluded).

§ 610. [1] 1876, Taliaferro, J., in Reilly *v.* Reilly's Succession, 28 La. An. 669, 670.

[2] *Accord: Connecticut:* 1808, Stanton *v.* Wilson, 3 Day 37, 39, 55 (widow allowed to testify in suit by administratrix for services rendered by deceased husband); *Illinois:* 1873, Deniston *v.* Hoagland, 67 Ill. 265, 268 (widow allowed to testify for the heirs in a bill for specific performance of a contract to sell land to her deceased husband); 1914, Monaghan *v.* Green, 265 Ill. 233, 106 N. E. 792 (widow held not admissible, on behalf of the sons contesting a will on the ground of undue influence, to testify to matters pending marriage; the decision turns upon the peculiar wording of Rev. St. c. 51, § 5); *Indiana:* 1858, Carpenter *v.* Dame, 10 Ind. 125, 128 (wife of deceased obligee in a bond, admitted for the heirs against the maker); *Kansas:* 1878, Jaquith *v.* Davidson, 21 Kan. 341, 347 (action by G. D., revived after his decease; his widow and executrix admitted for his estate; "Mr. D. being dead, she was no longer testifying for or against him"); *Kentucky:* 1904, Turner's Trustee *v.* Washburn, — Ky. —, 80 S. W. 460; *Louisiana:* 1876, Reilly *v.* Reilly's Succession, 28 La. An. 669 (widow testifying against a claim of defendant against husband's estate); 1878, Leyman *v.* Levy, 30 La. An. 745, 749 (husband testifying to deceased wife's claim against himself); 1878, State *v.* Ryan, 30 La. An. 1176 (widow testifying against one charged with murdering her husband); *Massachusetts:* 1867, Robinson *v.* Talmadge, 97 Mass. 171 (similar to the next case); 1869, Litchfield *v.* Merritt, 102 Mass. 520, 524 (widow admitted for the husband's executor suing on a debt to the husband); 1917, Thaden *v.* Bogan, 139 Minn. 46, 165 N. W. 864 (action for price of land, defendant being B.; administrator; B's widow held admissible for the defendant); *Missouri:* 1872, Spradling *v.* Conway, 51 Mo. 51, 54 (admitting a widow, in a proceeding for distribution of husband's estate); 1909, Brown *v.* Patterson, 224 Mo. 639, 124 S. W. 1 (widow admitted on behalf of her husband's grantee); *New York:* 1809, Jackson *v.* Bard, 4 John. 230, 233 (widow admitted in suit to recover lands claimed through her husband); 1809, Jackson *v.* Van Dusen, 5 N. Y. 144, 158 (same); *North Carolina:* 1821, Harrison *v.* Burgess, 1 Hawks 385, 393 ("after his death, she is as competent as any one"); 1833, Hester *v.* Hester, 4 Dev. 228, 229; *Ohio:* 1855, Stober *v.* McCarter, 4 Oh. St. 513, 516 (widow may testify for husband's administrator as to the estate); *Pennsylvania:* 1846, Cornell *v.* Vanartsdalen, 4 Pa. St. 364, 373 (widow admitted for executor in action against him for testator's debt); *South Carolina:* 1833, Capehart *v.* Huey, 1 Hill S. C. 407, *semble* (widow competent on a bill against husband's administrators); *Vermont:* 1863, Mathewson *v.* Sergeant's Est., 36 Vt. 142, 144, *semble;*

1846, ROGERS, J., in *Cornell* v. *Vanartsdalen*, 4 Pa. St. 364, 374: "It is somewhat difficult to understand how the point can arise, when her testimony is offered in favor either of the former husband or of his estate after his death. She may have a strong bias, it is true, but that goes to her credit and not to her competency. But in what respect public policy arising from the domestic relation forbids her to testify is not apparent to my mind."

(2) For the same reason, one whose marital relation has been ended by *divorce* may be called on behalf of the divorcee.[3]

4. Exceptions to the Rule

§ 612. **Necessity, as creating Exceptions at Common Law (Injuries to the Wife, Bailments, Account-books, etc.).** The rules of interest-disqualification always recognized certain exceptions founded on a supposed necessity (*ante*, § 576), *i.e.* the presumed impossibility, in specifically defined situations, of obtaining other witnesses; and this analogy was followed in recognizing certain exceptions to the marital disqualification.

(1) There was an exception of indefinite extent, chiefly confined to actions by the husband for *injury to the wife*.[1]

(2) There was, in a few jurisdictions, an exception here for all cases in which the one spouse could have been admitted, by the necessity-exception to the Privilege rule, to testify *against the other*, *i.e.* the exceptions to the two

1903, McDowell *v.* McDowell's Est., 75 Vt. 401, 56 Atl. 99 (wife of a deceased mortgagee, admitted in a foreclosure suit); *West Virginia:* 1878, White *v.* Perry, 14 W. Va. 66, 78 (widow admitted to prove 'bona fides' of husband's grant); *Wisconsin:* 1905, Schultz *v.* Culbertson, 125 Wis. 169, 103 N. W. 234 (widow admitted in an action against the executor on a contract).

Contra: 1871, Reeves *v.* Herr, 59 Ill. 81 (wife testifying for husband's executor; but this ruling receives countenance from the careless wording of the statute); 1855, William & Mary College *v.* Powell, 12 Gratt. Va. 373, 382; 1882, Smith *v.* Bradford, 76 Va. 758, 765; 1886, Mills *v.* Spencer, 81 Va. 751, 755.

[3] 1916, Merritt *v.* Cravens, 168 Ky. 155, 181 S. W. 970 (alienation of affections; plaintiff's divorced wife, admitted for him, under Civ. C. § 606); 1850, Dickerman *v.* Graves, 6 Cush. Mass. 308; 1838, Ratcliff *v.* Wales, 1 Hill N. Y. 63; 1877, Wottrich *v.* Freeman, 71 N. Y. 601.

§ 612. [1] Compare with these precedents the analogous exception to the Privilege rule, *post*, § 2239: ENGLAND: 1694, Thompson *v.* Trevanion, Skinner 402 (wife's statements immediately upon an injury, receivable on the principle of the Hearsay exception, § 1718, *post;* here admitted for the husband suing in trespass for the battery); 1710, Anon., 11 Mod. 224 (husband's action for battery of wife; wife admitted); 1734, R. *v.* Reading, Lee cas. temp. Hardwicke 79 (filiation order charging the husband); 1899, Dunning *v.* West, 51 La. An. 618, 623, 25 So. 306 (here both were admitted); 1906, Martin *v.* Derenbecker, 116 La. 495, 40 So. 849 (modifying the preceding case, in the light of St. 1902, No. 68, amending Civ. Code, § 2402); *Missouri:* 1900, Cramer *v.* Hurt, 154 Mo. 112, 55 S. W. 258 (wife allowed to testify for husband in action for loss of services by defendant's mal-practice, where the defendant took the stand); 1903, Turner *v.* Overall, 172 Mo. 271, 72 S. W. 644 (fraud in securing a trust deed from the wife; husband admitted).

defendant with a married woman's bastard; the woman held a sufficient sole witness to prove intercourse with defendant, "which is usually carried on with such secrecy that it will admit of no other evidence", but not to prove her husband's absence and non-access, "whereas this might be made to appear by other witnesses", and "there is no necessity that can justify her being an evidence"); 1752, R. *v.* Rook, 1 Wilson 340 (same); 1807, R. *v.* Luffe, 8 T. R. 193, 202 (same; as to this last series of precedents, compare the modern rule as to wife's testimony to *non-access*, *post*, § 2063).

UNITED STATES: *Arkansas:* 1916, Pudgett *v.* State, 125 Ark. 471, 188 S. W. 1158 (wife not received for defendant to contradict alleged admissions overheard in conversations with her; unsound); *Louisiana:* St. 1898, No. 190 (quoted *ante*, § 488; in actions for personal injuries to a wife, the wife is admissible, but not

rules were made identical.[2] As the two rules — that of disqualification and that of privilege — were utterly distinct both in reason and in scope, this attempt to assimilate the exceptions by a reversible rule of thumb was purely arbitrary and irrational, and received little recognition.

(3) Wherever the interest-disqualification suffered an exception on the ground of necessity, it would seem that the spouse of the interested person thus admitted became also admissible, — for example, to prove account-books by *suppletory oath*[3] or to prove the contents of *packages bailed and lost*.[4] This exception is hardly to be reconciled with the doctrine (*ante*, § 608) that the removal by statute of the interest-disqualification does not remove the marital disqualification; but consistency in the application of an artificial rule is not to be expected.

§ 613. **Statutory Exceptions**: (1) **Joint Parties; Effect of Statute making Party Competent.** The exceptions carved out of the rule by statute are numerous, and vary markedly in the different jurisdictions. Certain exceptions, however, are common to several jurisdictions, and the judicial interpretation of them may be of service reciprocally.

(1) (*a*) Suppose the spouse offered as a witness to be *also a party*, and suppose a statute to have made parties competent, while leaving married persons incompetent or omitting to provide for them; which of these statutory provisions is to override the other? In most jurisdictions, it has been held, without further discrimination, that the statutory qualification of parties was absolute, and by implication made the spouse competent whenever entitled as a party to testify.[1] In some jurisdictions, a more narrow con-

[2] Compare the corresponding necessity-exception under the Privilege rule, *post*, § 2239: 1844, State *v.* Neill, 6 Ala. 685 (wife admitted for the husband, on a charge of assaulting and beating her); 1882, Tucker *v.* State, 71 Ala. 342 (same); 1862, Com. *v.* Murphy, 4 All. Mass. 491 (similar); 1857, People *v.* Fitzpatrick, 5 Park. N. Y. Cr. C. 26 (similar).

[3] 1845, Littlefield *v.* Rice, 10 Metc. Mass. 287, 290 (wife allowed to make suppletory oath to her husband's account-books kept in part by her).

[4] 1860, Illinois C. R. Co. *v.* Taylor, 24 Ill. 323 (here, to prove the contents of a lost trunk); 1871, Freeman *v.* Freeman, 62 Ill. 189, 191; 1876, Crane *v.* Crane, 81 Ill. 165, 171; 1877, Galbraith *v.* McLain, 84 Ill. 379, 383; 1846, McGill *v.* Rowand, 3 Pa. St. 451 (loss of goods by a carrier; plaintiff's wife's testimony to the contents, admitted; "the principle of necessity which alone enables a party under certain circumstances to prove the contents of a box or trunk applies with as much if not greater force to the wife as to the husband; the wife usually packs her husband's trunk and always her own"; no precedent cited).

For another similar exception, in one jurisdiction, on the ground of *agency*, see *post*, § 616.

§ 613. [1] For all the statutes here involved, see *ante*, § 488;
Arkansas: 1881, Klenk *v.* Knoble, 37 Ark. 298, 302 (if also a party, the wife "*quoad hoc* might testify for herself"); 1891, R. Co. *v.* Amos, 54 Ark. 159, 163, 15 S. W. 362 (joint action for personal injuries; each competent for self alone);
Illinois: 1892, Kusch *v.* Kusch, 143 Ill. 353, 357, 32 N. E. 267 (consequently, if a bill is dismissed against the wife, during the hearing, when the wife is called, she is incompetent);
Indiana: 1872, Bennifield *v.* Hypres, 38 Ind. 498 (action by husband and wife against husband and wife for slander of the plaintiff wife; each wife allowed to testify as a party in interest; reviewing the prior differences of opinion in Carnie *v.* Murphy, 28 Ind. 88; Albaugh *v.* James, 29 Ind. 398; Crane *v.* Buchanan, 29 Ind. 570; Ward *v.* Colyhan, 30 Ind. 395; Mousler *v.* Harding, 33 Ind. 176; Newhouse *v.* Miller, 35 Ind. 463); 1874, Rogers *v.* Rogers, 46 Ind. 1, 4; 1876, McConnell *v.* Martin, 52 Ind. 434, 436; 1880, Clouse *v.* Elliott, 71 Ind. 302, 304; 1883, Sedgwick *v.* Tucker, 90 Ind. 271, 279);
Vermont: 1903, Hathaway's Will, 75 Vt. 137, 53 Atl. 996 (the wife of the proponent of a will, held disqualified in probate proceedings; but

struction has been adopted, and the mere fact of being a nominal party not interested (otherwise if a real party in interest) was held not sufficient to qualify a spouse, on the ground that the interest-statute had not changed the position of such persons.[2] In a few other jurisdictions, a still narrower construction has been followed, by holding in effect that the statute qualifying parties did not entitle a spouse who was a party to testify at all; *i.e.* if both M and N were real parties in interest, neither could testify; but if N was a nominal party only, M could testify, because at common law (*ante*, § 607) M was competent; while N could not testify, because M, the other spouse, was a party in interest.[3]

Thus is practised the sublimation of repulsive quibbling, over a series of combinations which have no real relation to the witness' truth-telling probabilities in any of the situations.

(*b*) In a number of jurisdictions, the matter is made plain by expressly providing that husband and wife shall be competent "where they are *joint parties* and have a joint interest", or (sometimes) " a separate interest."[4] But

not the wife of a legatee, who is herself as legatee joined as a party);
Wisconsin: 1862, Barnes *v.* Martin, 15 Wis. 240, 246 (husband admitted, in action for wife's injuries); 1863, Hackett *v.* Bonnell, 16 Wis. 417, 476 (wife's separate property; husband admitted); 1866, Farrell *v.* Ledwell, 21 Wis. 182; 1877, Holmes *v.* Fond du Lac, 42 Wis. 282, 285; 1877, Getzlaff *v.* Seliger, 43 Wis. 297, 302; 1880, Kaime *v.* Omro, 49 Wis. 371, 372, 5 N. W. 838; 1882, Snell *v.* Bray, 56 Wis. 156, 160, 14 N. W. 14 (even when a nominal party only); 1884, Hoverson *v.* Noker, 60 Wis. 511, 514, 19 N. W. 382; 1885, Strong *v.* Stevens Point, 62 Wis. 255, 261, 22 N. W. 425.

The same result was sometimes reached where the witness was merely interested and thus to that extent qualified by statute: 1885, Strong *v.* Stevens Point, 62 Wis. 255, 262, 22 N. W. 425 (admitting a wife for the husband suing as administrator for death of a child, the two being jointly interested, though she was not a party).

[2] *Missouri:* 1872, Tingley *v.* Cowgill, 48 Mo. 291, 296; 1872, Fugate *v.* Pierce, 49 Mo. 441, 444; 1873, Buck *v.* Ashbrook, 51 Mo. 539; 1873, Owen *v.* Brockschmidt, 54 Mo. 285, 288; 1874, Charles *v.* R. Co., 58 Mo. 458, 461; 1874, Harriman *v.* Stowe, 59 Mo. 93, 95; 1875, Evers *v.* Life Ass'n, 59 Mo. 429, 433; 1875, Cooper *v.* Ord, 60 Mo. 420, 430; 1877, Hearle *v.* Kreihn, 65 Mo. 202, 206; 1879, Steffen *v.* Bauer, 70 Mo. 399, 404 (nor is the witness confined to matters affecting his own interest); 1880, Joice *v.* Branson, 73 Mo. 28; 1882, Wood *v.* Broadley, 76 Mo. 23, 34; 1885, Bell *v.* R. Co., 86 Mo. 599, 606 (Steffen *v.* Bauer approved); 1889, Harrington *v.* Sedalia, 98 Mo. 583, 589, 12 S. W. 342; 1903, Layson *v.* Cooper, 174 Mo. 211, 73 S. W. 472 (admitting a wife as real party in interest, but not merely as owner of property in controversy); 1920, Pischel *v.* Marceline C. & M. Co., — Mo. —, 221 S. W. 74 (personal injury; Layson *v.* Cooper approved);
New Jersey: 1867, Metler's Adm'r *v.* Metler, 18 N. J. Eq. 270, 276;
New York: 1867, Maverick *v.* R. Co., 36 N. Y. 378, 380.

[3] *Virginia:* 1874, Statham *v.* Ferguson, 25 Gratt. 28, 34; 1882, Hayes *v.* Mutual Prot. Ass'n, 76 Va. 225, 227 (insurance policy); 1884, Burton *v.* Mills, 78 Va. 468, 470; 1886, Farley *v.* Tillar, 81 Va. 275, 279 (sole trader); 1886, Perry *v.* Ruby, 81 Va. 317, 323; 1886, Norfolk & W. R. Co. *v.* Prindle, 82 Va. 122, 126 (personal injury); 1886, Lindsay *v.* McCormick, 82 Va. 479, 481, 5 S. E. 534; 1887, Nicholas *v.* Austin, 82 Va. 817, 825, 1 S. E. 132; 1888, Jones *v.* Degge, 84 Va. 685, 688, 5 S. E. 799; 1890, Crabtree *v.* Dunn, 86 Va. 953, 959, 11 S. E. 1053; 1891, Defarges *v.* Ryland, 87 Va. 404, 406, 12 S. E. 806; 1891, Thomas *v.* Sellman, 87 Va. 683, 687, 13 S. E. 146.
West Virginia: the same result was reached under a statute expressly preserving the marital disqualification; 1872, Wheeling *v.* Trowbridge, 5 W. Va. 353; 1877, Hill *v.* Proctor, 10 W. Va. 59, 83; 1877, Rose *v.* Brown, 11 W. Va. 122, 133; 1878, Campbell *v.* White, 14 W. Va. 122, 148; 1880, Lawrence *v.* Dubois, 16 W. Va. 443, 457; 1881, Zane *v.* Fink, 18 W. Va. 693, 742; 1883, Anderson *v.* Snyder, 21 W. Va. 692, 644. But in West Virginia this was changed by St. 1882, c. 130, § 22.

[4] Compare also the analogous rulings under the Privilege rule, *post*, § 2235: *Kansas:* 1881, Jenkins *v.* Lewis, 25 Kan. 479, 481; 1889, Chicago K. & W. R. Co. *v.* Anderson, 42 Kan. 297, 21 Pac. 1059; *Louisiana:* 1871, Keller *v.* Vernon, 23 La. An. 164; 1878, Willis *v.* Ward, 30 La. An. 1282; 1882, Shantz *v.* Stoll,

this merely perpetuates the spirit of the vain distinctions of the common law.

§ 614. **Same: (2) Separate Estate.** It is sometimes provided that the one spouse shall be admissible for the other in trials "concerning the *separate estate* of the wife." [1] The common-law rule in this respect (*ante*, § 603) is thus directly abrogated.

§ 615. **Same: (3) Wife as if Unmarried.** It was often provided that the disqualification shall cease in cases where "the wife would *if unmarried* be plaintiff or defendant",[1] — a clause which perhaps was intended to cover chiefly actions for injuries to or by the wife, but is in fact to-day of large scope, if liberally interpreted.

§ 616. **Same: (4) Agents.** A common exception is that which qualifies husband and wife wherever the transaction in issue was alleged to have been conducted by the wife as *agent* for the husband, or (sometimes) by either as agent for the other.[1] Under this clause, it seems to be proper enough to

34 La. An. 1237; 1886, Beltran *v.* Gauthreaux, 38 La. An. 106, 111; 1888, Johnson *v.* Boice, 40 La. An. 273, 275; 4 So. 163; 1899, Watson *v.* Lyons, 51 La. An. 1697, 26 So. 440 (action by father for loss of services of child and on behalf of the child for latter's personal illness; wife held incompetent on the former issue alone; following Lapleine *v.* R. Co., 40 La. An. 661, 4 So. 875); 1904, Schoppel *v.* Daly, 112 La. 201, 36 So. 322 (husband admitted, in an action by the wife for personal injuries); 1906, Bianchi *v.* Del Valle, 117 La. 587, 42 So. 148 (in the wife's suit for personal injuries, the husband, being joined, may not testify for her); but the effect of these rulings is altered, for actions for *personal injuries to a wife*, by the statute and cases cited *ante*, § 612, n. 1.

§ 614. [1] The statute was applied in the following cases: *Illinois:* 1871, Northern Line P. Co. *v.* Shearer, 61 Ill. 263; 1872, Biggins *v.* Brockman, 63 Ill. 316, 320; 1873, McNail *v.* Ziegler, 68 Ill. 224; 1874, Anderson *v.* Friend, 71 Ill. 475; 1875, Hawver *v.* Hawver, 78 Ill. 412, 414; 1876, Davenport *v.* Ryan, 81 Ill. 218, 219; 1879, Pyle *v.* Oustatt, 92 Ill. 209, 216; 1879, Funk *v.* Eggleston, 92 Ill. 515, 532; 1879, Mueller *v.* Rebhan, 94 Ill. 142, 148; 1882, Otis *v.* Spencer, 102 Ill. 622, 626; 1899, Pain *v.* Farson, 179 Ill. 185, 53 N. E. 579; 1903, Cassem *v.* Heustis, 201 Ill. 208, 66 N. E. 283; 1904, Booker *v.* Booker, 208 Ill. 529, 70 N. E. 709; 1907, Linkemann *v.* Knepper, 226 Ill. 473, 80 N. E. 1009; 1913, Marks *v.* Madsen, 261 Ill. 51, 103 N. E. 625.

§ 615. [1] The statute was applied in the following cases: *Illinois:* 1872, Mitchell *v.* McDougall, 62 Ill. 498, 506; 1872, Krebaum *v.* Cordell, 63 Ill. 23, 25; 1874, Anderson *v.* Friend, 71 Ill. 475, 477; 1875, Hawver *v.* Hawver, 78 Ill. 412, 414; 1878, Pigg *v.* Carroll, 89 Ill. 205; 1878, Marshall *v.* Peck, 91 Ill. 187, 190; 1879, Mueller *v.* Rebhan, 94 Ill. 142, 148; 1882, Otis *v.* Spencer, 102 Ill. 622, 626; 1883, Smith *v.* Long, 106 Ill. 485, 488; 1893, Francis *v.* Rhoades, 146 Ill. 635, 642, 35 N. E. 232; 1916, Dinquel *v.* Dacco, 273 Ill. 117, 112 N. E. 337 (homestead estate; husband admitted for the wife); *Kentucky:* 1883, Wise *v.* Foote, 81 Ky. 10, 13; 1888, Howard *v.* Tenney, 87 id. 52, 55, 7 S. W. 547; 1892, Covington *v.* Geyler, 93 id. 275, 283, 19 S. W. 741; 1901, Smith *v.* Doherty, 109 Ky. 616, 60 S. W. 380; 1902, Board *v.* Moore, — Ky. —, 66 S. W. 417; 1904, Henning *v.* Stevenson, 118 Ky. 318, 80 S. W. 1135; 1907, Taylor *v.* Johnson, — Ky. —, 99 S. W. 320 (action to cancel shares of stock); 1908, Walker's Assignees *v.* Walker, — Ky. —, 114 S. W. 338 (note by partnership); 1911, Weber *v.* Lape, 145 Ky. 769, 141 S. W. 67 (joint liability); 1919, Baskett *v.* Rudy, 186 Ky. 208, 217 S. W. 112.

§ 616. [1] *Arkansas:* 1899, American Expr. Co. *v.* Lankford, 35 C. C. A. 353, 93 Fed. 380 (interpreting the Arkansas statute); 1900, Gunter *v.* Earnest, 68 Ark. 180, 56 S. W. 876; 1908, Taylor *v.* McClintock, 87 Ark. 243, 112 S. W. 405; *Illinois:* 1875, Trepp *v.* Barker, 78 Ill. 146; 1875, Hayes *v.* Parmalee, 79 id. 563; 1876, Robertson *v.* Brost, 83 Ill. 116, 118; 1884, Powell *v.* Powell, 114 Ill. 329, 2 N. E. 162; 1907, Donk Bros. C. & C. Co. *v.* Stroetter, 229 Ill. 134, 82 N. E. 250; *Indian Territory:* 1897, America Express Co. *v.* Lankford, 1 Ind. T. 233, 39 S. W. 817; *Kansas:* 1878, Fisher *v.* Conway, 21 Kan. 18, 23; 1887, Wichita & W. R. Co. *v.* Kuhn, 38 Kan. 104, 106; 16 Pac. 75; 1888, Pfefferle *v.* State, 39 Kan. 128, 130, 17 Pac. 828; 1888, Paulsen *v.* Hall, 39 Kan. 365, 369, 18 Pac. 225; *Kentucky:* 1904, Logsden *v.* Stern, 117 Ky. 217, 77 S. W. 927 (St. 1898, c. 1, construed to mean that each may testify to the matters within his or her knowledge, but not both to the

hold that the person offered under it may also be the one to prove the agency which thus qualifies the witness.[2]

This exception was instituted on the general principle of necessity (*ante*, § 612); and hence, in at least one jurisdiction it is found developed as an original part of the common law.[3]

§ 617. (5) **Desertion of Family.** The statutes declaring desertion of family to be a penal offence contain almost invariably a provision that the wife is admissible to prove marriage, parentage, and other relevant facts.[1] But this provision would of course usually be employed as an exception to the husband's privilege to withhold her testimony against him (*post*, § 2240), and not as an exception to her disqualification to testify on his behalf.

§ 618. **Same**: (6) **Sundry Statutory Provisions.** The further local variations of statute would be here unprofitable to examine in detail. The tenor of the statutes (*ante*, § 488) is usually sufficiently clear, and judicial interpretation seems to be needed in only casual instances.[1]

same matters); 1914, B. Nicholson *v.* Patrick, 160 Ky. 674, 170 S. W. 20 (action for malpractice); *Louisiana:* 1905, Shepherd *v.* Schonaker, 115 La. 542, 39 So. 554; *Missouri:* 1878, Williams *v.* Williams, 67 Mo. 661, 663; *Oklahoma:* 1912, Fish *v.* Bloodworth, 36 Okl. 586, 129 Pac. 32; 1913, Western N. L. Ins. Co. *v.* Williamson H. F. Co., 37 Okl. 213, 131 Pac. 691; 1917, Chicago R. I. & P. R. Co. *v.* Cotton, 62 Okl. 168, 162 Pac. 763 (personal injury to a wife); *Vermont:* 1861, Eastabrooks *v.* Prentiss, 34 Vt. 457; 1865, Orcutt *v.* Cook, 37 Vt. 515; 1868, Lunay *v.* Vantyne, 40 Vt. 501, 503; 1874, Bates *v.* Cilley, 47 Vt. 1, 7; 1888, Martin *v.* Hurlburt, 60 Vt. 364, 367, 14 Atl. 649; 1891, Pierce *v.* Bradford, 64 Vt. 219, 23 Atl. 637; 1892, Bates *v.* Sabin, 64 Vt. 511, 517, 24 Atl. 1013; 1896, Pingree *v.* Johnson, 69 Vt. 225, 39 Atl. 202; 1901, Farr *v.* Bell, 73 Vt. 342, 50 Atl. 1107; 1905, Miller *v.* Stebbins, 77 Vt. 183, 59 Atl. 844; 1906, Boyce *v.* Bolster, 79 Vt. 40, 64 Atl. 79 (wife not admitted to prove a book account; the trial took place before St. 1904, No. 60, p. 78, quoted *ante*, § 488); *Wisconsin:* 1911, Karlen *v.* Hadinger, 147 Wis. 78, 132 N. W. 591.

[2] *Accord: Mo.* 1893, Leete *v.* State Bank, 115 Mo. 184, 204, 21 S. W. 788 (repudiating Williams *v.* Williams, *supra*); 1899, Long *v.* Martin, 152 Mo. 668, 54 S. W. 473; 1901, Reed *v.* Peck, 163 Mo. 333, 63 S. W. 734 (approving Leete *v.* Bank and Long *v.* Martin). *Contra: Vt.* 1897, Jenne *v.* Piper, 69 Vt. 497, 38 Atl. 147 (agency must first appear otherwise); *Mo.* 1878, Williams *v.* Williams, 67 Mo. 661, 663; 1882, Wheeler & W. Mfg. Co. *v.* Tinsley, 75 Mo. 458, 459 (like Williams *v.* Williams).

[3] *Wisconsin:* 1862, Birdsall *v.* Dunn, 16 Wis. 235, 239 (on the analogy of the similar exception to the general rule of disqualification by interest); 1863, Hobby *v.* Wisconsin Bank, 17 Wis. 167, 169 (husband admissible to prove "the contract made by him as the agent of the wife, the receipt or payment of money, or other acts done by him within the scope of his agency); 1865, Meek *v.* Pierce, 19 Wis. 300, 302; 1867, Mountain *v.* Fisher, 22 Wis. 93, 97; 1872, Butts *v.* Newton, 29 Wis. 632, 640; 1872, O'Conner *v.* Ins. Co., 31 Wis. 160, 167; 1874, Ainsworth *v.* Barry, 35 Wis. 136, 141; 1876, Menk *v.* Steinfort, 39 Wis. 370, 375; 1876, Hale *v.* Danforth, 40 Wis. 382; 1878, Chunot *v.* Larson, 43 Wis. 536, 538; 1878, Marsh *v.* Pugh, 43 Wis. 597, 600 ("probably she is a competent witness to prove the agency"); 1885, Meade *v.* Gilfoyle, 64 Wis. 18, 26, 24 N. W. 413; 1896, Hager *v.* Streich, 92 Wis. 505, 509, 66 N. W. 720; 1898, Goesel *v.* Davis, 100 Wis. 678, 76 N. W. 768.

§ 617. [1] The statutes are collected *ante*, 488.

§ 618. [1] CANADA: 1889, McFarlane *v.* R., 16 Can. Sup. 393 (assault on a peace officer; defendant's wife excluded); 1902, Corkum *v.* Corkum, 40 N. Sc. 488 (crim. con. by force; plaintiff's wife not admitted in his favor, under Rev. St. c. 163, § 36).

UNITED STATES: *Arkansas:* 1921, Witham *v.* State, 149 Ark. 324, 232 S. W. 437 (murder; defendant's wife not admissible on his behalf, under St. 1919, No. 66); *Georgia:* 1905, Graves *v.* Rivers, 123 Ga. 224, 51 S. E. 318 (under Code § 5272, the parties to an action for breach of promise of marriage are disqualified); 1913, Anderson *v.* Anderson, 140 Ga. 802, 79 S. E. 1124 (cited *post*, § 2245, n. 5); *Illinois:* 1895, Johnson *v.* McGregor, 157 Ill. 350, 41 N. E. 559 (admitting the husband for the wife, where she sues, after the statutory period of six months, for the penalty, payable by one who wins in gambling, to any person suing); 1920, Ohio Oil Co. *v.* Industrial Commission, 293 Ill. 461, 127 N. E. 743 (widow's testimony that she had heard the deceased tell the employer's

5. Statutory Abolition

§ 619. **Statutory Abolition of Interest-Disqualification does not include Disqualification of Spouse.** Since the principle of the common law had for its basis the marital bias, and not the bias of interest in the event (*ante*, § 603), it followed that a statute making interested persons competent could not be construed to make married persons competent by implication. Ultimately, the ground of exclusion was the same, namely, the supposed danger of falsification; but, as specific rules, they rested on distinct sources of such danger, and hence their abolition would be required to be effected by distinct provisions. Such was the result reached by almost every Court before whom the question was raised.[1]

agent that he was injured, not admitted to show notice); 1921, Zimmer *v.* Zimmer, 298 Ill. 586, 132 N. E. 216 (bill for partition of estate of Sarah Z.; the widower, John Z., held not competent as to transactions of a warranty deed, etc., with the deceased wife); *Kentucky:* 1899, Bright's Ex'rs *v.* Swinebroad, 106 Ky. 737, 51 S. W. 578 (Civ. C. § 606 construed, as to one or the other, but not both, being admitted); 1903, s. c., 73 S. W. 1031; 1903, Williams *v.* Williams, — Ky. —, 71 S. W. 505 (under Civ. C. § 606, a husband is not admissible for the contestants of a will, where his wife has already testified in her own interest on the same side); 1904, Floore *v.* Green, — Ky. —, 83 S. W. 133 (under Civ. C. § 606, a husband is admissible in a probate contest where his wife is interested but does not testify); 1905, Com. *v.* Woelfel, 121 Ky. 48, 88 S. W. 1061 (preliminary issue of an accused's sanity; the wife not admissible for him); 1907, Mitchell *v.* Brady, 124 Ky. 411, 99 S. W. 266 (under Civ. C. § 606, a wife may testify for the administrator-husband in an action for the death of their child); 1915, North River Ins. Co. *v.* Dyche, 163 Ky. 271, 173 S. W. 784 (insurance inventory, husband as agent); *New Hampshire:* 1899, Chase *v.* Pitman, 69 N. H. 423, 43 Atl. 617 (statute applied); *Vermont:* 1895, Wheeler *v.* Campbell, 68 Vt. 98, 34 Atl. 35 (wife admitted, where the husband was not a party); 1917, Phelps *v.* Utley, 92 Vt. 40, 101 Atl. 1011 (crim. con.; plaintiff's wife admitted for the plaintiff, under Pub. St. § 1592); *Virginia:* 1899, Hoge *v.* Turner, 96 Va. 624, 32 S. E. 291 (statute applied); 1899, Crowder *v.* Garber, 97 Va. 565, 34 S. E. 470 (statute 1897–8, applied); 1901, First National Bank *v.* Holland, 99 Va. 495, 39 S. E. 126 (under St. 1897–8, deceased husband's declarations, made when free from debt, are admissible to prove gift to wife); *Washington:* 1896, Speck *v.* Gray, 14 Wash. 589, 45 Pac. 143 (wife not admissible in crim. con. actions by husband); *Wisconsin:* 1900, Miller *v.* State, 106 Wis. 156, 81 N. W. 1020 (murder; defendant's wife excluded); 1903, Kraimer *v.* State, 117 Wis. 250, 93 N. W. 1097 (assault on I.; defendant's wife excluded); 1905, Grabowski *v.* State, 126 Wis. 447, 105 N. W. 805 (lascivious conduct; defendant's wife excluded).

Under the *Michigan* clause as to "actions instituted in consequence of *adultery*", the following rulings have been made: 1870, Parsons *v.* People, 21 Mich. 509, 515 (statute does not exclude the wife in a criminal prosecution for adultery with her); 1880, Egbert *v.* Greenwalt, 44 Mich. 245, 247, 6 N. W. 654 (wife admitted for her husband in crim. con.; no question raised); 1882, Mathews *v.* Yerex, 48 Mich. 361, 12 N. W. 489 (wife not admissible for the husband in action for crim. con.); 1883, People *v.* Lovejoy, 49 Mich. 529, 531, 14 N. W. 485, *semble* (admissible in an action for enticement); 1885, Gleason *v.* Knapp, 56 Mich. 291, 294, 22 N. W. 865 (husband not admissible in his action for crim. con.); 1890, Carter *v.* Hill, 81 Mich. 275, 279, 45 N. W. 988 (same); 1914, Hirdes *v.* Ottawa Circuit Judge, 180 Mich. 321, 146 N. W. 646 (action for having intercourse with the plaintiff's wife after making her intoxicated; if this was adultery, the wife was not competent under Comp. L. § 10213; if it was rape, she was competent; what loud Jovian laughter must resound when Mercury calls attention to us mortals making rules of credibility depend on the varieties of criminality in issue!).

§ **619.** [1] ENGLAND: 1852, Barbat *v.* Allen, 7 Exch. 609; 1852, Stapleton *v.* Crofts, 18 Q. B. 367 (Erle, J., diss.).

UNITED STATES: *Federal:* 1873, Lucas *v.* Brooks, 18 Wall. 436, 453; *Ark.* 1877, Collins *v.* Mack, 31 Ark. 684, 688 (repudiating the 'obiter dictum' in Magness *v.* Walker, 26 id. 470); *D. C.* 1886, Holtzman *v.* Wagner, 16 D. C. 15; 1896, Foertsch *v.* Germuller, 9 D. C. App. 351, 356; *Ill.* 1871, Mitchinson *v.* Cross, 58 Ill. 366, 368; 1882, Lincoln Ave. & N. C. G. R. Co. *v.* Madaus, 102 id. 417, 422; *Mass.* 1857, Barber *v.* Goddard, 9 Gray 71; *Miss.* 1859, Dunlap *v.* Hearn, 37 Miss. 471, 474 (overruling Lockhart *v.* Luker, 36 id. 68); *N. H.* 1860, Kelley *v.* Proctor, 41 N. H. 139, 141; 1862, Smith *v.* R. Co., 44 N. H. 325, 334; *N. J.* 1862, Handlong *v.* Barnes, 30 N. J. L. 69;

§ 620. **Statutory Express Abolition.** The statutes expressly abolishing the common-law marital disqualification speak usually for themselves with sufficient plainness; they have been already set forth in full (*ante*, § 488). From time to time, judicial declarations of their effect have been given, but, owing to the gradual changes of statute in each jurisdiction, these must be weighed in connection with the tenor of the contemporary statute.[1]

1862, Bird *v.* Davis, 14 N. J. Eq. 467, 478; 1865, Marshman *v.* Conklin, 17 N. J. Eq. 282, 288; 1865, Staats *v.* Bergen, 17 N. J. Eq. 293, 303; 1866, Cramer *v.* Reford, 17 N. J. Eq. 367, 383; 1868, Yetman *v.* Dey, 33 N. J. L. 32; *N. Y.* 1853, Hasbrouck *v.* Vandervoort, 9 N. Y. 153, 161; 1868, Hicks *v.* Brander, 2 Abb. App. Cas. 362; *N. Car.* 1869, Rice *v.* Keith, 63 N. C. 319; *Ohio*, 1859, Bird *v.* Hueston, 10 Oh. St. 418, 429; *S. Car.* 1881, State *v.* Workman, 15 S. C. 540, 546; *Tenn.* 1871, Goodwin *v.* Nicklin, 6 Heisk. 257; *Vt.* 1832, Carr *v.* Cornell, 4 Vt. 116; 1852, Manchester *v.* Manchester, 24 Vt. 649; 1860, Cram *v.* Cram, 33 Vt. 15, 20; *Wis.* 1866, Farrell *v.* Ledwell, 21 Wis. 182.

Contra: Ala. 1870, Robison *v.* Robison, 44 Ala 227, 233; 1871, Miller *v.* State, 45 Ala. 24, 26; 1872, Johnson *v.* State, 47 Ala. 7, 33; 1872, Lang *v.* Waters, 47 Ala. 624, 636; 1873, Rowland *v.* Plummer, 50 Ala. 182, 193; 1874, Sumner *v.* Cooke, 51 Ala. 521; 1877, Chapman *v.* Holding, 60 Ala. 522, 533; 1888, Hussey *v.* State, 77 Ala. 121, 135; *Conn.* 1850, Merriam *v.* R. Co., 20 Conn. 354, 363; 1854, Lucas *v.* State, 23 Conn. 18, 20; *Ind.* 1879, Hutchinson *v.* State, 67 Ind. 449; *Pa.* 1870, Yeager *v.* Weaver, 64 Pa. 425, 427 (turning on the statute's peculiar wording).

§ 620. [1] *Federal:* 1919, Adams *v.* U. S. 8th C. C. A., 259 Fed. 214 (under no Federal statute to date is the husband qualified to testify for the accused wife in a criminal case; Stone, J., diss., but mistaking the question to be one of privileged communications); 1919, Fitter *v.* U. S., 2d C. C. A., 258 Fed. 567, 575, (defendant's wife held not erroneously excluded, though the opposite ruling would not have been held error); 1920, Jin Fuey Moy *v.* U. S., 254 U. S. 189, 41 Sup. 98 (violation of the anti-narcotic act; defendant's wife not admissible in his favor; "the relaxation of the rule in this regard by § 858, Rev. St. U. S., being confined to civil cases");

Ark. Disqualification not abolished: 1877, Collins *v.* Mack, 31 Ark. 684, 688; 1878, Phipps *v.* Martin, 33 Ark. 207, 210; 1878, Berlin *v.* Cantrell, 33 Ark. 611, 621; *Conn.* Disqualification not abolished in criminal cases: 1854, Lucas *v.* State, 23 Conn. 18, 20; *D. C.* 1920, Early *v.* Early, D. C. App., 261 Fed. 1003 (husband and wife are competent in divorce proceedings, under Code § 1068); *Del.* 1916, Williams *v.* Betts, 11 Del. Ch. 128, 98 Atl. 371 (disqualification abolished by St. 1907, now Rev. C. 1915, § 4216); *Fla.* Disqualification abolished in criminal cases: 1894, Walker *v.* State, 34 Fla. 167, 169, 16 So. 80; *Ind.* Disqualification entirely abolished: 1879, Brown *v.* Norton, 67 Ind. 424; 1879, Hutchason *v.* State, 67 Ind. 449; 1881, Roberts *v.* Porter, 78 id. 130, 133; *Ind. T.* 1913, Birdwell *v.* U. S., 10 Okl. Cr. App. 159, 135 Pac. 445 (under Ind. T. St. 1899, § 1974, a defendant's wife cannot testify for him); *Kan.* 1911, Harris *v.* Brown, C. C. A., 187 Fed. 6 (Kansas Gen. Stat. 1909, § 5915, C. C. P. § 321, held to abolish marital incompetency except for marital communications); *La.* 1896, State *v.* Pain, 48 La. An. 311, 19 So. 138 (wife is inadmissible in criminal suits generally); *Miss.* Disqualification entirely abolished: 1876, Rushing *v.* Rushing, 52 Miss. 329; 1876, Barry *v.* Sturdivant, 53 Miss. 490, 493; 1886, Ellis *v.* Alford, 64 Miss. 8, 12, 1 So. 155; 1894, Saffold *v.* Horne, 72 Miss. 470, 482, 18 So. 433 (giving a history of the legislation); *Nebr.* Disqualification abolished: 1897, Smith *v.* Meyers, 52 Nebr. 70, 71 N. W. 1006; *Ohio*: Disqualification abolished for civil cases: 1881, Howard *v.* Brower, 37 Oh. St. 402, 404, 409; *Okl.* Disqualification not abolished for civil cases: 1897, Nix *v.* Gilmer, 5 Okl. 740, 50 Pac. 131; *Pa.* Disqualification abolished for civil cases: 1870, Yeager *v.* Weaver, 64 Pa. 425, 427; 1874, Ballentine *v.* White, 77 Pa. 20, 26; 1893, Evans *v.* Evans, 155 Pa. 572, 576, 26 Atl. 755; *W. Va.* Disqualification abolished, except for spouse of disqualified survivor; 1889, Kilgore *v.* Hanley, 27 W. Va. 451, 454.

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

TOPIC IV: TESTIMONIAL KNOWLEDGE

CHAPTER XXV.

A. GENERAL PRINCIPLES OF KNOWLEDGE

1. Preliminary Distinctions

§ 650. Observation, Opportunity to Observe, and Knowledge; their difference, and their practical sameness.

§ 651. Distinction between Experience and Knowledge.

§ 652. Knowledge may rest upon a Hypothetical Basis.

§ 653. Knowledge often a double element, including (1) a Class of things, and (2) the Thing to be classed.

§ 654. Burden of Proof of Knowledge Qualification.

§ 655. Same: Witness asked to specify the Grounds of his Knowledge.

2. Degree, Quality, and Sources of Knowledge

§ 656. Judicial Phrasings of the Principle of Knowledge.

§ 657. (*a*) Knowledge must be founded on Personal Observation by the Senses, not on Hearsay.

§ 658. (*b*) Knowledge need not be Positive or Absolute; Admissibility of a "Belief", "Impression", "Opinion", or the like.

§ 659. (*c*) Knowledge must involve Rational Inferences from Adequate Data.

§ 660. Same: Inference of Identity of Person by Voice or Appearance; of Age from Appearance; of Chattels from their Qualities; Miscellaneous Instances of Inadequate Knowledge.

§ 661. Same: Testimony to Another Person's State of Mind.

§ 662. Same: Improbabilities in Scientific Testimony.

§ 663. Same: Speculative Testimony to Personal Injuries and to Values.

§ 664. Negative Knowledge; Testimony that a Fact would have been Seen or Heard, had it occurred.

3. Hearsay Knowledge exceptionally admitted

§ 665. (1) Official Records; (2) Scientific Instruments and Tables (Vacuum Rays, etc.); (3) Expert Learning founded on Books.

§ 666. (4) Execution and Contents of Documents not personally observed.

§ 667. (5) Testifying to One's Own Age, or to an Adoptive Child's Age; or (6) to Another Person's Name, or (7) Residence.

§ 668. (8) Conversations through an Interpreter.

§ 669. (9) Information received by Telephone or Dictagraph.

§ 670. (10) Testimony of Deceased or Absent Persons under the Hearsay Exceptions.

4. Hypothetical Questions

§ 672. General Theory.

§ 673. False Theory: "Usurping the Province of the Jury."

§ 674. Actual Observation not necessary; Hypothetical Presentation may be sufficient.

§ 675. Where Personal Observation is had, Hypothetical Presentation is unnecessary.

§ 676. Where Personal Observation is lacking, Hypothetical Presentation must be used.

§ 677. Personal Observation is not necessary, when Hypothetical Presentation is used.

§ 678. The same Skilled Witness may testify from both Personal Observation and Hypothetical Presentation.

§ 679. Only Skilled Witnesses may be asked Hypothetical Questions.

§ 680. If the Premises fail, the Conclusion must be disregarded.

§ 681. Form and Scope of the Question; (1) Particularization of the Premises to be used; Questions based on Testimony in the Case.

§ 682. Same: (2) Kind of Data that may be assumed in the Question; not All the Facts, but Any Facts of which there is Evidence.

§ 683. Same: (3) Form of Question must be expressly Hypothetical.

§ 684. Hypothetical Questions on Cross-examination.

§ 685. Length of Hypothetical Question.

A. General Principles of Knowledge

1. Preliminary Distinctions

§ 650. **Observation, Opportunity to Observe, and Knowledge; their difference, and their practical sameness.** It is obviously impossible to speak with accuracy of a witness' "knowledge" as that which the principles of testimony require. If the law received as absolute knowledge what he had to offer, then only one witness would be needed on any one matter; for the fact asserted would be demonstrated. When a thing is *known* to be, it *is;* and that would be the end of inquiry. A witness cannot be assumed beforehand, by the law, to know things; the most it can assume is that he thinks he knows. The law assumes that the matter is in truth of some particular complexion, but also realizes that to determine what its real complexion is the tribunal

may have to listen to various persons; the statements of some of these it will reject, and of others it will accept. But from the persons to whom the tribunal will listen the law will attempt to require some qualification which will make them worth listening to. It will not presume to determine beforehand which witness is correct — *i.e.* which one really *knows*, — but it will ask that each one offered shall be one 'prima facie' likely to know, — in short, shall have had *an opportunity of observing* what was or what happened and shall have *directed his attention* or observation to the matter. This is as far as the law can go.

Accordingly, the rules upon the subject in hand are all concerned, not strictly with the witness' knowledge, but with his *opportunities of observing* and his *actual observation*. For example, if it is a question of the aggressor in an affray, what the tribunal will ask for is, not persons who really "know" who the aggressor was, but persons who have been so situated that they had an opportunity of observing and did observe the affair.[1]

The practical tests, then, and the detailed rules, are in strictness concerned with observation and not with knowledge. Nevertheless, as the ultimate aim often gives name to the method, it may be said, roughly but sufficiently, that the qualification here involved is Knowledge, — at least as distinguished from Experience, Sanity, and the other qualifications of capacity to know.

§ 651. **Distinction between Experience and Knowledge.** Observation of the matters to be testified to is an essential conception in the qualifications of every witness without exception (*ante*, § 478). By Observation is meant that direction of attention which is the source of impressions, and thus of knowledge. The distinction between Experience (*ante*, § 558) and Observation is that the former concerns the mental power or capacity to acquire knowledge on the subject of testimony, while the latter concerns the actual exercise of the faculties upon the subject of testimony. Competency as a witness is inconceivable without the presence of both these elements.

It is true that the distinction between Experience and Observation is sometimes lost sight of in the practical tests applicable to certain subjects of testimony. For example, when a Court adopts the rule of thumb that farmers in the vicinity of a certain piece of land may testify to its value, it is ruling upon both these subjects; it is ruling that farmers are persons of sufficient experiential qualifications, and it is also ruling that persons in the vicinity have sufficient observation or knowledge of the general class of values in question and of the piece of land in question. Again, when a Court rules that a bank-cashier who has handled the kind of notes alleged to be counterfeit may testify to the genuineness of the one in question, it is ruling that bank-cashiers are experientially qualified to form an opinion on the matter, and it is also ruling that the handling of the notes sufficiently ensures obser-

§ 650. [1] From the point of view of logic and psychology as applicable to argument before the jury (not the rules of Admissibility), see the materials collected in the present author's "Principles of Judicial Proof, as given by Logic, Psychology, and General Experience, and illustrated in Judicial Trials" (1913), §§ 234–238.

vation or knowledge of the general type of note in question. In these instances, as well as in others, the rule of thumb does not distinguish the two principles. But the practical convenience of such rules need not prevent us from recognizing that two distinct principles are involved, or that the two elements must always exist however obscured.

§ 652. **Knowledge may rest upon a Hypothetical Basis.** The direction of attention which constitutes the source of the knowledge will usually be made upon matters as they present themselves to the senses out of court. But the observation may also be directed to the same matter hypothetically placed before the witness in court. Thus, a physician may examine a patient at his home and observe certain symptoms, whence he reaches the conclusion that a fever exists; but the same symptoms may be stated to him by counsel in court, and he may then reach the same conclusion, and it will be receivable, except that it will rest upon the hypothesis that the symptoms stated to him actually existed. Here the direction of attention to the symptoms is that observation which the law requires before receiving his conclusion as to the nature of the disease; but in the one case the alleged symptoms are learned by his own senses and rest on his own testimonial credit, while in the other case they rest on the hypothesis that other persons will testify them to be true. In §§ 672–684, the theory of the hypothetical question and its detailed rules are examined in full.

§ 653. **Knowledge often a double element, including** (1) **a Class of things, and** (2) **the Thing to be classed.** In certain subjects the observation must be of a double sort. For example, a witness to the value of a horse must be acquainted with the value-standards for different classes of horses, and must also be acquainted with the particular horse to be valued (*post*, § 720). A witness to the genuineness of handwriting must be acquainted with the type or standard of the handwriting of the alleged writer, and must also see the disputed writing which he is to say does or does not belong to that type (*post*, § 693). A witness to the identity of a person, a voice, or anything else, must be familiar with the person or voice or other things as to which the identity is asserted, and must also see or hear or otherwise perceive the thing to be identified with it.[1] In short, wherever the subject of the testimony consists in

§ 653. [1] Witnesses sometimes, though well enough qualified on the first element, jump to a conclusion on the second one, especially in matters of Identification; *e.g.* the Russell Will Case, Boston "Transcript", Feb. 14, 1910 (the issue in a will case was the identity of the claimant purporting to be Daniel Blake Russell. Mrs. George Moulton, a former resident of Melrose, testified that she knew Daniel Blake Russell in 1880. She said that he was a slight youth with sloping shoulders and long, slender hands, and that the claimant was entirely different from him. Mrs. Moulton said that she was well acquainted with all the Russell family and had been an intimate friend of Mrs. Daniel Russell. On cross-examination she said she went to the Hotel Commonwealth in Boston a few weeks ago to see the claimant, but that Mr. Simpson had refused to allow her to see him. "This is news to me," broke in Mr. Simpson. "Would you agree to have an interview with him now?" The witness said that she thought she would. "Of course you haven't any especial feeling about this whole matter, have you?" he asked. "Yes, indeed, I have," replied Mrs. Moulton in evident excitement. "I think it is a shame for a man who isn't Daniel Blake Russell to pretend that he is. *I made up my mind from reading the newspapers, before I ever came to the court room or saw him, that he wasn't the right man*").

classifying or identifying or testing or authenticating, the witness' observation necessarily involves two elements, (1) an observation of the class, type or standard, and (2) an observation of the thing to be classified or identified. Both elements must be supplied in his testimony. Under the particular topics of testimony, the rules applying this principle may be examined.

It may be noted that here it is not uncommon to supply the second element by hypothetical presentation (*post*, § 672). Thus, in valuing the cost of a house's construction, the witness may have actual observation of only the value-standards of different sorts of houses, and then the features of the particular house to be valued may be placed before him by hypothetical description. So a witness to the identity of a murdered person with one J. S. may have had actual observation of J. S. but not of the body of the murdered man, and the latter element may be supplied by showing him a photograph assumed to be that of the deceased, and then verifying the photograph as that of the deceased.

§ 654. **Burden of Proof of Knowledge Qualification.** It has already been noted (*ante*, §§ 484, 497, 508, 560, 584), that in adults the general Mental Capacity to testify is assumed, and need not be shown beforehand; and that the same is true of that capacity whose absence is indicated by the term Interest; while Experiential Capacity is not assumed, if the subject calls for special experience, and the possession of it must be made to appear beforehand. These differences are based on practical convenience and probabilities, for the probability is that the average witness will be sane (and thus sanity may be assumed), and the probability is that the average witness will not have special experience (and thus it cannot be assumed).

Analogy would indicate, then, that since the probabilities are all against a particular person, out of all persons, having been one to observe the particular matter in hand, it cannot be assumed that he is one of the few admissible persons, and his qualifications as to observation, or knowledge, must be made to appear beforehand. Such is the generally accepted rule. The witness, before he refers to the matter in hand, *must make it appear that he had the requisite opportunities to obtain correct impressions* on the subject; and the first questions put to him should be and usually are directed to laying this foundation:[1]

1870, MORTON, J., in *Wetherbee* v. *Norris*, 103 Mass. 564, 566 (approving a ruling, in the trial Court's discretion, that a witness to reputation must be asked beforehand whether he knows the reputation): "The same principle is applicable to the examination of witnesses upon other subjects. It often occurs, in the trial of cases, that the judge is called

§ 654. [1] 1900, Cleveland T. & V. R. Co. *v.* Marsh, 63 Oh. 236, 58 N. E. 821 (whether a person was a trainman); 1903, Friday *v.* Pennsylvania R. Co., 204 Pa. 405, 411, 54 Atl. 339 (a witness to land-values may be subjected to cross-examination as to his qualifications before expressing an opinion on direct examination); 1904, Davis *v.* Pennsylvania R. Co., 215 Pa. 581, 64 Atl. 774 (similar); 1899, Gorkrow's Estate, 40 Wash. 563, 56 Pac. 385 (prior statement of qualifications may be required, in trial Court's discretion.)

Compare the general rule for *voir dire* as to *interest* (ante, § 585) and as to *experience* (*ante*, § 560, n. 1).

upon to inquire of a witness whether he has knowledge of the matter of which he is called to testify. If it appears to be doubtful whether the witness understands and appreciates his duty to testify only to what he knows of his own knowledge, or if for any reason there is danger that he may testify to hearsay, it is the right and it may be the duty of the presiding judge to inquire of him if he has knowledge of the matter as to which he is asked to testify. . . . Whether the circumstances of this case required the preliminary question to be put was a matter within the judicial discretion of the presiding judge."

Where this preliminary inquiry is omitted, the opposing counsel cannot afterwards object to it as a technical violation of rules; this is usually placed on the theory that the knowledge may be presumed,[2] but it is more correct to place it upon the rule (*ante*, § 18) that a failure to make objection at the proper time is a waiver of the objection. Yet where the subsequent course of the examination develops a total lack of opportunity of knowledge, no doubt the testimony may be struck out, on the ground that the waiver was merely of the requirement of the preliminary burden of proof, and not of the substantial qualifications of the witness.

The importance of enforcing this general rule is illustrated in the following passage, where the unsuccessful counsel was, in strictness, in the right:

1888, *Parnell Commission's Proceedings*, 36th day, Times' Rep. pt. 10, p. 18; the Irish Land League and its leaders being charged with complicity in certain crimes, particularly in the Phœnix Park assassination of 1882, certain of the known criminals testified that their body, the Invincibles, had received assistance-money from the League; it had turned [illegible]n cross-examining one of them, that his testimony to the receipt of this money from [illegible]eague officers was not based on his knowledge at all, but merely on what he had [illegible]rom others; another of these persons was now asked on direct examination as follows:

A. James: "Tell me of your own knowledge whether you know of his receiving any money from the Land League." Sir *C. Russell:* "My Lords, I would ask my learned friend to be particular as to that question 'of his own knowledge' after the experience we had of Delaney's evidence. 'Did he see any one pay him?' is the proper form of question." Sir *H. James:* "I think not." Sir *C. Russell:* "With great deference, my Lords, it is. We had a deliberate statement the other day in answer to a similar question put to a witness, 'Did you know this?' and 'Did you know that?' and, afterwards in cross-examination, it turned out that he did not know it of his own knowledge, but it was what had been told him. I want to guard against a repetition of that. The proper form of question as I submit is, 'Did he see any money paid?'" Sir *H. James* (to the witness): "You understand what I mean — do you know this of your own knowledge?" Sir *C. Russell:* "I am objecting to the form of the question." President HANNEN: "It is a very usual form of question." Sir *C. Russell:* "I respectfully say, in view of the reasons I have given, that the proper question is, 'Did he see any money paid?'" President HANNEN: "I shall not interfere with the discretion of counsel in asking a question in a manner which

[2] 1904, Norman P. S. Co. *v.* Ford, 77 Conn. 461, 59 Atl. 499 (where a deposition shows that the witness speaks from hearsay only, the answer may be struck out; though "if the witness had been present to testify, the Court could have received these answers on the assumption that he was speaking of what he knew; leaving it to the defendants to show the contrary if they could, on cross-examination or otherwise"); 1874, Pearson *v.* Wheeler, 55 N. H. 41 ("Where nothing appears to the contrary it is to be presumed that what the witness stated was within his knowledge, and that his knowledge was derived from proper sources"); 1867, Field *v.* Tenney, 47 N. H. 513, 522; 1900, Glauber Mfg. Co. *v.* Voter, 70 N. H. 332, 47 Atl. 612; 1874, Fassin *v.* Hubbard, 55 N. Y. 471 (deposition; if knowledge would at least have been possible, from what appears, it may be presumed).

is quite usual." Sir *C. Russell:* "I have pointed out the danger — the great danger — of putting the question in the form in which my learned friend is putting it." President HANNEN: "Precisely so; and you have also shown where the safeguard lies, namely, in cross-examination."

§ 655. **Same: Witness specifying the Grounds of his Knowledge.** The party offering a witness may desire to make plain the strength of the witness' grounds of knowledge and the reasons for trusting his belief. This is a legitimate purpose. But, in pursuing it, the witness often will naturally state circumstances which may give indirectly some unfavorable impressions against the opposite party, — as where the witness is asked, "What made you notice the defendant's features?" and replies, "Because he was the same man who stole my wagon last year." Or he may relate other persons' utterances which would be inadmissible as hearsay, but for their present utility.

Nevertheless, on the principle of multiple admissibility (*ante*, § 13), the general rule is that the witness *may*[1] on the direct examination state the particular circumstances which legitimately affected his knowledge or recollection, even though the fact would otherwise be inadmissible;[2] the judge's

§ 655. [1] Put he is of course not *obliged* on direct examination to state his reasons: 1905, Com. *v.* Johnson, 188 Mass. 382, 74 N. E. 939, 1918, State *v.* Stegner, 276 Mo. 427, 207 S. W. 826 (handwriting).

[2] *Accord: Alabama:* 1895, Dickson *v.* Bamberger, 107 Ala. 293, 18 So. 290 (general principle, but too narrowly stated); 1905, Braham *v.* State, 143 Ala. 28, 38 So. 919 (insanity); *Arizona:* 1921, Moon *v.* State, 22 Ariz. 418, 198 Pac. 288 (burglary; finger-print identity having been testified to by experts, the witness was allowed to illustrate the certainty of such identification by taking the jurymen's finger-prints on a series of cards and identifying them; also to relate his experiences in other cases of finger-print identification); *California:* 1907, Salmon *v.* Rathjens, 152 Cal. 290, Pac. 733; *Connecticut:* 1876, Tomlinson *v.* Derby, 43 Conn. 562 (reasons for knowing that a highway-defect existed); *Florida:* 1914, Alford *v.* State, 47 Fla. 1, 36 So. 436 (occurrence of a fire, as the reason for fixing a date of seeing defendant, allowed); *Georgia:* 1908, Albany Phosphate Co. *v.* Hugger, 4 Ga. App. 771, 62 S. E. 533 (witness testified to present recollections based on a marked calendar lost: "the weather bureau reports verified what I had on my calendar"; the last reference held doubtful, but admitted); *Illinois:* 1919, People *v.* Baker, 290 Ill. 349, 125 N. E. 263 (murder; to explain the witness' notice of defendant's actions, he mentioned on cross-examination that deceased had called his attention to defendant's presence; but on re-examination he was not allowed to give the rest of deceased's remarks, alluding to defendant's hostile feelings); *Kentucky:* 1895, Kendall's Ex'rs *v.* Collier, 97 Ky. 446, 30 S. W. 1002 (reasons for knowing handwriting); *Maryland:* 1910, Mayor of Baltimore *v.* Hurlock, 113 Md. 674, 78 Atl. 558 (value-witness); *Massachusetts:* 1859, Dickenson *v.* Fitchburg, 13 Gray 556 (expert; general principle); 1864, Lincoln *v.* Mfg. Co., 9 All. 192 (same); 1878, Williams *v.* Taunton, 125 Mass. 40 (same); 1890, Hunt *v.* Boston, 152 Mass. 169, 25 N. E. 82 (same); 1896, Com. *v.* Bishop, 165 Mass. 148, 42 N. E. 560 (the witness' reason for identifying defendant was that the latter had come to him to be treated for a certain disease); 1897, Com. *v.* Kennedy, 170 Mass. 18, 48 N. E. 770 (identity of purchaser of poison); 1899, Leslie *v.* R. Co., 172 Mass. 468, 52 N. E. 542 (expert; general principle); 1902, O'Malley *v.* Com., 182 Mass. 196, 65 N. E. 30 (expert not allowed to state that his opinion was based on a consideration of sales not otherwise evidenced, without specifying them); 1905, Com. *v.* Tucker, 189 Mass. 457, 76 N. E. 127 (certain experiments, not admitted under the present rule); *Michigan:* 1864, Angell *v.* Rosenbury, 12 Mich. 241, 257 (whether notes produced were the same as those shown to witness by plaintiff; reasons for noticing them particularly, allowed to be stated; quoted *supra*); 1868, Detroit & M. R. Co. *v.* Van Steinburg, 17 Mich. 99, 107 (to indicate the fixing of a witness' attention on the fact of a locomotive bell having been rung or not, the witness was allowed to say that it had been then talked of, but not to state that "people said that the bell was not rung"), 1895, Cole *v.* R. Co., 105 Mich. 549, 63 N. W. 647 (words uttered, admitted to show how thing was remembered); 1900, Grenell *v.*

instruction to the jury must be relied upon for preventing their improper use of the fact:

1856, GREEN, C. J., in *State* v. *Fox*, 25 N. J. L. 575, 602 (in fixing the recollection of a time, the remark of a neighbor was used; "she said, 'Perhaps the man I met on Thursday morning might have had something to do with it'"): "The evidence was not offered or admitted to prove the truth of the facts stated to the witness, but merely to show what it was that called the attention of the witness to a fact stated by her or that fixed the fact in her recollection. Whether the statement of the third person was true or false was perfectly immaterial. The fact that the communication was made, and not its truth or falsity, was the only material point. The conversations were not hearsay, within the proper meaning of the term."

1864, CHRISTIANCY, J., in *Angell* v. *Rosenbury*, 12 Mich. 241, 257: "It was very important, in determining the credit to be given to the witness' recollection, to know whether any or what reason existed at the time to induce the witness to give particular attention to the appearance of the notes [then shown to him]. The value of his recollection would depend entirely upon the degree of attention with which he observed the facts and the reasons which operated upon his mind to excite that attention and to fix the facts in his memory. He should therefore have been allowed to state any facts which had that effect, whether relevant to the issue or not."

Compare a similar use of hearsay utterances to *identify a time, place,* or *person* (*ante,* § 416) to *corroborate a witness* (*post,* § 1129), and to exhibit the grounds of a *physician's opinion* (*post,* § 1720), or other *expert's opinions* (*ante,* § 562). The theory of the Hearsay rule on this point is dealt with *post,* § 1791.

Cross-examination to impeach the witness' sources of knowledge is noticed *post,* §§ 991–995, *ante,* § 463.

2. Degree, Quality, and Sources of Knowledge

§ 656. **Judicial Phrasings of the Principle of Knowledge.** Courts have often uttered in broad terms the general principle of the necessity of Observation as a source of Knowledge. The following passages illustrate their attitude:

1824, Mr. *Thomas Starkie,* Evidence, 79, 127: "To render the communication of facts perfect, the witnesses must be both able and willing to speak or to write the truth. It is necessary that they should possess, in the first place, the means and opportunity of ac-

R. Co., 124 Mich. 141, 82 N. W. 843 (similar); *Montana:* 1921, State v. Bess, 60 Mont. 558, 199 Pac. 426 (expert to effect of flat-nosed bullets); *Nebraska:* 1911, Brown v. Chicago B. & Q. R. Co., 88 Nebr. 604, 130 N. W. 265 (child's exclamation directing witness' attention); *New York:* 1879, O'Hagan v. Dillon, 76 N. Y. 170, 173 (a witness testifying to the hanging of a lamp at the place where an injury occurred, allowed to be asked: "Is your recollection refreshed, or your attention called to that from any circumstance, any accident that happened there?"); *Oklahoma:* 1917, Chicago R. I. & P. R. Co. v. Jackson, 63 Okl. 32, 162 Pac. 823 (patient's statement is the basis for physician's opinion); *Pennsylvania:* 1865, Howser v. Com., 51 Pa. 341 (that the witness on arriving home had told to her parents what she had heard and seen, and that they replied, allowed); *Rhode Island:* 1903, State v. Nagle, 25 R. I. 105, 54 Atl. 1063 ("Whenever the opinion of a person is deemed to be relevant, the grounds on which such opinion is based are also deemed to be relevant"; here, of experiments with a pistol as to the appearances of wounds); *Vermont:* 1913, Miller v. Pearce, 86 Vt. 322, 85 Atl. 620 (recollecting an act of defendant by a remark made about it).

This objection to testimony, however, must be distinguished from the objection based on the so-called Hearsay rule. Under the present principle, the law declines to accept a witness X's statement (for example) that he knows A struck B, because it appears that X had no personal observation but received his impressions from others' information. But if X were to testify, "Y told me that A struck B first", then he would appear to know sufficiently the fact of Y's making the assertion, and the question then becomes whether Y's assertion, thus proved, is admissible. Then it is that the Hearsay rule rejects the proof of X's assertion as a statement untested by oath and cross-examination. In other words, so long as it is attempted to argue directly from the witness X's statement to the striking of B by A, the question is one of the sufficiency of X's knowledge; it is only when the assertion of Y, a person not in court, is put forward testimonially that we are concerned with the Hearsay rule in the strict sense. The distinction is more fully examined elsewhere (*post*, § 1361).

Exceptional cases, under the present principle, when knowledge founded on hearsay may suffice, are later considered (*post*, §§ 664–670).

§ 658. (*b*) **Knowledge need not be Positive or Absolute; Admissibility of a "Belief", "Impression", "Opinion", or the like.** The second corollary of the general principle of knowledge is that the result of the witness' observation *need not be positive or absolute knowledge*. Such a degree of certainty cannot be demanded, even in theory (*ante*, § 650); it suffices if he had an opportunity of personal observation and did get some impressions from this observation. But in the attempt to name this quality of knowledge which suffices, the terms available are so loose and indefinite that other principles come naturally to introduce confusion. If positive knowledge is not required, does an "impression" or "belief" or "opinion" suffice? Here the operation of four different principles must be distinguished, because such terms may be criticized from the point of view of all four:

(1) "Belief" or "impression" may signify merely the *degree of positiveness of his original observation* of the facts. The witness may have had actual observation of the matter in hand, but the result may have been a not very definite or positive impression; for example, he saw a man and "thought" that it was the accused. In such cases there is no legal objection whatever to receiving such impression as the witness gained from his observation. In

Bynum, 137 N. C. 491, 49 S. E. 955 (proceedings at an auction); *Philippine Isl.* C. C. P. 1901, § 276 (like Cal. C. C. P. § 1845); *Porto Rico:* Rev. St. & C. 1911, § 1387 (like Cal. C. C. P. § 1845); *South Carolina:* 1906, Rouss *v.* King, 74 S. C. 251, 54 S. E. 615 (accounts, etc.); *Tennessee:* 1874, Woodward *v.* State, 4 Baxt. 324 (the witness heard a shot and saw a man running, and when he learned that W. had made threats against the deceased he thought the man running must be W.; excluded); *Texas:* 1881, Houston & T. C. R. Co. *v.* Burke, 55 Tex. 339; 1888, Gilbert *v.* Odum, 69 Tex. 673, 7 S. W. 510; 1895, Texas & P. R. Co. *v.* Reed, 88 Tex. 439, 31 S. W. 1058 (witnesses testifying without knowledge as to a foreman's authority over railroad hands).

The following ruling is peculiar, and rests on the principle of § 654, *ante:* 1857, Willey *v.* Portsmouth, 35 N. H. 308 (the witness said that the place at which W. fell was within the highway; but he was not present when W. fell; held, that as he might have learned of the place's identity by admissions of the party's or otherwise in an adequate way, the answer was proper).

other words, the degree or quality of his knowledge, so far as there was actual personal observation by him, is no ground of objection.[1]

(2) "Belief" or "impression" may signify the *degree of positiveness of the witness' recollection; i.e.* may signify that he obtained entirely clear and positive impressions at the time, but that since then his memory has faded, and his recollection to-day is so weak that he is not able to call it more than an "impression" or to say more than "I think." The deficiency comes merely in the quality of his recollection. Here again, the law makes no objection on such grounds. It welcomes whatever quality of recollection he is able to bring.[1] In general, then, where there has been actual observation, the quality of the impression received at the time and the quality of persistence of that impression are no grounds of objection; for the simple reason that Courts must accept the facts of human nature and must not insist on what they cannot fairly expect.

(3) "Belief" or "impression" may signify a *lack of actual personal observation;* when this is the case, the main principle (§§ 656, 657, *ante*) excludes such testimony. The shades of meaning in such expressions are often elusive; but if the present meaning appears, there is no question of the judicial attitude against admission:

1820, *R.* v. *Dewhurst*, 1 State Tr. N. S. 529, 590. Mr. *Raines* (cross-examining): "Upon your oath, did you not see something very like that which I have read to you?" *Witness:* "I cannot recollect." Mr. *Raines:* "Will you swear you do not believe what I have read to you?" BAYLEY, J.: "It must be belief from recollection." Mr. *Raines:* "I should have thought it was a legitimate question capable of being answered." BAYLEY, J.: "If it admits of a legitimate answer. It may not; because he might say 'I believe it, because I have heard people say so.'"

1810, Chief Justice SWIFT, Evidence, 111: "A witness must swear to facts within his knowledge and recollection, and cannot swear to mere matters of belief."

1820, HENDERSON, J., in *State* v. *Allen*, 1 Hawks 9: "The law requires that he who deposes to a fact should have the means of knowing it. Grounds of conjecture and opinions are not sufficient."

1839, WESTON, C. J., in *Clark* v. *Bigelow*, 16 Me. 247: "'Impression', though it may convey the idea of a certain degree of recollection, is an equivocal term. It may have been derived from the information of others, or from some unwarrantable deduction of the mind from premises not well established, . . . [in which case] it cannot in our judgment be safely or legally received."

1856, GOODENOW, J., in *Lewis* v. *Brown*, 41 Me. 451: "In general, the opinion of a witness is not evidence; he must speak of facts. It may have been derived from some unwarrantable deduction of the mind, from premises not well established."

1859, SAWYER, J., in *State* v. *Flanders*, 38 N. H. 332: "An impression may mean an understanding or belief of the fact as derived from some other source than personal observation, — as the information of others"; and this would not be admissible.

1877, BRICKELL, C. J., in *Wood* v. *Brewer*, 57 Ala. 517: "A witness generally must depose

§ 658. [1] The authorities on this point are examined in dealing with Recollection (*post*, § 728); because, though the principles are well settled, the rulings do not always distinguish the exact objection involved, and must therefore be marshalled in one place. The rulings in the ensuing note of the present section are only those in which it is clear that the objection was based on a lack of actual personal observation.

to facts within his knowledge, and cannot be permitted to testify upon mere conjecture or belief."

What the Courts repudiate, then, is a mere guess, an exercise of the imagination, a suspicion, a conjecture, offered in place of the result of actual personal observation; it is from this point of view only that a "belief" or "opinion" or "impression" is not to be received.[2]

(4) A "belief" or "impression" or "opinion" may, though otherwise admissible, be obnoxious to the *Opinion rule*, because all the data on which it is founded may be capable of being stated fully by the witness to the jury, and thus his inferences from them become superfluous. The operation of this rule is examined in detail elsewhere (*post*, §§ 1962, 1969).

§ 659. (*c*) **Knowledge must involve Rational Inferences from Adequate Data.** The third corollary of the general principle of Knowledge (*ante*, § 656) is that the witness' knowledge (assuming it to be based on personal observation) must not appear to *lack adequate data as its basis of inference*. For example, when Sherlock Holmes tells his companion that the neatly dressed person who is seen passing on the street is a banker, the father of six children, and a German by birth, the ordinary intelligence wonders at a statement based on such apparently invisible data. Yet if a man passed by in working clothes daubed with lime and brickdust, the ordinary intelligence would admit that any observer had the right to assert positively that the

[2] In the following rulings the testimony was excluded, except where otherwise stated:

ENGLAND: 1821, Redford *v.* Birley, 1 State Tr. N. S. 1071, 1171 (battery in dispersing a mob; Evans: "Do you believe there was [anybody cut]?"; disallowed; Holroyd, J.: "You must get that fact from a witness who saw the wound inflicted").

UNITED STATES: *Fed.* 1879, Atchison R. Co. *v.* U. S., 15 Ct. Cl. 141; Patten *v.* U. S., ib. 290 (the estimates of experts, roughly fixing a percentage of gross cost or earnings as representing a certain element of the total, were rejected and the items were carefully reckoned); 1896, Crane Co. *v.* Columbus Const. Co., 20 C. C. A. 233, 73 Fed. 984 (an estimate of the cost of pipe-laying; "mere guesses, prepared without personal knowledge of the facts", excluded); *Ala.* 1882, McDonald *v.* Jacobs, 77 Ala. 525, 527 ("reasons for belief" not amounting to personal knowledge); *Ark.* 1850, Jordan *v.* Foster, 11 Ark. 142 ("opinion" as a mere guess); *Cal.* 1886, Tait *v.* Hall, 71 Cal. 152, 12 Pac. 391 ("impression" of conduct, based on a guess from other acts); *Ga.* 1831, Bank *v.* Brown, Dudley Ga. 62, 65 ("The belief or persuasion of a witness cannot be received as evidence, unless it rests upon a sufficient legal foundation"); 1868, Macon & W. R. Co. *v.* Johnson, 38 Ga. 436 ("opinion", here based on inference, not sight; but admitted upon the facts); *Ida.* 1891, Terr. *v.* McKern, 2 Ida. 759, 26 Pac. 123 ("thought" the defendant received an object from another person, but did n't see it); *Ky.* 1834, Jones *v.* Chiles, 33 Ky. 33 (the witness "understood" that a certain possession existed); *Minn.* 1893, Lovejoy *v.* Howe, 55 Minn. 353, 354, 57 N. W. 57 (impression based on something heard, not on knowledge); *N. H.* 1846, Tibbetts *v.* Flanders, 18 N. H. 292 (understood); 1864, Kingsbury *v.* Moses, 45 N. H. 225 (impression); *N. Y.* 1873, Higbie *v.* Ins. Co., 53 N. Y. 604 (by a physician, "an impression sufficient to satisfy his own mind, but not enough to base a medical opinion upon"); *N. C.* 1895, State *v.* Lytle, 117 N. C. 799, 23 S. E. 476 ("I met a low, chunky man; it was dark; he had his back to me; I took him to be L.", held admissible; "I only judged it was L. from the fact that I had heard he had gone up the road that day", held inadmissible); *Or.* 1898, Farmers' Bank *v.* Saling, 33 Or. 394, 54 Pac. 190 (one who had means of observation allowed to state his "understanding" as to the membership of a firm; "the understanding was not based upon hearsay evidence"); *Pa.* 1839, Carmalt *v.* Post, 8 Watts 411 (impression); 1860, Duvall's Ex'r *v.* Darby, 38 Pa. 59 (same); *Tenn.* 1900, Endowment Rank *v.* Allen, — Tenn. —, 58 S. W. 241 (physician's testimony that "he thought" deceased took an overdose of medicine, excluded as "a mere conjecture").

Compare the cases cited *post*, § 728, admitting testimony of "impressions."

man was a bricklayer. Thus it is that the law may reject testimony which appears to be founded on data so scanty that the witness' alleged inference from them may at once be pronounced absurd or extreme.

This principle, however, sound as it is in theory, can seldom have frequent application. When the source of knowledge is so insufficient, Courts will rarely need to pronounce the formal exclusion of the testimony. Its weakness is self-exhibited. The risk of excluding a useful though small item of testimony is greater than the risk of admitting testimony capable of exaggeration. Cross-examination will usually furnish the exposure.

When the testimony, thus appearing to the ordinary layman to lack a rational basis, is founded on observations made with esoteric methods or apparatus — *vacuum-rays*, *telepathy*, and the like — this method should be explained by the witness; and, if it is vouched for as accepted in his branch of learning, it suffices to admit his testimony (*post*, §§ 665, 795).

§ 660. **Same: Inference of Identity of a Person by Voice or Appearance; of Age from Appearance; of Chattels from their Qualities; Miscellaneous Instances of Inadequate Knowledge.** In the application of the foregoing principle, Courts have shown no tendency to follow a narrow policy of exclusion. In most of the instances it needs no argument to perceive that the testimony was at least worth receiving. It has been properly held, for example, that a witness may testify to a person's *identity* from his *voice* alone,[1] or from observing his *stature*, *complexion*, *clothing*, or other marks,[2] or from

§ 660. [1] ENGLAND: 1660, Hulet's Trial, 5 How. St. Tr. 1185, 1187 (Counsel: "Did you mark the proportion of his body, or his habit, what disguise he was in?"; Witness: "He had a pair of freeze trunk breeches, and a vizor, with a grey beard"; Defendant: "I desire to know of him how he comes to know that I was there at that time?"; Witness: "By your voice"); 1692, Harrison's Trial, 12 How. St. Tr. 846, 850, 861, 862; 1806, The Threshers' Trial, 30 How. St. Tr. 197, 198, 204, 222; 1805, Picton's Trial, 30 How. St. Tr. 245; 1874, R. *v.* Castro (Tichborne Case), Charge of Cockburn, C. J., 4 ff.

CANADA: 1917, R. *v.* Murray & Mahoney, 33 D. L. R. 702, Alta. (robbery; identification by voice alone, held sufficient).

UNITED STATES: *Ark.* 1912, Rhea *v.* State, 104 Ark. 162, 147 S. W. 463 (voice distinguishing a white from a negro); *Fla.* 1907, Mack *v.* State, 54 Fla. 55, 44 So. 706; *Ga.* 1895, Fussell *v.* State, 93 Ga. 450, 21 S. E. 97 (a voice heard in the darkness); 1903, Patton *v.* State, 117 Ga. 230, 43 S. E. 533 (witness to a voice, held not well qualified on the facts); *Ill.* 1890, Ogden *v.* People, 134 Ill. 599, 25 N. E. 755; *Ind.* 1895, Deal *v.* State, 140 Ind. 354, 39 N. E. 930; *Kan.* 1901, State *v.* Herbert, 63 Kan. 516, 66 Pac. 235; *Mass.* 1870, Com. *v.* Williams, 105 Mass. 67 (hearing the voice only once before); 1904, Com. *v.* Kelley, 186 Mass. 403, 71 N. E. 807 (assault by night); *Mo.* 1884, State *v.* Hopkirk, 84 Mo. 288 (voice and motion); *Mont.* 1910, State *v.* Vanella, 40 Mont. 326, 106 Pac. 364; *Okl.* 1921, Patton *v.* State, — Okl. Cr. —, 200 Pac. 878 (labels and government stamps as evidence of bottle-contents being whiskey); *Pa.* 1874, Brown *v.* Com., 76 Pa. 319, 328, 338 (one who carries on a conversation through the soil-pipe of a prison or through a speaking-tube may form an opinion as to the identity of the person speaking with him; here the witness was familiar with the speaker's voice); *Tex.* 1906, Waggoner *v.* State, — Tex. Cr. —, 98 S. W. 254.

For the cases admitting the sound of a *voice as circumstantial evidence*, see *ante*, § 222.

For identification by voice on the *telephone*, see *post*, § 669.

For *identification in general*, see *ante*, §§ 410–416.

For the *opinion rule* as excluding this class of testimony, see *post*, § 1977.

[2] *England:* 1830, R. *v.* Shaw, 1 Lew. Cr. C. 116 (murder; "a witness was called to prove comparison of shoes and shoe-marks; Parke, J., asked him if he had looked at the soles of the shoes and examined them with the foot-marks *before* he put the shoe in the mark; the witness answered in the negative. Parke, J., desired the jury to reject the whole inquiry relating to the identification by shoe-marks").

United States: 1882, Beale *v.* Posey, 72 Ala. 332 (mode of walking); 1902, Trulock

the sight of the person's photograph;[3] and that a witness may testify to a person's *age*[4] or *intoxication*[5] merely from his appearance. So, too, *chattels* may be *identified* by their appearance and other qualities.[6] In sundry other instances the principle may need to be applied.[7]

It may be noted that of course the law does not refuse testimony based on *artificial experimentation*, merely as such.[8]

v. State, 70 Ark. 558, 69 S. W. 677 (mode of walking); 1904, Alford *v.* State, 47 Fla. 1, 36 So. 436 (identification from clothes, etc. allowed; but the witness must have had personal knowledge); 1881, State *v.* Lucas, 57 Ia. 502, 10 N. W. 868 (a peculiar shrugging of the shoulders); 1872, State *v.* Woodruff, 67 N. C. 91 ("The law allows persons to testify to such identity or to such resemblance who have had an opportunity of seeing such persons, if but for an instant"); 1895, State *v.* Lytle, 117 N. C. 799, 23 N. E. 476 ("I judged it to be L. from his chunky build", held admissible); 1885, Lipes *v.* State, 15 Lea Tenn. 125 (any person who had seen the defendant's feet, allowed to testify to their peculiarities).

There is apt to be a hasty judgment of identity, especially among ignorant persons and at the time of excitement, as when a murderer is pursued. Hence the extreme caution shown by some Courts in requiring a solid basis for such testimony. For *footprints* especially there is a stricter rule in some States (*ante*, § 415).

For *identification in general*, see *ante*, § 413.

For the *opinion rule*, as applied to identity, see *post*, § 1977.

For the privilege against *self-crimination*, as applied to *compulsory identification* by voice or foot-measure, see *post*, § 2265.

[3] 1883. Brooke *v.* Brooke, 60 Md. 529, 533; 1886, Marion *v.* State, 20 Nebr. 240, 29 N. W. 911.

For the use of *photographs to identify*, see also *post*, § 792.

[4] 1875, Benson *v.* McFadden, 50 Ind. 433; 1896, State *v.* Bernstein, 99 Ia. 5, 68 N. W. 442 (selling liquor to a minor).

For the inference to *age from appearance* as circumstantial evidence, see *ante*, § 222.

For inference from a child's *resemblance* to its *paternity*, see *ante*, § 166.

For the *exhibition* of a person *to the jury*, as evidencing his *age* or *paternity*, see *post*, § 1154.

[5] 1878, Aurora *v.* Hillman, 90 Ill. 61.

For other ways of evidencing *intoxication*, see *ante*, § 235.

[6] 1916, Terr. *v.* Meyer, 23 Haw. 121 (weight of cattle estimated by looking at them); 1887, State *v.* Rainsbarger, 74 Ia. 204, 37 N. W. 153 (identification of a buggy by its rattle, allowed); 1873, Com. *v.* Aaron, 114 Mass. 255 (seeing sales of liquor which the witness supposes was whiskey and ale; admitted); Com. *v.* Dowdican, 114 Mass. 257 (seeing liquor which "looked like" whiskey, admitted); 1902, Ainsworth *v.* Lakin, 180 Mass. 397, 62 N. E. 747 (identification of a wagon by its rattle, allowed).

[7] *Federal:* 1898, Northern P. R. Co. *v.* Hayes, 30 C. C. A. 576, 87 Fed. 129 (how fast a train was going, by one who was struck by it from behind but did not see it; excluded); 1849, Hopper *v.* Com., 6 Gratt. 687 (identity of a garment); *Ala.* 1852, Nolin *v.* Parmer, 21 Ala. 71 (a surveyor's knowledge of land); *Cal.* 1895, People *v.* Chin Hane, 108 Cal. 597, 41 Pac. 697 (that a pistol-shot sounded as though fired inside a building, admitted); *Conn.* 1859, Babcock *v.* Bank, 28 Conn. 306 (knowledge of another's pecuniary condition); *Ill.* 1894, Carter *v.* Carter, 152 Ill. 434, 28 N. E. 948, 38 N. E. 669 (testimony to an unseen adultery, from sounds heard in an adjoining room, admitted); *Ia.* 1864, Messer *v.* Reginniter, 32 Ia. 313 (surveyor's knowledge of land); 1905, Bryce *v.* Chicago, M. & St. P. R. Co., 129 Ia. 342, 105 N. W. 497 (by a brakeman, that he could tell by the sensation, etc., that the emergency brake was set, allowed; good opinion by Weaver, J.); *Mass.* 1852, Rich *v.* Jones, 9 Cush. 337 (goods examined by an expert had not been identified as the plaintiff's); 1866, Hamilton *v.* Nickerson, 13 All. 352 (usage of trade; "such knowledge of the practice and course of business as to create the belief or conviction of its existence"; "witnesses who had active and constant experience of the manner in which the trade was conducted in relation to the matter in controversy"); 1872, Com. *v.* Pease, 110 Mass. 412 (knowledge of the mode of making an established article several years before); 1891, Lynch *v.* Moore, 154 Mass. 335 (habits of a horse); *Mich.* 1905, Wright *v.* Crane, 142 Mich. 508, 106 N. W. 71 (speed of an automobile; witness not qualified on the facts); *N. C.* 1880, State *v.* Reitz, 83 N. C. 635 (the defendant had lived with the witness three or four weeks and had worn an old pair of boots of his, twisting them out of shape in using them; knowledge of the type of footprints held sufficient); *Tenn.* 1835, Burns *v.* Welch, 8 Yerg. 119 (capacity of a saw-mill); *Tex.* 1874, Albright *v.* Corley, 40 Tex. 113 (basis for estimating the number of cattle in a range).

The application of the principle should be left to the *determination of the trial Court:* 1888, Stillwell Mfg. Co. *v.* Phelps, 130 U. S. 527, 9 Sup. 601; 1890, Montana R. Co. *v.* Warren, 137 U. S. 353, 11 Sup. 96.

[8] 1886, Citizens' Gaslight Co. *v.* O'Brien, 118 Ill. 180, 8 N. E. 310; 1869, Swett *v.* Shum-

§ 661. **Same: Testimony to Another Person's State of Mind.** The argument has been made that, because we cannot directly see, hear, or feel the state of another person's mind, therefore testimony to another person's state of mind is based on merely conjectural and therefore inadequate data. This argument is finical enough; and it proves too much, for if valid it would forbid the jury to find a verdict upon the supposed state of a person's mind. If they are required and allowed to find such a fact, it is not too much to hear such testimony from a witness who has observed the person exhibiting in his conduct the operations of his mind:[1]

1791, *Answer of the Judges* to the House of Lords, concerning Fox's Libel Act, 31 Geo. III, c. 60, 22 How. St. Tr. 300: "Your lordships' fourth question is, 'Is a witness produced before a jury in a trial as above, by the plaintiff, for the purpose of proving the criminal intentions of the writer, or by the defendant, to rebut the imputation, admissible to be heard as a competent witness in such trial before the jury?' . . . [Assuming that the criminal intent is material and allowable to be proved or denied at all, then] cases may be put where a witness is competent and admissible to prove the criminal intention, on the part of the prosecutor; and it may be stated as a general rule, that in all cases where a witness is competent and admissible to prove the criminal intention, a witness will also be competent to rebut the imputation."

1882, BOWEN, L. J., in *Edgington* v. *Fitzmaurice*, L. R. 29 Ch. D. 459: "The state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is; but if it can be ascertained, it is as much a fact as anything else."

way, 102 Mass. 366; 1878, Williams *v.* Taunton, 125 Mass. 40; 1879, Eidt *v.* Cutter, 127 Mass. 524.

For the admissibility of experiments as *circumstantial evidence*, see *ante*, § 445. For the propriety of performing experiments *before the jury*, see *post*, § 1161.

§ 661. [1] *Accord:* 1902, Spencer *v.* Peterson, 41 Or. 257, 68 Pac. 519 (intent as to dedication of a way); 1840, Devling *v.* Williamson, 9 Watts Pa. 311, 316 (a witness to an interview; that "the contract was considered at an end by all parties", admitted); 1885, Plank *v.* Grimm, 62 Wis. 251, 253, 22 N. W. 470 (by a defendant in assault, as to his belief in the plaintiff's intention in wielding a weapon). *Contra*, but only more or less unsound: *Fed.* 1897, Rucker *v.* Bolles, 25 C. C. A. 600, 80 Fed. 504 (whether a person intended to remain a resident of New York; an acquaintance allowed to testify to his conduct only, not his intention); *Cal.* 1906, Sneed *v.* Marysville G. & E. Co., 149 Cal. 704, 87 Pac. 376 (boy killed by electrical contact; his mother's testimony that he did not know of electrical dangers, excluded; unsound on the facts; McLaughlin, J., diss.); *Ga.* 1903, Durrence *v.* Northern Nat'l Bank, 117 Ga. 385, 43 S. E. 726 (by B., that D. bought land in good faith and without notice, excluded); *Me.* 1857, Edwards *v.* Currier, 43 Me. 484 ("one not a party to the sale could not know the motives of those who were parties"); *Mich.* 1869, Gilman *v.* Riopelle, 18 Mich. 162 (excluded, "unless the motive was expressed"); *Minn.* 1866, State *v.* Garvey, 11 Minn. 163 (whether an assailant in firing intended to shoot the witness); 1901, State *v.* Pierce, 85 Minn. 112, 88 N. W. 417 (abortion; the defendant claimed that he was merely treating the woman for a vaginal disease; the woman's testimony as to his purpose in the operation, excluded; such a ruling affronts common sense); *Nebr.* 1901, Peterson *v.* State, 63 Nebr. 251, 88 N. W. 550 (whether the accused believed certain liquor to be intoxicating, excluded); *Tex.* 1921, Jones *v.* State, 89 Tex. Cr. 577, 232 S. W. 847 (homicide; deceased's wife's testimony that "she knew her husband was going to shoot the dog", held inadmissible); *Ut.* 1897, State *v.* Carrington, 15 Utah 480, 50 Pac. 526 ("no witness can state with what purpose another performed an act"); 1898, State *v.* Kilburn, 16 Utah 187, 52 Pac. 277 (whether the defendant meant, by certain expressions, that he was going to steal, excluded, from a hearer); 1898, Reese *v.* Min. Co., 17 Utah 489, 54 Pac. 759 (that the deceased knew the facts affecting his danger, excluded).

The Alabama rulings are also *contra*, and seem to have been the origin of this heresy; but they are so mixed with the application of the Opinion rule that they are placed under that head with the other Alabama rulings (*post*, § 1966).

1818, TILGHMAN, C. J., in *Delancy* v. *Little*, 4 S. & R. 503 (admitting testimony by Z. of what C. M. intended in locating a tract): "It has been argued that the intention of Charles McCormick, being confined to his own breast, was not a fact to which the witness could swear. This is a very subtle argument; but I cannot say that I feel the force of it. A man's intentions may be manifested by his words or his actions, and, when known, may be sworn to with as much certainty as any other fact. When a witness undertakes to swear to a thing of that kind, the jury who hear the oath will value it at what it is worth."

From the foregoing question, distinguish the questions (1) whether the *Opinion rule* affects testimony to another person's state of mind (*post*, § 1962), and (2) whether the *Interest rule* prevents a witness from testifying to his *own state of mind* (*ante*, § 581).

§ 662. **Same: Improbabilities in Scientific Testimony.** The inexpediency of applying the present principle (*ante*, § 659) in any but rare instances is the more apparent when a Court assumes to intrude into the technical domain of the engineer, the physician, and other scientific professional men, and to deny the possibilities of knowledge therein, by refusing to listen to that which appears, to the lay understanding of the tribunal, as an incredible assertion or an unlikely inference. Sometimes the exclusion has rested, not wholly on the impossibility of knowing the matter, nor yet wholly on the insufficiency of the particular witness' data of inference, but on mixed grounds, amounting to this, that the subject is one in which certain and accurate results are difficult to reach and upon which most persons' opinions will be merely notional and conjectural, so that it is not worth while to listen to testimony at all. In other words, the Court claims for the jury the exclusive privilege of guessing.[1]—The whole theory is of the past, unpractical, and ill-founded, and is obnoxious to the modern principle of receiving whatever light can be thrown upon the issue by competent persons and then leaving their credit to the jury:[2]

§ 662. [1] The following rulings illustrate various aspects of the tendency: 1857, State *v.* Knight, 43 Me. 133 (that no such a difference exists between the appearances of the blood of a man and of a sheep as will permit the identification of the former, excluded); 1859, Anon., 37 Miss. 58 (in a bastardy case, testimony that pregnancy from a first coition was highly improbable was rejected by the Court as "too uncertain, indefinite, and hypothetical", "mere speculative opinion"); 1900, Smitson *v.* S. P. Co., 37 Or. 74, 60 Pac. 907 (Moore, J.: "There may be certain physical facts the proof of the existence of which must necessarily overcome, as a matter of law, all testimony to the contrary. The present is not an age of miracles, and, if testimony be introduced at a trial which transcends the ordinary laws of the universe, the Court, being obliged to take judicial notice of such laws, would probably be compelled to reject such testimony"; applying it to testimony about a railroad accident); 1881, McLain *v.* Com., 99 Pa. 99 (the result of scientific investigation, that human blood cannot be distinguished from that of some animals, was not sanctioned as binding).

Compare the *Opinion rule*, as applied to testimony to *possibility* and *probability* (*post*, § 1976).

Distinguish those cases in which a *mere possibility* is not relevant in the cause: 1873, Davis *v.* State, 38 Md. 35 ("a mere possibility, not a rational probability"; here the question was "what kind of an instrument could have inflicted the wounds?", and it was allowed under the circumstances).

[2] *Accord:* 1905, Post *v.* U. S., 135 Fed. 1, 11, 67 C. C. A. 569 (fraud in mental healing; good opinion by Shelby, J.); 1905, Sun Ins. Office of London *v.* Western W. M. Co., 72 Kan. 41, 82 Pac. 513 (spontaneous combustion); 1870, Horton *v.* Green, 64 N. C. 67.

For testimony founded on *observation by scientific apparatus* — vacuum-ray, stethoscope, etc. — see *post*, §§ 665, 795.

Compare the criticisms of Bentham, Rationale of Judicial Evidence, b. V, c. XVI, § 5 (Bowring's ed. vol. VII, p. 87).

1851, RUFFIN, C. J., in *State* v. *Clark*, 12 Ired. 154: "When professors of the science swear they can thus distinguish, it would be taking too much on themselves, for persons who like Judges, are not adepts, to say the witness cannot thus distinguish, and on that ground refuse to hear his opinions at all. By such a course the judge would undertake of his own sufficiency to determine how far a particular science, not possessed by him, can carry human knowledge, and to determine it in opposition to the professors in that science."

§ 663. **Same: Speculative Testimony to Personal Injuries and to Values.** (1) In comparatively recent years, a few Courts have refused to accept, in personal injury trials, testimony as to the *possible time of persistence of the injury* or the *possible development* of certain consequences. As to this, first, the same answer may be made as to the general attitude already considered. If physicians are willing to estimate certain consequences as probable or possible, it is hardly proper for judges to affirm the untrustworthiness of these conclusions. The worthlessness, in casual instances, of the testimony of hired and unscrupulous physicians is no more a reason for rejecting all such testimony indiscriminately than the constant abuse of expert testimony generally is a reason for excluding all expert testimony without distinction. Next, it must be said that the Courts have in many of these rulings proceeded upon a confused apprehension of a legitimate doctrine of the law of Torts, namely, that recovery may be had for such injurious consequences only as are fairly certain or probable, not for merely possible harm. That is, a Court, in holding that the physician may not testify to possible harmful consequences, is not always ruling that testimony to possible consequences is evidentially improper, but is meaning to rule that such possible consequences are as a matter of substantive law not entitled to consideration at all. This is often the real explanation for such rulings.[1] But the evidential doctrine in question has little standing elsewhere,[2] and should not be extended.

(2) At one time it was advanced as a reason for rejecting *opinions as to value* that they dealt with a matter essentially uncertain, speculative, and incapable of definite ascertainment, and hence should not be the subject of testi-

§ 663. [1] *California:* 1907, Cordiner *v.* Los Angeles Traction Co., 5 Cal. App. 400, 91 Pac. 436 (personal injury); *Iowa:* 1921, Kime *v.* Owens, 191 Ia. 323, 182 N. W. 398 (personal injury; questions as to "possibility" of permanent injury, held improper); *New York:* 1872, Filer *v.* R. Co., 49 N. Y. 45 (whether an inflammation would probably recur, admitted); 1884, Strohm *v.* R. Co., 96 N. Y. 306; 1888, Turner *v.* Newburgh, 109 N. Y. 308, 16 N. E. 344 (whether injury caused disease, admitted); 1889, Griswold *v.* R. Co., 115 N. Y. 63, 21 N. E. 726 (distinguishing future recovery from present harm from the access of a new disease); 1889, McClain *v.* R. Co., 116 N. Y. 467, 22 N. E. 1062 (same); 1891, Wallace *v.* Oil Co., 128 N. Y. 580, 27 N. E. 956; 1911, Cross *v.* Syracuse, 200 N. Y. 393, 94 N. E. 184 (the Strohm case explained and limited); *Wisconsin:* 1909, Bucher *v.* Wisconsin Central R. Co., 139 Wis. 597, 120 N. W. 518 (permanence of impotency).

Compare the citations under the Opinion rule (*post*, § 1976).

[2] 1908, Donnelly *v.* Chicago City R. Co., 235 Ill. 35, 85 Ill. 233 (probable effect of injury, admitted); 1916, Fellows-Kimbrough *v.* Chicago City R. Co., 272 Ill. 71, 111 N. E. 499; 1889, Louisville N. A. & C. R. Co. *v.* Lucas, 119 Ind. 592, 21 N. E. 968 (probable result of an injury, admitted); 1850, Dupré *v.* Desmaret, 5 La. An. 591; Dupré *v.* Prescott, ib., 592; 1860, Paty *v.* Martin, 15 La. An. 620 (in these cases the testimony was not rejected; it was merely declared insufficient); 1888, Peterson *v.* R. Co., 38 Minn. 515, 39 N. W. 485 (probability of recovery, admitted).

Most of the cases on this subject deal with the Opinion rule (*post*, § 1676).

mony at all. The ground of the opponents of value-testimony was soon shifted to the Opinion rule, and the contest has since been settled in that field (*post*, § 1940); but the present reason, though of little consequence in the law of to-day, was advanced by eminent judges in leading opinions:

1840, NELSON, C. J., in *Lincoln* v. *R. Co.*, 23 Wend. 434 (rejecting testimony to the probable loss of profits in business): "There may be a tolerable conjecture of the amount of damage, . . . but their opinions can rise no higher than mere conjecture. In the nature of the case no set or series of facts exists to which the application of their peculiar knowledge would naturally lead with anything like mathematical certainty. . . . Assume the whole [of the grounds] to be true, and loss does not follow with anything like the exactness that exists in matters of science and skill, more especially to any given amount. Even with the jury the damage, beyond the actual expenses out, can at best rise but little above conjecture." [3]

§ 664. **Negative Knowledge; Testimony that a Fact would have been Seen or Heard had it occurred.** In applying the foregoing principle requiring that the witness' inferences be based on adequate data (*ante*, § 659), Courts have often been asked to exclude testimony based on what may be called *negative knowledge*, *i.e.* testimony that a fact did not occur, founded on the witness' failure to hear or see a fact which he would supposedly have heard or seen if it had occurred. But there is no inherent weakness in this kind of knowledge. It rests on the same data of the senses. It may even sometimes be stronger than affirmative impressions. The only requirement is that the witness should have been so situated that in the ordinary course of events he would have heard or seen the fact had it occurred. This sort of testimony is constantly received, — particularly in proof of the failure to give railroad signals, the loss of a chattel, the absence of a witness, the non-existence of a fictitious person, the non-payment of money, and other negative facts.[1]

[3] *Accord:* 1837, Norman v. Wells, 17 Wend. N. Y. 162, Cowen, J.; 1847, Fish v. Dodge, 4 Denio N. Y. 318.

It must be noted that the present reason, though no longer advanced, was quite different from that based on the Opinion rule; and thus it was possible for the same Court to reject value-testimony on the present ground (Lincoln v. R. Co., 23 Wend. 434, value of business profits) and to admit it where the present objection did not exist (Brill v. Flagler, ib. 356).

Moreover, traces of this notion still survive at the present day in some courts and classes of cases, — where a Court rejects an estimate of what the value of land would have been if a railroad had not passed by (*post*, §§ 1943).

§ 664. [1] In the following rulings the testimony was received, except where otherwise noted: ENGLAND: 1780, Maskall's Trial, 21 How. St. Tr. 681 (a person at a riot, not seeing the accused among the active part of the mob); 1832, R. v. King, 5 C. & P. 123 (fictitious character of a name forged; testimony by a person who was otherwise unacquainted with the locality, but had made special inquiries, was admitted); 1834, R. v. Brannan, 6 C. & P. 326 (clerk in one department of a large commercial house, admitted to prove that no customer of a certain name was known to it).

CANADA: *New Brunswick:* 1918, Hallett v. Bank of Montreal, 43 D. L. R. 115 (money in an envelope); *Ontario:* 1906, Kastor Advertising Co. v. Coleman, 11 Ont. L. R. 262, 267 (whether certain advertisements were published, etc.); *Nova Scotia:* 1904, Hart v. Taylor, 37 N. Sc. 155 (conversations); *Saskatchewan:* 1921, Canadian Bank of Commerce v. Bezy, 63 D. L. R. 696, Sask. (mortgage payment).

UNITED STATES: *Federal:* 1897, Rhodes v. U. S., 25 C. C. A. 186, 79 Fed. 740 (whether a person had sore eyes; relatives and fellow-soldiers allowed to testify that they did not see the disease); 1902, Texas & P. R. Co. v. Watson, 190 U. S. 287, 23 Sup. 681 (setting fire to cotton); 1904, Chicago & N. W. R. Co. v. Andrews, 130 Fed. 65, 70, 64 C. C. A. 399 (railroad train); *Alabama:* 1850, Thomas v. Degraffenreid, 17 Ala. 607 (one who had lived 25 years in the family, who never knew or heard of a certain member being given and

1850, CHILTON, J., in *Thomas* v. *Degraffenreid*, 17 Ala. 607 (the issue being the title to slaves): "The witness C. states his intimacy with the family of A. T. [the alleged owner]. . . . If his relation to the family was such as he would in all probability have known the existence of a fact ostensible and notorious in its character had it existed, his want of all knowledge on the subject may be received as some evidence of its non-existence."

1876, COOLEY, C. J., in *Chambers* v. *Hill*, 34 Mich. 524 (excluding the testimony of a neighbor, who had formerly lived a short time in the family, as to conversations in the

having certain slaves); 1853, Gilbert *v.* Gilbert, 22 Ala. 533 (relatives of the deceased, living in the neighborhood, who never heard of a will being made, excluded); 1853, Nelson *v.* Iverson, 24 Ala. 17 (an intimate friend who lived near by, who never knew of a transfer of a slave); 1857, Pool *v.* Devens, 30 Ala. 675 (did not see money given); 1858, Ward *v.* Reynolds, 32 Ala. 389, *semble* (a neighbor of old standing, who never knew or heard of a slave being unsound); 1859, Blakey's Heirs *v.* Blakey's Ex'x, 33 Ala. 614, 618 (one who had often boarded with the testator, and had never known of any "serious difficulty" between his wife and himself); 1875, Bennett *v.* State, 52 Ala. 370, *semble* (did not see or hear a person leave the room); 1880, Killen *v.* Lide, 65 Ala. 508 (excluding testimony that the witness would have known if his friend L. had any money, but believed he had none); 1884, Tesney *v.* State, 77 Ala. 33, 37 (testimony of a bystander, in a position to hear, that he did not hear the defendant curse); 1897, Burton *v.* State, 115 Ala. 1, 22 So. 585 (not finding a revolver, after searching in the likeliest place, admitted); 1900, Tennessee C. I. & R. Co. *v.* Hansford 125 Ala. 349, 28 So. 45 (if in a position to observe, allowable; here as to the ringing of an engine-bell, etc.);

Arizona: 1921, Davis *v.* Boggs, 22 Ariz. 497, 191 Pac. 116 (ringing the engine bell);

California: 1894, People *v.* Eppinger, 105 Cal. 36, 38 Pac. 538 (police-officer's search, held sufficient); 1896, People *v.* Sanders, 114 Cal. 216, 46 Pac. 153 (that a sheriff who had searched the whole region had not been able to find a trace of one J. K., admitted, to show that no such person existed); 1913, Thompson *v.* Los Angeles & L. D. B. R. Co., 165 Cal. 748, 134 Pac. 709 (witnesses who heard no motorman's signal, admitted);

Colorado: 1912, Colorado & S. R. Co. *v.* Lauter, 21 Colo. App. 101, 121 Pac. 137 (locomotive whistle);

Columbia (Dist.): 1895, Le Cointe *v.* U. S., 7 D. C. App. 16 (by a person present, that he heard no loud tones, etc.);

Connecticut: 1849, Abel *v.* Fitch, 20 Conn. 96 (arbitrators, testifying that they did not see an interlineation in the submission, and did not hear the subject of it argued);

Delaware: 1913, Philadelphia B. & W. R. Co. *v.* Gatta, 27 Del. 38, 85 Atl. 721 (careful opinion by Woolley, J.);

Florida: 1900, Gray *v.* State, 42 Fla. 174, 28 So. 53 (failure of neighbors to see a person about his home);

Georgia: 1848, Matthews *v.* Poythress, 4 Ga. 287, 295 (by a third person, that the plaintiff had never received value for a note); 1853, Johnson *v.* State, 14 Ga. 63 (a person working on a road, that he saw no one pass during a given time); 1881, McConnell *v.* State, 67 Ga. 635 (in general); 1896, Killian *v.* R. Co., 97 Ga. 727, 25 S. E. 384, *semble* (in general); 1906, Warrick *v.* State, 125 Ga. 133, 53 S. E. 1027 (murder);

Illinois: 1857, Coughlin *v.* People, 18 Ill. 267 (by a bystander, that the defendant did not strike the blow); 1861, Great Western R. Co. *v.* Hanks, 25 Ill. 242 (by an agent, that he did not make a purchase alleged); 1865, Rockwood *v.* Poundstone, 38 Ill. 201 (by a witness to boundaries, that he did not see a landmark); 1866, Frizell *v.* Cole, 42 Ill. 363 (by a bystander, that certain words were not spoken); 1882, Pennsylvania Co. *v.* Boylan, 104 Ill. 595, 599 (testimony by a track-workman, as to defective planks, that he did not know of any and would have known of them if there);

Indiana: 1882, Burchfield *v.* State, 82 Ind. 584 (by a bystander, that he did not hear a shot from a certain place); 1910, Grand Trunk Western R. Co. *v.* Reynolds, 175 Ind. 161, 92 N. E. 733 (railroad signals);

Iowa: 1898, Trimble *v.* Tautlinger, 104 Ia. 665, 74 N. W. 25 (non-hearing of certain words in a conversation, inadmissible);

Kansas: 1921, Weir *v.* Kansas City R. Co., 108 Kan. 610, 196 Pac. 442 (street-car gong);

Maryland: 1905, Northern C. R. Co. *v.* State, 100 Md. 404, 60 Atl. 19 (bystanders not hearing an engine-bell, said to be some evidence);

Massachusetts: 1824, Com. *v* Hershell, Thacher Cr. C. 70, 74 (to disprove that the defendant had sent goods to Charleston, testimony was received of the carter usually employed by him in shipping, that he had carried no such goods for the defendant); 1856, Com. *v.* Cooley, 6 Gray 352, 354 (by a bystander, that he did not hear anything said); 1898, Walsh *v.* R. Co., 171 Mass. 52, 50 N. E. 453 (that a passerby did not hear the locomotive-bell rung); 1899, McMahon *v.* McHale, 174 Mass. 320, 54 N. E. 854 (that employees saw no one inspect a derrick); 1904, McDonald *v.* N. Y. C. & H. R. R. Co., 186 Mass. 474, 72 N. E. 55 (railroad signals); 1909, Slattery *v.* New York N. H. & H. R. Co., 203 Mass. 453, 89 N. E. 622;

family about a son's absence): "Had the witness lived in the family at the time, the proposed evidence might have had some value, especially as the subject was one of high importance to the parties concerned and, if spoken of at all, would have been likely to be discussed more or less by all the family. But the fact that a matter of family concern is not talked about before the neighbors is no evidence that it is not talked about at all."

1880, STONE, J., in *Killen* v. *Lide*, 65 Ala. 508: "Want of knowledge of things open to the senses, in a person who had the opportunity of knowing such fact if it existed, is some evidence, though slight, that the thing did not exist."

Nevertheless, from some source not traceable, there lingers in the judicial mind, in many quarters, an antiquated notion that *negative impressions are not so probative* as affirmative impressions; and a charge to the jury often embodies that notion, where the witnesses differ.[2] The truth is that the con-

Michigan: 1874, People *v.* Marion, 29 Mich. 31, 38 (that no such officer existed in the county, the witness having been personally acquainted with all); 1876, Chambers *v.* Hill, 34 Mich. 524 (quoted *supra*); 1882, Marcott *v.* R. Co., 49 Mich. 101, 13 N. W. 374 (the question "Could the whistle have blown anywhere near C. station and you not have heard it?" was excluded, because the witness might have been otherwise occupied so as not to notice the bell; this is erroneous); 1884, People *v.* Sharp, 53 Mich. 523, 525, 19 N. W. 168 (sheriff's failure to find an alleged subscribing witness, admitted to prove the name to be fictitious); 1894, Edwards *v.* Three Rivers, 102 Mich. 153, 60 N. W. 454 (whether a person had been lame, had varicose veins, etc.; that intimate acquaintances had never known of it, admitted);
Minnesota: 1906, Cotton *v.* Willmar & S. F. R. Co., 99 Minn. 366, 109 N. W. 835 (ringing of bell);
Missouri: 1920, State *v.* Smith, — Mo. —, 222 S. W. 455 (here the Court imprudently allows itself to be entrapped by an anonymous treatise into saying "Negative evidence is admissible only if it tends to contradict positive evidence introduced by the other party"; where this preposterous fallacy started is not worth investigation; but it represents poor sense, poor psychology, and poor justice; in the present case, a charge of murder by poisoning with strychnine in whisky, the accused's evidence, from twelve druggists in the county, that no strychnine had been sold to him for at least two years previously, was excluded; thus do absurd and unjust results flow from plausible word-jingles);
New Hampshire: 1844, Lyford *v.* Thurston, 16 N. H. 399, 407 (by a deed's subscribing witness, that he did not see any consideration paid);
New York: 1838, People *v.* Abbot, 19 Wend. 192, 194 (rape; an occasional resident in a family, not allowed to testify to not seeing any improper liberties said by the prosecutrix to have been taken with her secretly by the defendant); 1910, People *v.* Faber, 199 N. Y. 256, 92 N. E. 674 (approving the above passage);
North Carolina: Purnell *v.* R. Co., 122 N. C. 832, 29 S. E. 953 (by persons near cars, that they saw no flagman's light);
Oregon: 1900, State *v.* Mims, 36 Or. 315, 61 Pac. 888 (carrying weapons);
Pennsylvania: 1921, Rapp *v.* Central R. Co., 269 Pa. 266, 112 Atl. 440 (railroad crossing collision); 1916, Simons *v.* Philadelphia & R. R. Co., 254 Pa. 507, 98 Atl. 1080 (train signal);
Utah: 1922, Jensen *v.* Oregon S. L. R. Co., — Utah —, 204 Pac. 101 (locomotive signals);
Vermont: 1875, State *v.* Phair, 48 Vt. 377 (by a passenger in a midnight train, that he did not see A. on it); 1909, Ide *v.* Boston & Maine R., 83 Vt. 66, 74 Atl. 401 (that no other cause for a fire was seen than engine-sparks, allowed); 1912, Barney's Adm'x Quaker Oats Co., 85 Vt. 372, 82 Atl. 113 (that the deceased and others had never been heard to say anything about the danger of a dust explosion, admitted); 1911, Comstock's Admr. *v.* Jacobs, 84 Vt. 277, 78 Atl. 1017 (wife's not hearing of directions given by husband);
Washington: 1898, State *v.* Lattin, 19 Wash. 57, 52 Pac. 314 (by one living with the deceased, that he had never seen the latter with a pistol); 1911, Kahaley *v.* Frye, 62 Wash. 43, 113 Pac. 247 (injury by a runaway team);
Wisconsin: 1873, Ralph *v.* R. Co., 32 Wis. 181 (that a person did or did not receive an order from the other); 1911, Brown *v.* Milwaukee E. R. L. Co., 148 Wis. 98, 133 N. W. 589; 1913, Marinette *v.* Goodrich T. Co., 153 Wis. 92, 140 N. W. 1094 (whistle);
Washington: 1921, Smith *v.* Inland Empire R. Co., 114 Wash. 441, 195 Pac. 236 (railroad collision).

[2] This kind of evidence usually gives rise to a quibbling and futile discussion as to the *relative weight* of positive and negative testimony; the rule of law, however, has really nothing to say on such subjects, which go to the jury for determination. In the following cases, and many cited *supra*, the Supreme Court was improperly asked to hold that an instruction on the relative weight of negative knowledge should be given: 1906, Dillman *v.* McDaniel, 222 Ill. 276, 78 N. E. 591; 1905,

ditions affecting correctness and fullness of observation are so numerous and varied that the one under consideration has a negligible or minor status.[3] Modern psychology sneers (or smiles) at the law's crude assumption that the complexities of human perception can be handled by some rules of thumb about negative testimony or the like.

The analogies of this use of negative testimony are seen in the rules admitting testimony of *inability to find a document*, to prove its loss (*post*, §§ 1196, 1678), or to find an *attesting witness*, to prove his absence (*post*, § 1312); of the *absence of an entry in a public record* (*post*, § 1633) or in an *account-book* (*post*, §§ 1531, 1556), to prove that no such transaction took place; of the absence of repute in a *family* (*post*, § 1495), to prove that the event of family history did not occur; and of the *lack of traces or news* of a person or a thing (*ante*, §§ 158–160) to show circumstantially that the person or thing is deceased, or non-existent, or is absent.

3. Hearsay Knowledge exceptionally admitted

§ 665. (1) **Official Records**; (2) **Scientific Instruments and Tables (Vacuum Rays, etc.)**; (3) **Expert Learning founded on Books.** Under the general principle of Knowledge (*ante*, §§ 656, 657), testimony founded not on personal observation, but on the information of others, is inadmissible. But this cannot be enforced as a rule of unbending rigidity. There must be exceptions; for the affairs of life often recognize a practical trustworthiness in beliefs not founded altogether on personal observation. The law of Evidence must follow the facts of life. In a number of instances it has recognized exceptions to the rule.

(1) The *records of a public office* are not personally known by the official successors to be authentic. But their place of custody is of itself sufficient circumstantial evidence of genuineness (*post*, § 2158); and for much the same reason the belief of the succeeding incumbents is recognized as competent knowledge. In this and a few related ways, the testimony of a public officer, and even of private persons having to do with a mass of records, may be received.[1] So, too, a public officer's certificate or entry of a transaction actually

State *v.* Murray, 139 N. C. 540, 51 S. E. 775.

A rule-of-thumb for measuring testimonial weight has here grown up in some jurisdictions: "Where two witnesses, unimpeached, contradict each other, the presumption is in favor of the witness who swears affirmatively"; 1919, Estill *v.* Estill, 149 Ga. 384, 100 S. E. 365; 1920, Fullerton Lumber Co. *v.* Hosford, 42 S. D. 642, 176 N. W. 1017 (purchase of coal); 1908, Anderson *v.* Horlick M. M. Co., 137 Wis. 569, 119 N. W. 342; 1920, Suick *v.* Krom, 171 Wis. 254, 177 N. W. 20 (slander).

The rule is a discredit to the science of law, and should be discarded. The vain lucubrations to which it leads have no relation to the real probative value of specific testimony.

[3] From the point of view of logic and psychology as applicable to argument before the jury (not the rules of Admissibility), see the materials collected in the present author's "Principles of Judicial Proof, as given by Logic, Psychology, and General Experience, and illustrated in Judicial Trials" (1913), §§ 234–238, especially the passage from Professor Hans Gross, which elaborately analyzes the psychology of perception.

§ 665. [1] *Canada*: 1916, Canadian Pacific R. Co. *v.* Jackson, 27 D. L. R. 86, Can. Sup. (personal injury; actuarial table testified to be "one in actual use by a company dealing in that class of business", held proper as a basis of testimony, even if the witness is not sufficiently expert to be able "to explain the

performed by his subordinates, not by himself, may be received.[2] But this is not yet conceded for the account-books of a private person.[3]

(2) The use of *scientific instruments, apparatus, and calculating-tables,* involves to some extent a dependence on the statements of other persons, even of anonymous observers. Yet it is not feasible for the scientific man to test every instrument himself; furthermore he finds that practically the standard methods are sufficiently to be trusted. Thus, the use of a vacuum-ray machine may give correct knowledge, though the user may neither have seen the object with his own eyes nor have made the calculations and adjustments on which the machine's trustworthiness depends. The adequacy of knowledge thus gained is recognized for a variety of standard instruments.[4] In some instances the calculating tables or statistical results are admitted directly, under an exception to the Hearsay rule.[5]

(3) The data of every science are enormous in scope and variety. No one professional man can know from personal observation more than a minute fraction of the data which he must every day treat as working truths. Hence a reliance on the *reported data of fellow-scientists,* learned by perusing their

basis on which the table was prepared or to give an opinion worth something as to its reliability or correctness");

United States: 1894, Chicago & A. R. Co. *v.* Keegan, 152 Ill. 413, 418, 39 N. E. 33 (personal knowledge of existence of abstracts, etc., made before the fire of 1871, not required); 1886, Worcester *v.* Northborough, 140 Mass. 397, 402, 5 N. E. 491 (clerk of adjutant-general's office, of over twenty years' service, allowed to testify to custom of office prior to his incumbency); 1897, Westfield Cigar Co. *v.* Ins. Co., 169 Mass. 382, 47 N. E. 1026 (a city engineer, as to the official actions of his office, though really performed by a predecessor, admitted); 1884, Anderson *v.* Volmer, 83 Mo. 403, 407 (bill of goods sold; witness knowing nothing of it except from his books, excluded); 1897, Southern I. C. Line *v.* R. Co., — Tenn. —, 42 S. W. 529 (statements as to car mileage, etc., made by the general manager of the plaintiff, admitted, though not based in every detail on his own observation); 1890, Hill *v.* Kerr, 78 Tex. 217, 14 S. W. 566 (knowledge of the filing and date of filing of surveyor's notes, based in part on their mere presence in the office, admitted).

Contra: 1916, Com. *v.* Quinn, 222 Mass. 504, 111 N. E. 405 (false representations as to F. and M. being wealthy manufacturers at S.; a member of the board of assessors at S., not admitted to testify that neither F. nor M. were assessed for any property; the ruling is based on the ground that the assessor's record was the best evidence; but the ruling should have construed the testimony as to the assessor's testimony to the fact of no property, and should frankly have accepted the principle that an official assessor is qualified to testify on that point; there is too little flexibility in the requirement of personal knowledge as hitherto applied).

[2] *Post,* § 1635.

[3] *Post,* §§ 1530, 1555.

[4] The cases on *vacuum rays,* which deal chiefly with photographs, are placed *post,* § 795.

The cases on different forms of *lenses* are placed *post,* § 795, and on the *telephone* and the *dictagraph, post,* § 669.

Other examples are as follows: 1896, Grayson *v.* Lynch, 163 U. S. 468, 16 Sup. 1064 (veterinary surgeons in the Department of Agriculture, allowed to testify to the districts particularly infected with Texas cattle-fever, though they had not personally been there); 1898, More's Estate, 121 Cal. 608, 54 Pac. 97 (counting sheep by a registering-machine, verified by the witness as accurate in its operation, allowed); 1897, Hatcher *v.* Dunn, 102 Ia. 411, 71 N. W. 343 (a thermometer used in making tests, the variations indicated by a certificate of test made at Yale College and attached to the instrument, admitted); N. Y. St. 1851, c. 134, § 33, Civil Practice Act 1920, § 356; (no surveyor shall testify to a survey of lands without oath or other evidence, on demand, that "the chain or measure used by him was conformable to the standards of the State" at the time of survey; official sealer's certificate, admissible); Oh. Gen. Code Ann. 1921, § 2619 (surveyor not to testify to land-survey until he has sworn, if required, that his chain or measure was of legal standard); 1901, State *v.* McDaniel, 39 Or. 161, 65 Pac. 520 (fire department secretary, allowed to testify from an automatic indicator that no alarm had sounded).

[5] *Post,* § 1706.

reports in books and journals. The law must and does accept this kind of knowledge from scientific men. On the one hand, a mere layman, who comes to court and alleges a fact which he has learned only by reading a medical or a mathematical book, cannot be heard. But, on the other hand, to reject a professional physician or mathematician because the fact or some facts to which he testifies are known to him only upon the authority of others would be to ignore the accepted methods of professional work and to insist on finical and impossible standards. Yet it is not easy to express in usable form that element of professional competency which distinguishes the latter case from the former.[6] In general, the considerations which define the latter are (*a*) a professional experience, giving the witness a knowledge of the trustworthy authorities and the proper source of information, (*b*) an extent of personal observation in the general subject, enabling him to estimate the general plausibility, or probability of soundness, of the views expressed, (*c*) the impossibility of obtaining information on the particular technical detail except through reported data in part or entirely. The true solution must be to trust the discretion of the trial judge, exercised in the light of the nature of the subject and of the witness' equipments. The decisions show in general a liberal attitude in receiving technical testimony based on professional reading.

§ 666. (4) **Execution and Contents of Documents, not personally observed.** (*a*) A witness who testifies to the *execution* of a document, not merely to the handwriting,[1] will usually have seen the very act of affixing the signature.[2] Nevertheless, he may have observed circumstances which will suffice in place of this. The sufficiency of such circumstantial evidence is dealt with under the subject of Authentication of Documents (*post,* §§ 2131, 2148–2154). Moreover, he may have seen and heard the maker's subsequent acknowledgment of the document's genuineness. Such an acknowledgment would, as against the maker himself, be sufficient as an admission (*post,* §§ 1300, 2131); but, apart from that, it is an act of adoption of the document, equivalent to a reëxecution, and hence is now universally conceded to be a sufficient basis of testimony (*post,* § 1648). In the case of wills, the execution has been by statute everywhere made a formal act, in which the attesting witness' pres-

[6] 1879, Central R. Co. *v.* Mitchell, 63 Ga. 176, 180 (based partly on book-learning; admitted); 1906, Remsburg *v.* Iola P. C. Co., 73 Kan. 66, 84 Pac. 548 (expert on explosives, speaking partly from book learning, admitted); 1901, New York P. & N. R. Co. *v.* Jones, 94 Md. 24, 50 Atl. 423 (a private surveyor not allowed to testify that certain marks of the U. S. survey signified the altitude; a singular ruling); 1872, Howard *v.* Gt. Western Co., 109 Mass. 385 (a witness who had made a study of coals, etc., yet not dealt in them, and testified to a fuel's composition, admitted); 1888, Slocovich *v.* Ins. Co., 108 N. Y. 62, 14 N. E. 802 (shipping-expert; knowledge founded on Lloyd's books, etc., admitted); 1903, Scott *v.* R. Co., 43 Or. 26, 72 Pac. 594 (an engineer, not experienced in railroad building, but acquainted with the scientific literature, and otherwise experienced, allowed to testify to the approved slope of a railroad embankment).

For the cases concerning such testimony to *medical matters*, *foreign law*, and *values* or *prices*, see *post*, §§ 687, 690, 719.

For a *physician's* testimony based on the *patient's statement of symptoms*, see *post*, § 688.

§ 666. [1] For handwriting, see *post*, § 693.

[2] 1869, Filley *v.* Angell, 102 Mass. 68 (excluded, where the attesting witness was not present at a note's execution).

On this point, compare the ancient practice *post*, § 1510; Thayer, Prelim. Treat. Evid. 97.

ence is technically necessary (*post*, § 2456), so that the ordinary principle of testimonial knowledge has ceased to operate, and the requirements of the statute are the sole tests.

(*b*) A witness to the *contents* of a document may sometimes lack personal observation; but this rule is best examined in dealing with the subject of copies in general (*post*, § 1277).

§ 667. (5) **Testifying to One's Own Age, or to an Adoptive Child's Age; or** (6) **to Another Person's Name, or** (7) **Residence.** (5) Strictly speaking, one cannot exactly know his *own age* except upon hearsay information; for he is not capable of knowing this, or anything, until an appreciable time after birth. But practically a person's belief on this point has a satisfactory basis. Courts have commonly preferred to accept this practical certainty rather than to insist on academic nicety.[1] But in any case one may know whether at a particular time he was of one age or another, if the difference is as much as the time that must have brought him to the age of observation.[2] Moreover, a person who does not know the date of another's birth or of his own may know, by the association of events, whether he or the other was over or under a certain age at a certain time.[3]

§ 667. [1] *Accord: Cal.* 1896, People *v.* Ratz, 115 Cal. 132, 46 Pac. 915; *Ga.* 1904, McCollum *v.* State, 119 Ga. 308, 46 S. E. 413 (selling liquor to A., a minor; A. allowed to testify to his own age, though he knew it only from his mother, who was living and in the county); *Ill.* 1901, Chicago & A. R. Co. *v.* Lewondowski, 190 Ill. 301, 60 N. E. 497; *Kan.* 1892, State *v.* McClain, 49 Kan 730, 734, 31 Pac. 790 (seduction; prosecutrix' testimony to her age, admitted, her parents being dead); 1905, State *v.* Miller, 71 Kan. 200, 80 Pac. 51 (even though parents are available); *Mass.* 1886, Com. *v.* Stevenson, 142 Mass. 468, 8 N. E. 341, *semble;* 1898, Com. *v.* Hollis, 170 Mass. 433, 49 N. E. 632; 1895, Com. *v.* Phillips, 162 Mass. 504, 39 N. E. 109 (rape-prosecutrix under age of consent); *Mich.* 1876, Cheever *v.* Congdon, 34 Mich. 395; 1905, People *v.* Colbath, 141 Mich. 189, 104, N. W. 633 (rape under age; the prosecutrix being permitted to testify to her own age, a cross-examination as to what others, not members of the family, had told her, was held properly excluded; three judges diss.); *Minn.* 1892, Houlton *v.* Manteuffel, 51 Minn. 185, 187, 53 N. W. 541 (action on a note); *Mo.* 1896, State *v.* Marshall, 137 Mo. 463, 36 S. W. 619 (admitting it; but still intimating that where the witness appears on cross-examination to be speaking from mere hearsay the statement will be excluded; yet all testimony as to one's own age is founded on hearsay); 1897, State *v.* Marshall, 137 Mo. 463, 39 S. W. 63, *semble; Mont.* 1898, State *v.* Bowser, 21 Mont. 133, 53 Pac. 179 (rape-prosecutrix under age of consent); 1914, State *v.* Vinn, 50 Mont. 27, 144 Pac. 773 (statutory rape; that the witness gives, as the source of her knowledge, among other things a baptismal certificate, does not exclude her testimony); *N. H.* 1915, State *v.* Tetrault, 78 N. H. 14, 95 Atl. 669 (rape under age; the female allowed to testify to her own age); *N. J.* 1903, Hancock *v.* Supreme Council, — N. J. Eq. —, 55 Atl. 346 (a witness allowed to testify to his own and his elder brother's approximate age; good opinion by Dixon, J.); *N. M.* 1918, State *v.* Whitener, 25 N. M. 20, 175 Pac. 870 (girl of 14); *Okl.* 1915, Harris *v.* Hart, 49 Okl. 143, 151 Pac. 1038 (claimant to land); *Tex.* 1859, Brown *v.* Mitchell, 88 Tex. 350, 31 S. W. 621 (knowledge of sonship, based in part upon the mother calling him her son); 1906, Curry *v.* State, 50 Tex. Cr. 158, 94 S. W. 1058; *W. Va.* 1876, State *v.* Cain, 9 W. Va. 569; *Wis.* 1898, Dodge *v.* State, 100 Wis. 294, 75 N. W. 954; 1903, Loose *v.* State, 120 Wis. 115, 97 N. W. 526.

Contra: 1846, Doe *v.* Ford, 3 U. C. Q. B. 353.

Undecided: 1910, R. *v.* Farrell, 21 Ont. 540 (liquor-selling to a minor).

Of course, as *admissions* such statements are receivable: 1910, The King *v.* Turner, 1 K. B. 346, 362 (accused's statement of his age, as given for entry on the prison record; here the issue was whether he had been convicted three times since the age of 16, so as to be sentenced as an habitual criminal).

[2] 1879, Hill *v.* Eldredge, 126 Mass. 234 (whether he was 16 or 21 years old at a certain time).

[3] 1870, Folta *v.* State, 33 Ind. 217 (whether another was over 14).

Even if, from the present point of view, testimony to one's own age is not to be received, yet it may be regarded as asserting the family reputation on the subject, and the latter may thus be received under the exception to the Hearsay rule (*post*, § 1493).

The parents of an *adoptive child*, not having been present at its birth, have not personal knowledge, in the strictest sense, of the child's age. But their belief, based on the statements of the natural parents or of the original custodians of the child, together with their observation of the child's behavior during its growth, has for practical purposes a sufficient probability of correctness, — the probative value varying with the age at which the child was adopted and with the other circumstances of their acquisition of the child. To reject their testimony would be pedantic.[4]

(6) A person's *name* is the title by which habitually he calls himself and others call him. To know a person's name, therefore, is to have heard him so called by himself and by others. In strictness, such an utterance is not hearsay (*post*, § 1772), except where it is made as an assertion of fact. But, though it may be hearsay, as a source of information, yet it is universally relied upon as a source of knowledge. Courts have commonly accepted the testimony founded upon it.[5]

(7) A person's *non-residence* or *non-existence* in a *place* is in the practical affairs of life constantly ascertained by inquiries made and answers received in the region of alleged residence. Testimony based on such inquiries should be received. But many Courts have perversely applied here the strict rule. The frequent uses of such testimony occur in proof of a *witness' non-residence* or *decease* and a *document's loss*.[6]

[4] 1921, People v. Caldwell, — Cal. App. —, 203 Pac. 441 (rape under age of an adoptive child; the adoptive parents' testimony to her age, based on her appearance when adopted, and the hearsay of the orphans' home officers from whom she was obtained, admitted; sensible opinion by Works, J.); 1915, State v. Tetrault, 78 N. H. 14, 95 Atl. 669 (rape under age; adoptive parents' testimony to the female's age, based on her appearance when adopted and the statement of a deceased aunt, admitted).

So also the testimony of a *husband* to his wife's age; 1903, U. S. v. Bergantino, 3 P. I. 118 (age of accused).

[5] 1744, Heath's Trial, 18 How. St. Tr. 152 (Mr. Harwood, objecting to a statement that the witness saw Lady Altham at Wexford: "This evidence is founded upon a supposition that the lady he saw at Wexford was the Lady Altham; he says he was only told it was she, and cannot say it was of his own knowledge"; Witness: "I am pretty certain the lady I saw was Lady Altham. I am told, sir, that you are counsellor Harwood; am I not to believe you are? I am told that gentleman is counsellor Daley; I am morally assured of it, and I believe it"); 1857, R. v. Toole, 7 Cox Cr. 266 (one who merely saw X sign his name, admitted to prove the name); 1917, Hornsby v. State, 16 Ala. App. 89, 75 So. 637 (murder; proving the name of deceased as alleged in the indictment; citing the above text with approval).

Compare the cases cited *ante*, §§ 270, 413, *post*, § 2156, some of which apply this principle. Compare also the following: 1848, R. v. O'Doherty, 6 State Tr. N. S. 831, 884 (challenge to array; to prove the religion of a qualified juror, one who had not inquired of the juror himself but spoke from unspecified hearsay, excluded).

[6] The cases are found in the following places; §§ 668, 1196, 1313, 1405, 1725, 1789. The following case may serve as the lecturer's "horrible example" of extreme perversity; it shows the possibilities of non-commonsense which to-day can be exhibited by our courts; 1909, Chambers v. Morris, 159 Ala. 606, 48 So. 687; "Dowdell, J.: The witness John W. Chambers, having testified on his direct examination that one Colin S. Varnum, who had been examined as a witness on a former trial of the case, was dead, was then per-

§ 668. (8) **Conversations through an Interpreter.** When A speaks with B through an interpreter, because of ignorance of B's language, A cannot of his own hearing know what B said; he depends on the interpreter's report. Here no exception has been recognized to the general rule (though it might well have been). The witness A is allowed to testify only to what he heard from the interpreter, and the interpreter must be called to testify to what B said to him.[1] If, however, B is a *party*, whose *admissions* can be used, then the interpreter is to be regarded as B's agent, and the agent's statements on B's behalf (being in a language understood by the witness) are usable as B's admissions.[2]

§ 669. (9) **Information received by Telephone or Dictagraph.** When a witness testifies to a conversation heard by him over the telephone, two kinds of questions arise, in which the present principle is involved.

(*a*) The question of the *identity* or personality of the antiphonal speaker may arise. How can A know that the person speaking to him was really B? Here the principle of Authentication, with its related applications to letters and telegrams, is involved, and the precedents can best be considered in comparison (*post*, § 2155).

(*b*) The question of the *tenor* of the utterance may arise. Assuming that B was really the speaker, how can A know that B did utter the words? When A and B converse directly at the instrument, A's knowledge is based directly on his sense of hearing, aided by a scientific instrument of accepted correctness, and hence is receivable (on the principle of § 665, *ante*).

But if A, instead of speaking directly, converses with a *clerk* or *operator*, and the latter reports B's utterances to A, then A is no longer a witness having personal knowledge. Here three solutions present themselves. (1) The *strict rule* of personal knowledge (*ante*, § 657) may be applied, and A's testimony be excluded.[1] (2) Or, an *exception to that rule* may be recognized, on the

mitted to testify as to what the said Varnum had sworn on the former trial. On the cross-examination of Chambers he was asked by counsel how he knew that Varnum was dead, in answer to which he said: 'I went to Varnum's former home in Houston County, Ala., and he was not there. His family was there, and they told me he was dead, and that he died at the time named. I saw his family physician, who told me that he attended him in his last sickness, and that he (Varnum) was dead. His former neighbors told me that Varnum was dead. I did not see him myself after death, and know that he is dead only from what these persons told me.' Thereupon the court, on motion of the plaintiff excluded all of the testimony of the witness Chambers as to what Varnum swore on the former trial. In this there was no error. Evidence of the declarations of the physician and the neighbors as to the death of Varnum were hearsay, and by no rule of evidence admissible."

§ 668. [1] The cases are collected under § 1810, *post* (Hearsay rule). For other principles applicable to *interpreters* and *translators*, see *post*, §§ 811, 1672.

[2] 1773, Fabrigas *v.* Mostyn, 20 How. St. Tr. 123, Gould, J.; 1903, Meacham *v.* State, 45 Fla. 71, 33 So. 983 (embezzlement from G.; conversation between G. and defendant, interpreted by W., allowed to be proved against G. by L., a bystander, who heard W., but did not understand Spanish, the language of G.); 1885, Sullivan *v.* Kuykendall, 82 Ky. 489; 1865, Camerlin *v.* Palmer Co., 10 All. 541; 1892, Com. *v.* Vose, 157 Mass. 393, 32 N. E. 355 (abortion; defendant spoke English, deceased French, witness French; testimony to the conversation between defendant and deceased through witness, received).

§ 669. [1] 1888, Wilson *v.* Coleman, 81 Ga. 299, 6 S. E. 693 (where the plaintiff was informed by his clerk of the answer).

For the question whether a notary's *certificate of acknowledgment* taken by telephone

analogy of the foregoing exceptions, and of the exceptions to the Hearsay rule for regular entries in the course of business (*post*, § 1517) and of commercial reports (*post*, § 1702); this is the sound solution. (3) In any case, the doctrine of *admissions* may be invoked, where one of the speakers is a party to the cause, just as it may be for interpreters (*ante*, § 668). If B had sent his clerk to A to report orally B's orders or agreements, the clerk's statements would unquestionably be used as B's admissions. In the same way, the clerk's or the operator's report may be used against B, on the theory that the latter has made the former his agent for the purpose of communication. This theory has thus far sufficed for the Courts.[2]

Conversely, a *bystander*, listening to A's conversation with B at the telephone, is qualified to report A's utterances heard by him, but in strictness is not qualified to report B's utterances as repeated or alluded to by A during the conversation. Nevertheless, the strict application of the requirement of personal knowledge is here out of place, and leads to unpractical quibbles.[3]

(*c*) The *dictagraph* is merely a form of telephone, and the same questions are presented in testimony based upon its use.[4]

§ 670. (10) **Testimony of Deceased or Absent Persons, under the Hearsay Exceptions.** Under the exceptions to the Hearsay rule the testimony of the witness deceased or absent must equally be based on personal observation. The testimony is admitted in spite of its not having been given

is effective, see *post*, § 1635, and whether it is conclusive, see *post*, § 1347.

[2] 1885, Sullivan *v.* Kuykendall, 82 Ky. 487 (to show the plaintiff's admissions, the defendant testified to a conversation over the telephone which an operator received and reported at the time to the defendant; the defendant's statements of what he was told were received; the operator was treated as the agent of the plaintiff to communicate, on the analogy of an interpreter); 1892, Oskamp *v.* Gladsden, 35 Nebr. 7, 52 N. W. 718 (here the witness received the message from an operator at a way station F., who repeated the message of the plaintiff at O., and served as intermediary; admitted).

[3] 1897, German Bank *v.* Citizens' Bank, 101 Ia. 530, 70 N. W. 769 (the hearer at a telephone, testifying to what he heard, not allowed to tell what he repeated to a bystander as the tenor of the message); 1904, McCarthy *v.* Peach, 186 Mass. 67, 70 N. E. 1029 (contract; the plaintiff conversed by telephone with the defendant, and a person present with the plaintiff was allowed to testify to the plaintiff's words, as a part of the conversation of the defendant, there being other evidence that the defendant was the person conversing from the other end of the line; this rests on the principle of § 2115, *post*); 1920, Jamaica Pond Garage *v.* Woodside M. Livery, 236 Mass. 541, 128 N. E. 881 (plaintiff telephoned defendant as to terms; plaintiff testified that defendant agreed to pay $4, defendant testified that he agreed only to $3.50; bystander's testimony to plaintiff's language at his telephone referring to $4, admitted).

[4] 1920, Schoborg *v.* U. S., 6th C. C. A., 264 Fed. 1, 9 (listeners to seditious utterances at a club-room meeting); 1915, Brindley *v.* State, 193 Ala. 43, 69 So. 536 (murder; admissions of defendant, made in jail, proved by witnesses listening through a detectaphone, the method of operation of the machine being fully explained); 1916, Padgett *v.* State, 125 Ark. 471, 188 S. W. 1158 (assault; defendant's conversation overheard in jail by the dictagraph, admitted); 1921, Miller *v.* People, 70 Colo. 313, 201 Pac. 41 (confessions of accused made when in jail in conversation with each other, overheard through a dictagraph by stenographers not knowing the accused's voices; "the competency of this evidence was at best very doubtful"); 1918, Com. *v.* Wakelin, 230 Mass. 567, 120 N. E. 209 (homicide; conversation by defendant in jail, proved by testimony of one using a dictagraph); 1913, State Minneapolis Milk Co., 124 Minn. 34, 144 N. W. 412 (detective's testimony to conversations heard by a dictagraph installed in the room where the conversers were, admitted; point not disputed); 1915, State *v.* Dougherty, 86 N. J. L. 525, 93 Atl. 98 (testimony to a conversation, based on hearing a dictagraph, admitted); 1914, People *v.* Eng Hing, 212 N. Y. 373, 106 N. E. 96 (affidavits based on dictagraph listening, received on a motion for a new trial).

on the stand subject to the test of cross-examination; but still it is testimony, and the person making the statements must have the means of knowledge expected normally of every witness. Nevertheless, there as here, exceptions to this requirement are recognized; for example, in statements of Family History, the person's knowledge is usually based on the family-reputation on the subject (*post*, § 1486); on Official Documents, the entry of an assessor or the certificate of a recorder of deeds is sometimes based on hearsay (*post*, § 1635). These exceptions, being peculiar to the kind of statement offered, are better dealt with under the respective subjects of the Hearsay rule.

4. Hypothetical Questions

§ 672. **General Theory.** Suppose the facts of an affray are in issue, and it is disputed whether A or B was the aggressor. A witness is asked, "Did you have an opportunity to observe the situation?" He answers, "I did; I was at the place at the time, and saw the affray." Then, "Is it your belief that A or B struck first?" and he expresses his belief. Suppose, again, the issue is as to the mode of a death, and certain indicia are in question. A physician is asked, "Have you considered the matter of a congestion of the windpipe with reference to the cause of death?" Answer, "I have." Then, "What mode of death, if any, does it here indicate as probable?" Answer, "Death by strangulation." Now in order that this latter answer may be further considered by the tribunal for the case in hand, it is obvious that the circumstance on which it rests, namely, the congestion of the windpipe, must be supplied, *as a fact in the case*, by testimony. This may be done in one of two ways, — either (1) by the testimony of the physician himself, based on a personal examination of the body, that the windpipe was congested, or (2) by the testimony of some one else who has made such a personal examination. But if the latter method is chosen — and this is the important circumstance — the fact to be considered by the physician *must be placed before him as a hypothesis only*. It may be assumed for the time being, but must afterwards be supplied by the testimony of another person. If this were not done, and if the single question were asked, "What in your opinion was the mode of this man's death?", it would be impossible for the tribunal to tell whether to accept the witness' conclusion or not; since, if the tribunal were to find that there had been no congestion of the windpipe, it would be unable to know whether the physician's conclusion had been based on a consideration of that circumstance alone or on a consideration of some other circumstance alone or of both. In other words, the hypothetical question to the physician, as to the data for inference, takes the place of the question to the bystander whether he was in a position to observe the affray.

The reasoning may be explained in the following propositions: 1. Testimony in the shape of inferences or conclusions *rests always on certain premises of fact*. That which has been called Observation, serving as the basis of belief

in matters directly cognizable by the senses — as, the facts of an affray, a conversation, a trespass, and the like — is here replaced by what may be called a Consideration of the Premises. If the witness has not considered or had in mind these premises, his inference or opinion is good for nothing. 2. *These premises*, a consideration of which is essential to the formation of the conclusion or opinion, *must somehow be supplied to the jury by testimony*. The same witness may supply both premises or conclusion; or one witness may supply the premises and another the conclusion. The two are not necessarily connected. 3. If the latter method is chosen, and a witness is put forward to testify to the conclusion, *the premises considered by him must be expressly stated, as the basis of his conclusion;* otherwise, since his conclusion rests for its validity upon a consideration of the premises, the tribunal, if those premises are not made to accompany the conclusion, might be accepting a conclusion for which the witness had considered premises found by the tribunal not to be true. 4. Hence, the *premises must be stated hypothetically in connection with the conclusion;* then, by other testimony, the material for determining the truth of the assumed premises may be furnished to the tribunal.

The key to the situation, in short, is that there may be two distinct subjects of testimony, — premises, and inferences or conclusions; that the latter involves necessarily a consideration of the former; and that the tribunal must be furnished with the means of rejecting the latter if upon consultation they determine to reject the former, *i.e.* of distinguishing conclusions properly founded from conclusions improperly founded.[1]

That this is the orthodox and accepted theory of the hypothetical question in our law may be gathered from the following passages, in which the principle is indicated in one or another aspect:[2]

1806, ERSKINE, L. C., in *Lord Melville's Trial*, 29 How. St. Tr. 1065 (admitting the results of a calculation by the witness as to the profit made by the defendant from the sums alleged to have been received by him): "If you take away the foundation upon which it is made, which is matter for the Court afterwards, there is an end to the super-

§ 672. [1] Approved in Kearner *v.* Tanner Co., 31 R. I. 203, 76 Atl. 833 (1900).

[2] The earliest English and American rulings seem to be the following: 1760, Earl Ferrers. Trial, 19 How. St. Tr. 943 ("Please to inform their Lordships whether any and which of the circumstances which have been proved by the witnesses are symptoms of lunacy." . . . Earl of Hardwicke: "My Lords, this question is too general, tending to ask the doctor's opinion upon the result of the evidence; . . . if the noble Lord at the bar will divide the question and ask whether this or that particular fact is a symptom of lunacy, I daresay they will not object to it"); 1807, Beckwith *v.* Sydebotham, 1 Camp. 116 (a witness was called to say whether a ship having on Oct. 12 the defects already testified to could have been seaworthy on Sept. 2 preceding; Garrow pointed out the prejudice that might arise from asking the opinion of a witness on a statement which might be false, and was here 'ex parte' (in a deposition); Lord Ellenborough "held that this was like examining a physician or surgeon to say whether upon such and such symptoms a person whose life was insured could at the time of insurance have been in a good state of health. . . . As the truth of the facts stated to them was not certainly known, their opinion might not go for much; but still it was admissible evidence. The prejudice alluded to might be removed by asking them in cross-examination what they should think upon the statement of facts contended for on the other side"); 1824, State *v.* Powell, 7 N. J. L. 249 (objection overruled that the physician had not made a "personal examination" but was speaking upon a "mere supositious case").

structure. All the witness has done is to establish by calculation that such a stock from such a time will produce so much. He does not himself prove any fact, and the calculations he has made must therefore depend upon the facts which are proved by others." *A Lord:* "The data and facts stand as they did; it is a mere hypothetical question to the witness: *If* the fact stands so and so, what is the arithmetical result?"

1843, MAULE, J., in *M'Naghten's Case,* 10 Cl. & F. 207 (Question for the Judges: "Can a medical man conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, etc.?"): "In principle it is open to this objection, that as the opinion of the witness is founded on those conclusions of fact which he forms from the evidence, and as it does not appear what these conclusions are, it may be that the evidence he gives is on such an assumption of facts as makes it irrelevant to the inquiry."

1851, CURTIS, J., in *U. S.* v. *McGlue,* 1 Curtis C. C. 1 (to the jury): "[The expert physicians] were, as you observed, not allowed to give their opinions upon the case; because the case, in point of fact, on which any one might give his opinion, might not be the case which you upon the evidence would find; and there would be no certain means of knowing whether it was so or not."

1854, DEAN, J., in *Lake* v. *People,* 1 Park. Cr. C. 557: "A question in physical science will afford an illustration. A motion which is the result of a combination of different forces invariably changes its direction if but one of the moving powers is withdrawn. Take away half of them, it would be reversed in its course. Experts might be called to prove any given motion; they might also be asked what would be the effect of certain combined forces; but in either case it is manifest that to have the opinion correct, *all* of the motive powers must be given. . . . To allow [medical testimony to be given on merely such part of the evidence as they heard] would be as dangerous a principle as to permit a juror to sit during a part of the trial and then unite with the rest in rendering a verdict."

1859, SHAW, C. J., in *Dickenson* v. *Fitchburg,* 13 Gray 556: "This objection [of counsel] assumes that the facts will be taken to be true because the witness has stated that he founds his opinion on them. But this is quite a mistake. . . . The question is put to him hypothetically, whether *if* certain facts testified to are true, he can form an opinion and what that opinion is. The jury will then be instructed, if the truth of any such fact is contested, first to consider whether the fact on which such opinion rests is proved to their satisfaction; if it is, then to give such weight to the opinion resting on it as it deserves; but if the fact is not proved by the evidence, then to give the opinion no weight."

1870, CHRISTIANCY, J., in *Kempsey* v. *McGinniss,* 21 Mich. 139: "As a collection or state of facts assumed, whether few or many, constitute in the aggregate the basis on which the opinion is asked, if it does not appear that the opinion would be the same with any of those facts omitted, it necessarily follows that if the jury should negative or fail to find any one of the assumed facts, the opinion expressed cannot be treated as evidence, but must be rejected by the jury. From these considerations it necessarily follows that the jury should know just what facts are assumed and enter into the collection or state of facts upon which the witnesses' opinions are based. Otherwise they cannot know whether they ought to treat the opinions as evidence at all, since they can form no opinion whether such assumed facts, or the opinions based upon them, are true or false. . . . If the witness be asked his opinion of a case assuming the testimony of certain specified witnesses to be true, and it appears that he did not hear the whole of their testimony, and it does not definitely appear what facts stated by them he has heard, and what he did not hear, the jury cannot know upon what state of facts he forms his opinion, nor whether the facts he has assumed are true, nor whether his opinion would have been the same if he had heard the whole."

1872, KINGMAN, C. J., in *State* v. *Medlicott*, 9 Kan. 288: "It does not appear anywhere what part of the medical testimony [the expert] had heard. . . . [Thus] neither the court, nor the jury, nor counsel, knew on what part of the medical testimony the opinion of the witnesses was founded; therefore the answer formed no criterion of the intelligence of the witness or his capacity to form a correct judgment. . . . It would be as sensible to test a person's knowledge of mathematics by asking him the sum of two and an unknown quantity at most known only to himself."

1886, *Forsyth* v. *Doolittle*, 120 U. S. 77, 7 Sup. 408 (approving the following charge): "You must readily see that the value of the answers to these questions depends largely, if not wholly, upon the fact whether the statements made in these questions are sustained by the proof. If the statements in these questions are not supported by the proof, then the answers to the questions are entitled to no weight because based upon false assumptions or statements of facts."

1898, MCGILL, Ch., in *Malynak* v. *State*, 61 N. J. L. 562, 40 Atl. 572: "It is plain that the method [of not asking hypothetically] would be valueless in a case where the testimony is conflicting, or is of such character as to be susceptible of more than one interpretation, and hence affords room for different deductions of fact, and where the expert does not make known his findings of fact, because it would be impossible for the jury to give weight to the opinion, for they could not know whether or not it would be applicable to the facts as they find them. In such case the juror of thoughtful mind would reject the opinion as valueless."

§ 673. **False Theory: "Usurping the Province of the Jury."** This being the plain, logical, and necessary reason for the use of the hypothetical question, it will easily be seen that it is not resorted to from any fear that the witness will "*usurp the function of the jury.*"[1] This bugbear, vigorously denounced with sentimental appeals to the value of jury trial, has been made to serve again and again as the dreadful source of those evils which the hypothetical question enables us to avoid. But the expert is not trying to usurp that function, and could not if he would. He is not trying to usurp it, because his error, if any, is merely the common one of witnesses, that of presenting as knowledge what is really not knowledge. And he could not usurp it if he would, because the jury may still reject his testimony and accept his opponent's, and no legal power, not even the judge's order, can compel them to accept the witness' statement against their will. That there is no hidden danger to the jury system, and no need of invoking rhetoric in its aid, will be seen when it is remembered that the logical necessity for hypothetical questions is exactly the same for a judge sitting without a jury. Whatever the tribunal, it must separate premises from conclusions, and it must wait till the end of the trial and all the evidence on both sides is in, before it determines what premises are proved and therefore which opinions have a factual basis.

The "usurpation" theory (which appears in other fields of Evidence also) has done much to befog bench and bar, and to assist in producing some of the confusion which attends the precedents.

§ 673. [1] 1890, Ruger, C. J., in People *v.* McElvaine, 121 N. Y. 250, 24 N. E. 465: "It cannot be questioned but that the witness was by the question put in the place of the jury, and was allowed to determine upon his own judgment what their verdict ought to be in the case. . . . It substantially allowed him to usurp the functions of the jury in deciding the questions of fact."

§ 674. **Actual Observation not necessary; Hypothetical Presentation may be sufficient.** The first corollary of the theory of hypothetical questions, then, is that *actual personal observation*, hitherto (*ante*, § 657) assumed as in general necessary for a witness, *is not needed* where the testimony consists in conclusions drawn from premises, but is replaced by the consideration or examination of those premises; and this consideration of the premises may be afforded by presenting them hypothetically to the person who is to draw conclusions from them. In other words, the same person need not testify to both premises and conclusion. This general principle is now universally accepted; but it is worth while to mark it at the outset.

§ 675. **Where Personal Observation is had, Hypothetical Presentation is unnecessary.** Secondly, since it is the essential nature of conclusions that they are always relative to and dependent upon the premises, is not every offered opinion or conclusion hypothetical in its nature, whether the witness himself supplies the testimony to the premises or whether they are assumed in the question and then supplied by other testimony? This is certainly so. Even though the physician testifies himself to seeing the congestion of the windpipe, and then infers from these premises a death by strangulation, the jury may later decide that there was no congestion, and thus the opinion based on this premise fails also. Thus all opinions or conclusions are in a sense hypothetical. But does it follow that, when the opinion comes from *the same witness* who has received the basis of it by actual observation, those premises must be stated beforehand, hypothetically or otherwise, by him or to him? For example, the physician is asked, "Did you examine the body?": "Yes"; "State your opinion of the cause of death." Is it here necessary that he should first state in detail the facts of his personal observation, as premises, before he can give his opinion?

In academic nicety, yes; practically, no; and for the simple reason that on cross-examination each and every detail of the appearance he observed will be brought out and thus associated with his general conclusion as the grounds for it, and the tribunal will understand that the rejection of these data will destroy the validity of his opinion.

Through failure to perceive this limitation, Courts have sometimes sanctioned the requirement of an advance hypothetical statement even where the expert witness speaks from personal observation: [1]

§ 675. [1] *Accord:* 1898, Flannagan v. State, 106 Ga. 109, 32 S. E. 80 (facts observed by a medical man testifying to insanity must be specified); 1885, Louisville N. A. & C. R. Co. v. Falvey, 104 Ind. 418, 3 N. E. 389, 4 Ind. 908, *semble;* 1887, L. N. A. & C. R. Co. v. Wood, 113 Ind. 553, *semble;* 1895, McDonald v. McDonald, 142 Ind. 55, 41 N. E. 346, *semble;* 1879, Van Deusen v. Newcomer, 40 Mich. 119 (excluding "From what you found at the time in examining the patient, from your knowledge of her during the years previous, . . . what produced the condition she was in?"); 1914, Southern Iron & E. Co. v. Smith, 257 Mo. 226, 165 S. W. 804 ("In what condition were the engines?" "They were good", not allowed for the very persons who had overhauled them; this is absurd, and Graves, J., rightly dissents); 1874, Haggerty v. R. Co., 61 N. Y. 624, *semble:* 1901, State v. Simonis, 39 Or. 111, 65 Pac. 595; 1901, Easler v. R. Co., 59 S. C. 311, 37 S. E. 938 (physician, who had examined the plaintiff, not allowed to testify positively to the cause of her injury); 1898, Foster v. F. & C. Co., 99 Wis. 447, 75 N. W. 69 (attending physician; question as to cause of death "from

1878, MARSTON, J., in *Hitchcock* v. *Burgett*, 38 Mich. 507: "Even in cases where experts are called upon to give an opinion based upon their own personal observation or examination, the facts upon which the opinion is founded must all be stated [beforehand]; otherwise the witness might be giving an opinion which would have great weight with the jury, upon a state of facts very different from those found by them in the case on trial."

But this fallacy of being too unpractical in forcing the logic of the theory is generally and properly repudiated:[2]

1860, BRINKERHOFF, J., in *Bellefontaine & I. R. Co.* v. *Bailey*, 11 Oh. St. 337 (admitting a question, to an engineer who saw the injury, as to the possibility of avoiding it): "Undoubtedly, if the witness had been a stranger to the actual facts, it would then have been necessary to assume a state of facts as the foundation of any opinion he might give; but no such assumption, it seems to us, is necessary when the witness is or is properly presumed to be himself personally acquainted with the material facts of the case. . . . If an expert may give his opinion on facts testified to by others, we see no reason why he may not do so on facts presumably within his own personal knowledge; and if his knowledge of any material fact be wanting or defective, the parties have ample opportunity to show it by cross-examination and by testimony 'aliunde.'"

1868, DILLON, C. J., in *State* v. *Felter*, 25 Ia. 75: "If a physician visits a person and from actual examination or observation becomes acquainted with his mental condition, he may give an opinion respecting such mental condition at that time. . . . There is no more reason why he may not do this than why he might not testify that he saw a certain person at a certain time and that he was then laboring under an epileptic fit or under an attack of typhus fever, or had been stricken down and rendered unconscious by an apoplectic stroke."

§ 676. **Where Personal Observation is lacking, Hypothetical Presentation must be used.** Thirdly, though hypothetical presentation is thus not universally necessary, it is certainly necessary (for the reason just noted) where the premises are not supplied by the witness himself. The premises must be brought out in some way. If the witness cannot himself supply them by details of his own observation, they must be presented hypothetically.[1]

all the evidence you had before you there at that time", excluded); 1898, Green *v.* Water Co., 101 Wis. 258, 77 N. W. 722 (expert testifying partly from personal examination as to cause of typhoid fever; hypothetical form required).

[2] *Accord:* 1897, New York El. Eq. Co. *v.* Blair, 25 C. C. A. 216, 79 Fed. 896; 1855, Bennett *v.* Fail, 26 Ala. 610 (a trial court was criticised for ignoring this); 1884, Louisville N. A. & C. K. Co. *v.* Shires, 108 Ill. 631; 1920, Independent Five and Ten Cent Stores *v.* Heller, 189 Ind. 554, 127 N. E. 439 (architects); 1868, State *v.* Felter, 25 Ia. 75 (quoted *supra*); 1871, State *v.* Reddick, 7 Kan. 149; 1914, George *v.* Shannon, 92 Kan. 801, 142 Pac. 967 (applying the rule liberally); 1896, McCarthy *v.* Boston Duck Co., 165 Mass. 165, 42 N. E. 568 (the trial Court's discretion controls); 1879, Brown *v.* Huffard, 69 Mo. 305 (value of services); 1896, People *v.* Youngs, 151 N. Y. 210, 45 N. E. 460; 1896, Tullis *v.* Rankin, 6 N. D. 44, 68 N. W. 187; 1900, State *v.* Foote, 58 S. C. 218, 36 S. E. 551; 1850, Jones *v.* White, 11 Humph. Tenn. 268; 1875, Pigg *v.* State, 43 Tex. 111; 1900, Wells *v.* Davis, 22 Utah 322, 62 Pac. 3.

§ 676. [1] 1891, Southern Bell Teleph. Co. *v.* Jordan, 87 Ga. 72, 13 S. E. 202; 1903, Western Union T. Co. *v.* Morris, 67 Kan. 410, 73 Pac. 108; 1906, Federal B. Co. *v.* Reeves, 73 Kan. 107, 84 Pac. 560 ("From the history of the case, as you learned it [from others] and from your diagnosis", excluded; Porter, J., diss.); 1876, State *v.* Pike, 65 Me. 111 (rejecting a question as to how long a post-mortem examination should have taken, no premises being presented: "It does not appear that the witness was present at the post-mortem examination of the deceased, or that he had any knowledge of the case or the kind or extent of the examination needed. . . . [The answer] would have been no more than the opinion of one who, so far as appeared, had no knowledge on which to base it"); 1896, Flaherty *v.* Powers, 167 Mass. 61, 44 N. E. 1074; 1867, Moore *v.* State, 17 Oh. St. 525; 1911, Weibert *v.* Hanan, 202 N. Y. 328, 95 N. E. 688 (opinion as to capacity of heating-apparatus).

§ 677. **Personal Observation is not necessary, when Hypothetical Presentation is used.** Fourthly, though the premises must be supplied in one form or the other, it is not necessary that both be available. If the witness is skilled enough (*post*, § 679), his opinion may be adequately obtained upon hypothetical data alone; and it is immaterial whether he has ever seen the person, place, or thing in question: [1]

1873, GRAY, C. J., in *Miller* v. *Smith*, 112 Mass. 475: "A witness having the requisite knowledge and experience may always be examined by hypothetical questions, even if he has not seen the particular subject to which the trial relates and has not heard all the other evidence given in the case."

§ 678. **The same Skilled Witness may testify from both Personal Observation and Hypothetical Presentation.** On the other hand, no harm is done if the skilled witness has had personal observation. His testimony may be based upon both forms of data.[1] It will not always happen that persons having special skill will be totally devoid of actual observation of the matter in hand; they may have partially observed it, and their opinion may be desired upon premises partly furnished by personal observation, partly remaining to be supplied by hypothesis.

§ 679. **Only Skilled Witnesses may be asked Hypothetical Questions.** Fifthly, since hypothetical presentation is proper and necessary only where

§ 677. [1] 1894, Missouri Pac. R. Co. *v.* Hail, 14 C. C. A. 153, 66 Fed. 868 (shrinkage of cattle); 1888, Central City Ins. Co. *v.* Oates, 86 Ala. 558, 6 So. 83 (value of a burned house); 1904, Parrish *v.* State, 139 Ala. 16, 36 So. 1012; 1879, Cook *v.* Fuson, 66 Ind. 530 (the issue arose on a warranty as to a cellar's dryness, and the witness had never been in the cellar or had any personal knowledge of it, but had lived in a house near by where the cellar had been wet; his testimony that the cellar in question could not be kept dry was rejected); 1875, Lawrence *v.* Boston, 119 Mass. 130, 132 (land value); 1895, Pierce *v.* Boston, 164 Mass. 92, 41 N. E. 229 (land value); 1888, Slocovich *v.* Ins. Co., 108 N. Y. 64, 14 N. E. 802 (value of a ship); 1859, Mish *v.* Wood, 34 Pa. 452 (value testimony, based on a description of goods lost).

Contra: 1896, Schneider Br. Co. *v.* A. I. M. Co., 23 C. C. A. 89, 77 Fed. 138, *semble* (opinion on the net value of a machine, the price being fixed and the only material question being the value of the defects, excluded); 1892, State *v.* Maier, 36 W. Va. 757, 761, 15 S. E. 991 ("Are not love and jealousy causes of insanity?", excluded; erroneous).

It has been said that an object that can be produced must be produced, and not described hypothetically; but this seems unnecessary: 1859, Beecher *v.* Denniston, 13 Gray Mass. 355, *semble*.

Compare § 1181, *post* (production of chattels).

§ 678. [1] 1915, Biddle *v.* Riley, — Ark. —, 176 S. W. 134 (personal injury); 1895, Mullin's Estate, 110 Cal. 252, 42 Pac. 646 (a physician as to his patient's sanity); 1909, Washington A. & M. V. R. Co. *v.* Lukens, 32 D. C. App. 442 (physician's answer based on a hypothetical question plus the facts as examined by him, admitted, because he had already stated the facts as examined by him); 1885, Louisville N. A. & C. R. Co. *v.* Flavey, 104 Ind. 418, 3 N. E. 389, 4 id. 908; 1887, L. N. A. & C. R. Co. *v.* Wood, 113 Ind. 553, 14 N. E. 572, 16 N. E. 197; 1903, Skelton *v.* R. Co., 88 Minn. 192, 92 N. W. 960; 1896, State *v.* Wright, 134 Mo. 404, 35 S. W. 1145 (a case hypothetically stated, together with the data of a personal examination, held proper for a physician giving an opinion on sanity); 1878, Pannell *v.* Com., 86 Pa. 269; 1881, State *v.* Clark, 15 S. C. 407 (a physician testified partly upon his own post-mortem examination and partly on other testimony); 1865, Wetherbee's Ex'rs *v.* Wetherbee's Heirs, 38 Vt. 454; 1895, Tebo *v.* Augusta, 90 Wis. 405, 63 N. W. 1045; 1898, Selleck *v.* Janesville, 100 Wis. 157, 75 N. W. 975.

Contra: 1893, State *v.* Welsor, 117 Mo. 570, 581, 21 S. W. 443 (physician's statement, based in part on personal examination and in part on hypothetical data, excluded); 1908, Cobb *v.* United E. & C. Co., 191 N. Y. 475, 34 N. E. 395, *semble*.

the witness has not had actual observation, does it follow that *to any one whatever*, who has not had actual observation, the premises may be presented hypothetically and his conclusion asked upon them? They might, so far as the present principle is concerned, which requires only that the premises must be supplied in at least one form or the other. But by the Opinion rule (*post*, § 1918) the tribunal will not listen to conclusions or opinions from persons who possess no more skill than the tribunal itself in drawing inferences from the premises, *i.e.* persons of only ordinary skill. The hypothetical form of presentation is therefore proper for those witnesses only who bring to the consideration of the particular premises in hand a more than ordinary skill.[1] The detailed tests which define an expert witness are a part of the Opinion rule (*post*, §§ 1923, 1924). It is sufficient to note here the effect of that rule on the use of hypothetical questions.

§ 680. **If the Premises fail, the Conclusion must be disregarded.** Sixthly, It follows as a necessary part of the theory, that if the premises are ultimately *rejected by the jury as untrue*, the testimonial conclusion based on them must also be disregarded. This is plain enough where a witness has claimed to have personal observation and is disbelieved. It is only where his testimony is based on hypothetical data that the same result needs to be emphasized.[1] But the failure which justifies rejection must be a failure in some one or more important data, not merely in a trifling respect.[2]

§ 681. **Form and Scope of Question**; (1) **Particularization of the Premises to be used.** The question of greatest practical difficulty and of most frequent occurrence concerns the form and the scope of the hypothetical question. The detailed rules rest on simple considerations, partly of principle, partly of practical expediency. The difficulty lies in securing the best results in their

§ 679. [1] 1900, Ragland *v.* State, 125 Ala. 12, 27 So. 983; 1858, Dunham's Appeal, 27 Conn. 197; 1906, Dolbeer's Estate, 149 Cal. 227, 86 Pac. 695; 1912, Chicago & W. I. R. Co. *v.* Heidenreich, 254 Ill. 231, 98 N. E. 567 (hypothetical opinion of value, based on lists of sales of other property, submitted to the witness, held improper, on the singular ground that value testimony is not expert testimony).

Even *on cross-examination* to test the opinion already expressed: 1912, Lang *v.* Lang, 157 Ia. 300, 135 N. W. 604.

§ 680. [1] 1895, Delaware L. & W. R. Co. *v.* Roalefs, 16 C. C. A. 607, 70 Fed. 23 ("the opinion of the doctor is indivisible; it must be accepted or rejected as a whole; there is nothing to indicate how much it rests on the declaration [of the patient] and how much on personal observation"); 1903, Kirsher *v.* Kirsher, 120 Ia. 337, 94 N. W. 846; 1904, Stutsman *v.* Sharpless, 125 Ia. 335, 101 N. W. 105; 1861, Com. *v.* Mullins, 2 All. Mass. 296; 1886, People *v.* Sessions, 58 Mich. 599, 26 N. W. 291; 1884, Loucks *v.* R. Co., 31 Minn. 534, 18 N. W. 651.

[2] Compare the foregoing cases and the following: 1886, Forsyth *v.* Doolittle, 120 U. S. 76, 7 Sup. 408; 1877, Eggers *v.* Eggers, 57 Ind. 461; 1885, Epp *v.* State, 102 Ind. 554, 1 N. E. 491; 1909, Peterson *v.* Brackey, 143 Ia. 75, 119 N. W. 967 (phrasing of the instruction, discussed); 1917, Ingwersen *v.* Carr, 180 Ia. 988, 164 N. W. 217; 1863, Hovey *v.* Chase, 52 Me. 313; 1866, Boardman *v.* Woodman, 47 N. H. 135 ("so proved as to resemble as near as may be the case under consideration; the jury can judge whether the case supposed is so far like the one they are considering as that the opinion of the expert on the supposed case is any guide to them"); 1916, Haas *v.* Kundtz, 94 Oh. 238, 113 N. E. 826 (an instruction requiring the jury to discard the opinion if "any material fact" used as its basis was not proven, held not prejudicial in this case).

Contra: 1909, Burk *v.* Reese, — Nebr. —, 121 N. W. 1016 (here the Court lays down the unpractical and logic-beridden rule that if any one assumption, however unimportant, is not established, the opinion must be rejected).

application. The fundamental purpose of hypothetical presentation — furnishing the tribunal with the means of knowing just what premises the conclusion is based upon — requires that *the data to serve as premises should be particularized.* Various situations raise questions under this head:

(*a*) May the witness be asked, "Upon *all the testimony in the case,* what is your opinion on a given point?" The objection to this form of question is stated in the following passage:

1890, RUGER, C. J., in *People* v *McElvaine,* 121 N. Y. 250, 24 N. E. 465: "It would then be impossible for the jury to determine the facts upon which the witness bases his opinion whether such facts were proved or not. . . . When specific facts either proved or assumed to have been proved, are embraced in the question, the jury are enabled to determine whether the answer to such question is based upon facts which have been proved in the case or not."

Accordingly, it is generally accepted that such a question is improper.[1] Yet many Courts, having regard to the reason of the rule, are willing to permit such a question where that reason does not exist, *i.e.* where the testimony is *not conflicting* and hence the witness may assume it all as true and is not obliged to choose (unknown to the jury) between conflicting witnesses.[2] The

§ 681. [1] *Eng.* 1760, Earl Ferrers' Trial, 19 How. St. Tr. 943; 1821, R. *v.* Wright, R. & R. 456 (uncertain); 1827, R. *v.* Wright, R. & R. 457; 1831, R. *v.* Searle, 1 Moo. & Rob. 75 (uncertain); 1840, Sills *v.* Brown, 9 C. & P. 604; 1840, R. *v.* Oxford, 4 State Tr. N. S. 497, 532; *Can.* 1870, Key *v.* Thomson, 13 N. Br. 227; 1882, Diffin *v.* Dow, 22 N. Br. 108; *Federal:* 1855, The Clement, 2 Curt. C. C. 369; *Ala.* 1903, Porter *v.* State, 135 Ala. 51, 33 So. 694; *Cal.* 1880, People *v.* Goldenson, 76 Cal. 350, 19 Pac. 161; *Ind.* 1871, Rush *v.* Magee, 36 Ind. 73; Bishop *v.* Spining, 38 Ind. 144; *Iowa,* 1868, State *v.* Felter, 25 Ia. 74; 1876, Butler *v.* Ins. Co., 45 Ia. 98; 1882, Smith *v.* Hickenbotton, 57 Ia. 738, 11 N. W. 664; *Mass.* 1856, Woodbury *v.* Obear, 7 Gray 471; *Miss.* 1913, Prewitt *v.* State, 106 Miss. 82, 63 So. 330 (question based partly on unspecified personal knowledge, partly on unspecified testimony, and partly on specified data, held improper on the facts); *N. H.* 1858, Spear *v.* Richardson, 37 N. H. 34, *semble; N. Y.* 1855, People *v.* Lake, 12 N. Y. 362; 1890, People *v.* McElvaine, 121 N. Y. 250, 24 N. E. 465; *S. Dak.* 1896, Aultman Co. *v.* Ferguson, 8 S. D. 458, 66 N. W. 1801; *Wis.* 1883, Bennett *v.* State, 57 Wis. 86, 14 N. W. 912, *semble;* 1885, Quinn *v.* Higgins, 63 Wis. 669, 24 N. W. 482, *semble. Contra:* 1918, Mayor etc. of Baltimore *v.* State, 132 Md. 113, 103 Atl. 426 (opinion given "after reading all the testimony", admitted).

[2] The Courts put this rule in different ways. Some declare admissible a question based on all the testimony, unless it is conflicting; others declare such a question inadmissible, unless the facts testified to are undisputed by the opposite witnesses. There seems to be no practical difference, except that it would be easier to justify the question in the former case: *Ala.* 1878, Page *v.* State, 61 Ala. 18; *Ill.* 1895, Pyle *v.* Pyle, 158 Ill. 289, 41 N. E. 999; *Kan.* 1870, Tefft *v.* Wilcox, 6 Kan. 58; *Md.* 1856, Baltimore & O. R. Co. *v.* Thompson, 10 Md. 84; 1865, Walker *v.* Rogers, 24 Md. 243; *Mass.* 1895, Chalmers *v.* Mfg. Co., 164 Mass. 532, 42 N. E. 98; 1898, Oliver *v.* R. Co., 170 Mass. 222, 49 N. E. 117; 1919, Com. *v.* Russ, 232 Mass. 58, 122 N. E. 176; *Mich.* 1870, Kempsey *v.* McGinness, 21 Mich. 138; *Minn.* 1875, Getchell *v.* Hill, 19 Minn. 472; 1876, State *v.* Lautenschlager, 22 Minn. 521; 1881, Storer's Will, 28 Minn. 11; *N. Dak.* 1913, State *v.* Reilly, 25 N. D. 339, 141 N. W. 720, 734; *Oh.* 1851, Cincinnati Mut. Ins. Co. *v.* May, 20 Oh. 211, 223; *Pa.* 1882, Olmsted *v.* Gere, 100 Pa. 131, *semble;* 1922, Wissinger *v.* Valley Smokeless Coal Co., 271 Pa. 566, 115 Atl. 880 (damage to land); *Tex.* 1887, Armendaiz *v.* Stillman, 67 Tex. 462, 3 S. W. 678; *Vt.* 1862, Fairchild *v.* Bascomb, 35 Vt. 398, *semble;* 1878, Gilman *v.* Strafford, 50 Vt. 725; State *v.* Hayden, 51 id. 304; *Wis.* 1849, Luning *v.* State, 1 Chand. 184; 1883, Bennett *v.* State, 57 Wis. 81, 14 N. W. 912 (modifying Luning *v.* State; advising hypothetical questions as a rule; and if the testimony of one or all the witnesses is allowed to be taken, in case of conflict or doubt, the witness should state beforehand his understanding of the testimony he is speaking of); 1886, Gates *v.* Fleischer, 67 Wis. 508, 30 N. W. 674 (applying this liberally); 1888, Kreuziger *v.* R. Co., 73 Wis. 163, 40 N. W. 657.

matter should be left to the discretion of the trial Court.[3] It may be noted, that whenever this form of question is to be allowed, it must appear that the witness has in fact heard all the testimony.

(*b*) The same objections apply to the question, "On *what you have heard of the testimony* in this case, what is your opinion?"; with the additional objection that it is here still more difficult to understand the premises actually in the witness' mind, since no one else knows exactly how much he has heard.[4]

(*c*) The question, "Assuming the truth of the *testimony for the plaintiff* (or for the defendant), what is your opinion?" is not seriously affected by the reason of the uncertainty of the data; although the witnesses on the same side do not always agree entirely. But the further reason remains, that it is difficult to fix in the mind (whether of witness or of jury) all the facts testified to by a number of witnesses and to associate them with this particular opinion as its premises. There are opposing rulings upon this form of question.[5] The only proper solution is to leave it to the discretion of the trial judge to accept the question when it does fair justice.[6] In any case, the witness must have heard all the testimony he is asked about.

(*d*) A question assuming the truth of the testimony of *several specified witnesses* may very well suffice, if the facts they testify to are likely to be definitely in the minds of the witness and the jury. This must depend on the circumstances of the case. There should be no fixed rule excluding such a question; and in the precedents it can hardly be said that a fixed rule is intended to be laid down.[7]

[3] 1875, Getchell *v.* Hill, 19 Minn. 472; 1876, State *v.* Lautenschlager, 21 Minn. 521; 1881, Storer's Will, 28 Minn. 11, 8 N. W. 827; 1907, Decker *v.* Chicago, M. & St. P. R. Co., 102 Minn. 69, 112 N. W. 901.

[4] 1859, Champ *v.* Com., 2 Metc. Ky. 27; 1896, Connell *v.* McNett, 109 Mich. 329, 67 N. W. 344; 1898, Malynak *v.* State, 61 N. J. L. 562, 40 Atl. 572; 1854, Lake *v.* People, 1 Park. Cr. C. N. Y. 557; 1860, Sanchez *v.* People, 22 N. Y. 154.

Contra: 1907, Chicago Union Traction Co. *v.* Roberts, 229 Ill. 481, 82 N. E. 401 (here allowed, only because proper objection was not made); 1897, Swanson *v.* Mellen, 66 Minn. 486, 69 N. W. 620 (a part of the testimony only was heard, but as it related to services of a common and uniform kind, an opinion of value based on it was admitted); 1903, State *v.* Privitt, 175 Mo. 207, 75 S. W. 457 (opinion based on the testimony as he heard it, with a recital of the testimony of the only witness he had not heard, allowed); 1878, State *v.* Hayden, 51 Vt. 299, 306.

[5] *Admitted:* 1880, Polk *v.* State, 36 Ark. 123; 1887, Schneider *v.* Manning, 121 Ill. 387, 12 N. E. 267; 1895, Pyle *v.* Pyle, 158 id. 289, 41 N. E. 999; 1921, People *v.* Lowhone, 296 Ill. 391, 129 N. E. 781 ("Taking the testimony offered and your observations, etc., in your opinion was the defendant sane or insane?" held not improper on the facts); 1905, Com. *v.* Johnson, 188 Mass. 382, 74 N. E. 939 ("From all you have observed of this man, and from all you have heard in court", allowed, where the only evidence as to insanity consisted of the defendant's own witnesses and admissions, accepted as true, and the expert's personal observation; the trial Court's discretion to control).

Excluded: 1882, Diffin *v.* Dow, 22 N. Br. 107 ("Is the statement of the medical case, as given by the defendant in evidence, reconcilable with the facts, assuming them to be true, as given by the other witnesses?" excluded); 1890, People *v.* McElvaine, 121 N. Y. 250, 24 N. E. 465.

[6] For instance, where the opinion, when expressed, favors the opponent, and could not more favor him upon any supposition, there is no reason for him to object to the scope of the question: 1872, Dexter *v.* Hall, 15 Wall. 26.

[7] CANADA: 1870, Key *v.* Thomson, 2 Han. N. Br. 224, 228 (testimony based on the evidence of other witnesses, excluded).

UNITED STATES: *Ala.* 1857, Wilkinson *v.* Moseley, 30 Ala. 573 (two witnesses; excluded); *Cal.* 1909, People *v.* LeDoux, 155 Cal. 535, 102 Pac. 517 (question based on testimony

(*e*) A question assuming the truth of *a single witness' testimony* will usually be proper. Yet here, too, the scope of the testimony may be so extended or so confused that the assumed premises are not clear, and an express rehearsal of the assumed facts should be made.[8] As before, it should rest in the discretion of the trial judge.

(*f*) Questions in any *other way* covering a *scope which is not clear* may always be excluded; much depending on the discretion of the trial judge.[9]

of "certain other witnesses", excluded); *Md.* 1900, Baltimore City P. R. Co. *v.* Tanner, 90 Md. 315, 45 Atl. 188 (several witnesses' testimony to undisputed facts, allowed); 1916, Damm *v.* State 128 Md. 665, 97 Atl. 645 (abortion: "assuming that the testimony that you have heard from these various doctors is true", allowed, in the trial Court's discretion; approving the text above); 1916, Rickards *v.* State, 129 Md. 184, 98 Atl. 525 (Damm *v.* State followed); *Mass.* 1904, Burnside *v.* Everett, 186 Mass. 4, 71 N. E. 82 (question based on the testimony of several witnesses not conflicting, held proper); *N. Y.* 1876, Reynolds *v.* Robinson, 64 N. Y. 595 (the value of services in nursing a cancer patient was in issue, and the witness' opinion was based on hearing the testimony of three witnesses of the plaintiff as to the nature of the services; excluded); 1880, Guiterman *v.* Steamship Co., 83 N. Y. 366 (several witnesses to a collision; excluded); 1893, Snelling's Will, 136 N. Y. 515, 518, 32 N. E. 1006 (two witnesses; excluded); *N. Dak.* 1908, Walters *v.* Rock, 18 N. D. 45, 115 N. W. 511 (allowed, but disapproved); *Wis.* 1899, Cornell *v.* State, 104 Wis. 527, 80 N. W. 745 (allowable, for the testimony of a few conflicting witnesses, but not for voluminous and conflicting testimony; the matter to be in the trial Court's discretion).

W. Va. A question involving reference to former testimony was excluded in McMechen *v.* McMechen, 17 W. Va. 692 (1881), where the testimony of two witnesses was named; it does not appear whether the Court intended to prohibit all reference to even one witness' testimony; but in Kerr *v.* Lunsford, 31 W. Va. 672, 8 S. E. 493 (1888), it was said that "the opinion of medical experts founded on testimony already in the case can be given only on a hypothetical case"; in 1891, however, it was expressly held, ignoring Kerr *v.* Lunsford, in Bowen *v.* Huntington, 35 W. Va. 694, 14 S. E. 217, for a question based on a reference to three witnesses' testimony, that this form was proper.

[8] *Admitted: Federal:* 1912, M'Intyre *v.* Modern Woodmen, 6th C. C. A., 200 Fed. 1 (distinguishing Manuf. A. I. Co. *v.* Dorgan, *infra;* the two cases illustrate the degree of weird logic and dream-reasoning which some Courts have developed on this topic); *La.* 1874, State *v.* Baptiste, 26 La. An. 137; *Mass.* 1853, Twombly *v.* Leach, 11 Cush. 402, 405; 1864, Hunt *v.* Lowell Gaslight Co., 8 All. 170; *N. Y.* 1875, McCollum *v.* Seward, 62 N. Y. 318; 1879, Seymour *v.* Fellows, 77 N. Y. 180; *Or.* 1913, Latourette *v.* Miller, 67 Or. 141, 135 Pac. 327 (but here excluded, because the witness had heard only a part); *R. I.* 1920, Henderson *v.* Dimond, 43 R. I. 60, 110 Atl. 388 (allowable in discretion; but disparaged); *Vt.* 1878, Gilman *v.* Strafford, 50 Vt. 725; State *v.* Hayden, 51 Vt. 305; *Wis.* 1867, Wright *v.* Hardy, 22 Wis. 353; 1883, Bennett *v.* State, 57 Wis. 81, 14 N. W. 912; 1897, McKeon *v.* R. Co., 94 Wis. 477, 69 N. W. 175 (part being heard, the rest read from a stenographic report); 1899, Cornell *v.* State, 104 Wis. 527, 80 N. W. 745.

Excluded: Federal: 1893, Manuf. A. I. Co. *v.* Dorgan, 16 U. S. App. 290, 299, 7 C. C. A. 581, 58 Fed. 945; *Conn.* 1893, Barber's Estate, 63 Conn. 393, 408, 27 Atl. 973 (testimony of another witness, with additional data; improper on the facts); *Ill.* 1898, Chicago & A. R. Co. *v.* Glenny, 175 Ill. 238, 51 N. E. 896; 1905, Elgin A. & S. Traction Co. *v.* Wilson, 217 Ill. 47, 75 N. E. 436 (opinion based in part on the testimony of the plaintiff, excluded); *Ind.* 1883, Elliott *v.* Russell, 92 Ind. 530 (an opinion as to the results of a hanging "for the time and in the manner plaintiff said he was hung"); 1884, Craig *v.* R. Co., 98 Ind. 112; 1911, Ditton *v.* Hart, 175 Ind. 181, 93 N. E. 961 (opinion based on a clause in the will and a letter from the draughtsman, excluded; opinion obscure); *Mass.* 1893, Stoddard *v.* Winchester, 157 Mass. 567, 575, 32 N. E. 948; *Mich.* 1899, Detzur *v.* Brewing Co., 119 Mich. 282, 77 N. W. 948; *Minn.* 1906, State *v.* Cowing, 99 Minn. 123, 108 N. W. 851, *semble; Mo.* 1903, State *v.* Dunn, 179 Mo. 95, 77 S. W. 848 (testimony of defendant himself); *N. J.* 1904, Shoemaker *v.* Elmer, 70 N. J. L. 710, 58 Alt. 940; *N. Y.* 1892, Link *v.* Sheldon, 136 N. Y. 1, 9, 32 N. E. 696.

[9] 1884, Louisville N. A. & C. R. Co. *v.* Shires, 108 Ill. 630 (excluding an opinion based on the testimony of witness T. and also a private conversation with him); 1904, Smith *v.* Minneapolis St. R. Co., 91 Minn. 239, 97 N. W. 881 (excluded where it did not appear that the witness had heard the testimony referred to in the question); 1891, Wallace *v.* Oil Co., 128 N. Y. 580, 27 N. E. 956 ("judging from the whole history of his case and what you have learned of it in all other ways", excluded).

From this point of view it may sometimes be necessary to state hypothetically the data gained from the witness' personal observation; although in the ordinary case of that sort (*ante*, § 675) hypothetical presentation is not necessary.

§ 682. **Same: (2) Kind of Data that may be assumed in the Question; not All the Facts, but Any Facts of which there is Evidence.** (*a*) Since the data to be assumed are those which it is expected or claimed by the party the jury will subsequently adopt as true, it is obvious that it is both wasteful and misleading to ask a witness to consider *data which there is not a fair possibility of the jury accepting*.[1] It is wasteful, because the process takes up

§ 682. [1] For *cross-examination*, see *post*, § 648; in the cases not specially so noted, no particular rule is laid down: *Federal:* 1895, North American Acc. Ass'n *v.* Woodson, 12 C. C. A. 392, 64 Fed. 689 (facts of which some evidence has been offered); 1900, Denver & R. G. R. Co. *v.* Roller, 41 C. C. A. 22, 100 Fed. 738 ("any state of facts which the evidence directly, fairly, and reasonably tends to establish or justify"); *Colorado:* 1876, Gottlieb *v.* Hartman, 3 Colo. 62 ("evidence tending to prove"); 1895, Jackson *v.* Burnham, 20 Colo. 532, 39 Pac. 577 ("within the possible or probable range of the evidence"); 1896, Courvoisier *v.* Raymond, 23 Colo. 113, 47 Pac. 284 (same); *Connecticut:* 1893, Barber's Estate, 63 Conn. 393, 409, 27 Atl. 973 ("such only as counsel may fairly claim that the evidence tends to justify"); 1898, Porter *v.* Ritch, 70 Conn. 235, 39 Atl. 169; *Florida:* 1922, Atlantic Coast Line R. Co. *v.* Shouse, — Fla. —, 91 So. 90 (personal injury); *Idaho:* 1897, Kelly *v.* Perrault, 5 Ida. 221, 48 Pac. 45 (founded on facts which the evidence "tends to prove", not on "conjecture"); *Illinois:* 1872, Decatur *v.* Fisher, 63 Ill. 241; 1897, Grand Lodge *v.* Wieting, 168 Ill. 408, 48 N. E. 59 (may range "within reasonable limits"; here held not to violate this rule); 1900, Howard *v.* People, 185 Ill. 552, 57 N. E. 441 ("evidence tending to prove"); 1902, Economy L. & P. Co. *v.* Sheridan, 200 Ill. 439, 65 N. E. 1070 (facts "within the scope or range of the evidence"); 1904, Chicago City R. Co. *v.* Bundy, 210 Ill. 39, 71 N. E. 28; *Indiana:* 1879, Guetig *v.* State, 66 Ind. 104 ("must be supported by some evidence"); 1880, Nave *v.* Tucker, 70 Ind. 18 ("evidence tending to prove"); 1885, Louisville N. A. & C. R. Co. *v.* Falvey, 104 Ind. 420, 3 N. E. 389, 4 N. E. 908 (excluding "where there is no evidence at all in support of the facts assumed, or where the question is strictly irrelevant, or where it is merely speculative"); 1888, Conway *v.* State, 118 Ind. 490, 21 N. E. 285 (must be "within the range of the evidence"); *Iowa:* 1878, Hurst *v.* R. Co., 49 Ia. 78 ("evidence tending to establish"); 1879, *Re* Ames' Will, 51 Ia. 603, 2 N. W. 408 (same); 1881, Bomgardner *v.* Andrews, 55 Ia. 638, 8 N. W. 48 (same); 1888, Meeker *v.* Meeker, 74 Ia. 355, 37 N. W. 973 ("based on evidence"); 1898, Manatt *v.* Scott, 106 Ia. 203, 76 N. W. 717; 1901, Pierson *v.* R. Co., 116 Ia. 601, 88 N. W. 363; 1921, Morrison *v.* McLaughlin, 191 Ia. 474, 182 N. W. 671 (mode of framing the question, expounded); *Kansas:* 1898, Davis *v.* Ins. Co., 59 Kan. 74, 52 Pac. 67; 1899, Medill *v.* Snyder, 61 Kan. 15, 58 Pac. 962 ("some evidence"); 1900, Roark *v.* Greeno, 61 Kan. 299, 59 Pac. 655; *Kentucky:* 1898, Baxter *v.* Knox, 19 Ky. 1973, 44 S. W. 972 (question held proper on the testimony); 1918, Barrett's Admir. *v.* Brand, 179 Ky. 740, 201 S. W. 331; *Maryland:* 1901, Safe Deposit & T. Co. *v.* Berry, 93 Md. 560, 49 Atl. 401 (certain questions held improper on the facts); *Maine:* 1885, Powers *v.* Mitchell, 77 Me. 369 ("evidence tending to prove"); 1914, Reid *v.* Eastern S. S. Co., 112 Me. 34, 90 Atl. 609, 617 (trial Court's discretion); *Massachusetts:* 1898, Oliver *v.* R. Co., 170 Mass. 222, 49 N. E. 117 ("something must be left to the presiding judge"); 1900, Anderson *v.* Albertstamm, 176 Mass. 87, 57 N. E. 215 (trial judge "in many cases must rely to a great extent upon the good faith of counsel in their statements as to what they expect the evidence will be"); 1905, Com. *v.* Tucker, 189 Mass. 457, 76 N. E. 127 (Anderson *v.* Albertstamm, approved); 1909, Carroll *v.* Boston Elev. R. Co., 200 Mass. 527, 86 N. E. 793; *Michigan:* 1882, People *v.* Hall, 48 Mich. 489, 12 N. W. 665 (must not be "contrary to positive and uncontradicted facts"); 1886, People *v.* Sessions, 58 Mich. 598, 26 N. W. 291 ("evidence tending to establish"); 1886, Mayo *v.* Wright, 63 Mich. 43, 29 N. W. 832 (some testimony must have been offered); 1887, People *v.* Foley, 64 Mich. 153, 31 N. W. 94; 1896, Rivard *v.* Rivard, 109 Mich. 98, 66 N. W. 681; 1897, Holman *v.* R. Co., 114 Mich. 208, 72 N. W. 202; 1898, People *v.* Foglesong, 116 Mich. 556, 74 N. W. 730 ("any evidence tending to prove"); 1920, Rose's Estate, Newnham *v.* Newell, 210 Mich. 628, 178 N. W. 23 (will contest); *Minnesota:* 1886, State *v.* Hanley, 34 Minn. 433, 26 N. W. 397 (excluded if it covers a single material fact not evidenced); 1888, Peterson *v.* R. Co., 38 Minn. 515, 39 N. W. 485 ("any evidence tending to prove"); 1899, Wittenberg *v.* Onsgard, 78 Minn. 342, 81 N. W. 14 (facts which "might legitimately be found by the

valuable time without being of any service. It is misleading, because the jury may often, ignoring the precise data of an opinion, accept the opinion itself when in fact its data are not accepted, and the opinion is therefore really irrelevant. Various practical tests have been proposed for indicating the minimum quality of possibility which the data must possess in order to be taken as the premises of an opinion. No one of them seems preëminently the best; they express the various predilections and experience of different judges as to the safe limits to be set. Sometimes different tests occur in the same opinion; occasionally an extreme strictness or looseness is found, palpably in excess of the general practice.

(*b*) The question, on principle, need not include any particular number of facts; *i.e.* it may assume any one or more facts whatever, and *need not cover all the facts which the questioner alleges* in his case. The questioner is entitled to the witness' opinion on any combination of facts that he may choose. It is often convenient and even necessary to obtain that opinion upon a state of facts falling short of what he or his opponent expects to prove, because the questioner cannot tell how much of the testimony the jury will accept; and if proof of the whole should fail, still proof of some essential part might be made and an opinion based on that part is entitled to be provided for the jury. For reasons of principle, then, and to some extent of policy, the natural

jury from the evidence"); *Mississippi:* 1887, Woolner *v.* Spalding, 65 Miss. 211, 3 So. 583; 1890, Kearney *v.* State, 58 Miss. 238; *Missouri:* 1871, Tingley *v.* Cowgill, 48 Mo. 297; 1889, State *v.* Meyers, 99 Mo. 121; 1892, Russ *v.* R. Co., 112 Mo. 45, 48, 20 S. W. 472 (there must be evidence for all the facts assumed); 1898, Fullerton *v.* Fordyce, 144 Mo. 519, 44 S. W. 1053 ("tends to prove"); 1904, State *v.* Brown, 181 Mo. 192, 79 S. W. 1111; *Montana:* 1899, State *v.* Peel, 23 Mont. 358, 59 Pac. 169 ("evidence tending to support"); *Nebraska:* 1883, O'Hara *v.* Wells, 14 Nebr. 408, 15 N. W. 722; 1886, Morrill *v.* Tegarden, 19 Nebr. 536, 26 N. W. 202 ("so framed as to fairly reflect facts either admitted or proved by other witnesses"); 1886, Ballard *v.* State, 19 Nebr. 613, 28 N. W. 271; *New Hampshire:* 1858, Spear *v.* Richardson, 37 N. H. 34; 1862, Perkins *v.* Railroad, 44 N. H. 225; *New Jersey:* 1898, Lindenthal *v.* Hatch, 61 N. J. 29, 39 Atl. 662 (question on data involving "mere guesswork", excluded); *New York:* 1876, Harnett *v.* Garvey, 66 N. Y. 641 ("within the possible or probable range of the evidence"); 1882, Stearns *v.* Field, 90 N. Y. 641 ("any state of facts which the evidence fairly tends to justify"); 1884, People *v.* Angsbury, 97 N. Y. 504 ("facts admitted or established by the evidence, or which, if controverted, the jury might legitimately find on weighing the evidence"); 1891, People *v.* Smiler, 125 N. Y. 717, 26 N. E. 312; 1899, Cole *v.* Fall Brook C. Co., 159 N. Y. 59, 53 N. E. 670 (excluded if "there is proof sustaining" the data); *North Carolina:* 1897, Burnett *v.* R. Co., 120 N. C. 517, 26 S. E. 819 (excluded, because no evidence on the point was offered); *Ohio:* 1876, Williams *v.* Brown, 28 Oh. St. 552; *Oregon:* 1882, State *v.* Anderson, 10 Or. 455; *Pennsylvania:* 1884, First Nat'l Bank *v.* Wirebach's Ex'r, 106 Pa. 44; 1887, Reber *v.* Herring, 115 Pa. 608, 8 Atl. 830 (fluctuates, in excluding, between "facts not supported" and "facts not proved" by the testimony); 1916, Albert *v.* Philadelphia R. T. Co., 252 Pa. 527, 97 Atl. 680; *Porto Rico:* 1913, Camacho *v.* Balasquide, 19 P. R. 564, 578; *Rhode Island:* 1904, McDonald *v.* Rhode Island Co., 26 R. I. 467, 59 Atl. 391 (the evidence must be offered before stating the question; unless in the discretion of the trial Court); *South Dakota:* 1894, Vermillion Co. *v.* Vermillion, 6 S. D. 466, 61 N. W. 802; 1910, State *v.* Swanson, 26 S. D. 589, 129 N. W. 119; *Utah:* 1902, Nichols *v.* R. Co., 25 Utah 240, 70 Pac. 996 (a question assuming facts which "indisputably had neither been proven nor in truth existed", held improper); *Vermont:* 1875, Hathaway's Adm'r *v.* Ins. Co., 48 Vt. 351 ("evidence tending to prove"); *West Virginia:* 1888, Kerr *v.* Lunsford, 31 W. Va. 672, 8 S. E. 493 ("evidence tending to prove"); *Wisconsin:* 1885, Quinn *v.* Higgins, 63 Wis. 670, 24 N. W. 482 ("evidence tending to prove"); 1895, Tebo *v.* Augusta, 90 Wis. 405, 63 N. W. 1045 ("sufficient evidence on which to base an assumption"); 1900, Werner *v.* R. Co., 105 Wis. 300, 81 N. W. 416 ("tended to prove").

conclusion would be that the questioner need not cover in his hypothesis the entire body of testimony put forward on that point by him or by the opponent, but may take as limited a selection as he pleases and obtain an opinion on that basis. Such is the orthodox doctrine as applied by most Courts.[2]

But there are opposing considerations of policy. The jury are apt, especially where there are many expert witnesses and the evidence is voluminous, to remember and accept merely the net opinion of a witness, with little or no reference to the special premises on which it was based. Thus, if a counsel were to select from the testimony the evidential circumstances most favorable to his party, or those least favorable to the opponent, and obtain an opinion thereon, it is obvious that if the jury forgets the partial nature of the opinion's premises, the opinion may count with them, when perhaps it ought not to count at all. Now the law and the judge cannot, of course, be expected to reject legitimate offers of evidence simply because the jury may occasionally fail to perform its duty intelligently. But the Court may well interfere to prevent questions which are under the circumstances practically valueless, and are either intended or fairly likely to mislead the jury. Some Courts, looking at the not uncommon abuse of the hypothetical question, have properly attempted to forbid the putting of questions whenever the abuse of this sort is probable.

There are two slightly different forms of the abuse. (1) One consists in asking an opinion as to the effect of facts testified to by a *given*

[2] *Federal:* 1902, Swenson v. Bender, 51 C. C. A. 627, 114 Fed. 1; 1919, Napier v. Greenzweig, 2d C. C. A., 256 Fed. 196 (malpractice); *Alabama:* 1916, Pullman Co. v. Meyer, 195 Ala. 397, 70 So. 763 (lack of train, causing illness); 1918, Hamilton v. Cranford Mercantile Co., 201 Ala. 403, 78 So. 401 (fire destruction); 1918, Miller v. Whittington, 202 Ala. 406, 80 So. 499 (sanity); *Arkansas:* 1906, Ince v. State, 77 Ark. 426, 93 S. W. 65 (approving the above passage); 1911, Missouri & N. A. R. Co. v. Daniels, 98 Ark. 352, 136 S. W. 651 (subject to the trial Court's discretion); 1915, Bell v. State, — Ark. —, 180 S. W. 186; *California:* 1897, People v. Durrant, 116 Cal. 179, 48 Pac. 75; 1897, People v. Hill, 116 Cal. 562, 48 Pac. 711; 1909, Perkins v. Sunset Tel. & T. Co., 155 Cal. 712, 103 Pac. 190; *Columbia* (Dist.): 1899, Horton v. U. S., 15 D. C. App. 310, 324; *Florida:* 1903, Williams v. State, 45 Fla. 128, 34 So. 279; *Illinois:* 1903, Chicago & E. I. R. Co. v. Wallace, 202 Ill. 129, 66 N. E. 1096; 1921, People v. Geary, 297 Ill. 608, 131 N. E. 97; *Indiana:* 1871, Davis v. State, 35 Ind. 497; 1879, Guetig v. State, 66 Ind. 104; 1884, Goodwin v. State, 95 Ind. 554; 1887, Louisville N. A. & C. R. Co. v. Wood, 113 Ind. 554, 14 N. E. 572, 16 N. E. 197; *Iowa:* 1917, Ranne v. Hodges, 181 Ia. 162, 162 N. W. 803; *Michigan:* 1888, Turnbull v. Richardson, 69 Mich. 413, 37 N. W. 499; *Montana:* 1897, Morrill v. Hershfield, 19 Mont. 245, 47 Pac. 997; 1909, State v. Crowe, 39 Mont. 174, 102 Pac. 579; *Nebraska:* 1909, Landis & Schick v. Watts, 84 Nebr. 671, 121 N. W. 980 (but here a special and not very clear rule of restriction is laid down); *New Jersey:* 1921, Ollert v. Ziebell, — N. J. L. —, 114 Atl. 356; *New York:* 1882, Stearns v. Field, 90 N. Y. 640; *Oregon:* 1909, Crosby v. Portland R. Co., 53 Or. 496, 100 Pac. 300 (enough for "forming an intelligent opinion on the subject considered"); *Pennsylvania:* 1884, First Nat'l Bank v. Wirebach's Ex'r, 106 Pa. 44 (this opinion contains a good exposition); 1909, Gillman v. Media M. A. & C. E. R. Co., 224 Pa. 267, 73 Atl. 342 (but here stating too narrow a limitation); *Texas:* 1890, Gulf C. & S. F. R. Co. v. Compton, 75 Tex. 673, 13 S. W. 667; 1902, Fretwell v. State, 43 Tex. Cr. 501, 67 S. W. 1021 (unless it appears that an opportunity on cross-examination to add the remaining material facts was denied); *Vermont:* 1900, State v. Doherty, 72 Vt. 381, 48 Atl. 658; 1902, McKinstry v. Collins, 74 Vt. 147, 52 Atl. 438; *Virginia:* 1917, Bowen's Ex'r v. Bowen, 122 Va. 1, 94 S. E. 166; *Washington:* 1904, State v. Underwood, 35 Wash. 558, 77 Pac. 863; *West Virginia:* 1916, Keenan v. Scott, 78 W. Va. 729, 90 S. E. 331; (value of legal services); 1921, State v. Long, 88 W. Va. 669, 108 S. E. 279 (reflex action in shooting); *Wisconsin:* 1904, Schissler v. State, 122 Wis. 365, 99 N. W. 593.

witness, whose *testimony* is culled and *partially stated*, so that while in form the opinion deals with a part only, in effect the whole of that witness' testimony is either discredited or approved, as the case may be. The remedy for this is to require a statement of all the material facts testified to by the witness.[3] (2) The other method does not specially mention particular witnesses, but *culls certain facts* having a bearing particularly favorable for the questioner's side or particularly unfavorable to the opponent's, and then the opinion obtained will, it is hoped, be remembered as absolutely (not conditionally) favorable or unfavorable respectively:[4]

1888, MORSE, J., in *People* v. *Vanderhoof*, 71 Mich. 176, 39 N. W. 28: "I believe that even in a civil case all the undisputed facts of a case must be included in a hypothetical question, both as a matter of sound principle, and of reason and justice. . . . To permit, as was done in this case, a culling of facts to suit the purposes of conviction, to be propounded in hypothesis to the experts, and then to instruct the jury that the only way to contradict the opinion of the experts is by the opinion of other experts, is to deny a fair trial."

But though any efforts to repress the abuses of the hypothetical question at the hands of unscrupulous tricksters should meet with approval, it is improper and unnecessary to lay down any general rule. The trial judge should be given discretion to determine how far the counsel can and must properly limit his questions, and how far the jury may be trusted, with the aid of argument, to discover the conditional nature of the opinion.

(*c*) There could be no reason in confining the hypothetical question to the *undisputed facts*, or to the facts "proved." The former expedient is at least conceivably possible; though the latter is not. Both are without the slightest ground of logic or policy. It is singular that Courts have consented to discuss such propositions; but they have often thought it necessary to negative them.[5]

[3] 1912, Williams *v.* Fulkes, 103 Ark. 196, 146 S. W. 480; 1873, Davis *v.* State, 38 Md. 40, 44; 1910, Grill *v.* O'Dell, 113 Md. 625, 77 Atl. 984; 1879, Hand *v.* Brookline, 126 Mass. 326; 1906, Pyke *v.* Jamestown, 15 N. D. 157, 107 N. W. 310.

The same situation is also presented where a written contract is to be interpreted; the question must assume terms similar to the contract, and no less or different: 1883, Jewett *v.* Brooks, 134 Mass. 505.

[4] *Accord:* 1908, Taylor *v.* McClintock, 87 Ark. 243, 112 S. W. 405 (question held here improper); 1876, Gottlieb *v.* Hartmann, 3 Colo. 61 (must cover all the evidence; this goes too far); 1893, Barber's Estate, 63 Conn. 393, 409, 27 Atl. 973 (the omitted data must not leave the others in a false relation); 1904, Aledo *v.* Honeyman, 208 Ill. 415, 70 N. E. 338; 1920, Opp. *v.* Pryor, 294 Ill. 538, 128 N. E. 580 (question held to omit material facts as to physical symptoms); 1909, Miller *v.* Leib, 109 Md. 414, 72 Atl. 466; 1888, Peterson *v.* R. Co., 38 Minn. 515, 39 N. W. 485 (must cover all the material parts); 1920, Harju *v.* Allen, 146 Minn. 23, 177 N. W. 1015 (question omitting material facts, held unfair); 1901, Schulz *v.* Modisett, — Nebr. —, 96 N. W. 338 ("All the undisputed pertinent facts"); 1902, Nichols *v.* R. Co., 25 Utah 240, 70 Pac. 996 (a question omitting material undisputed facts is unfair); 1865, Thayer *v.* Davis, 38 Vt. 163 (based on notes of counsel; excluded); 1899, Schaidler *v.* R. Co., 102 Wis. 564, 78 N. W. 732 (a material fact must be included).

[5] 1895, Jackson *v.* Burnham, 20 Colo. 532, 39 Pac. 577 (not confined to undisputed facts); 1880, Nave *v.* Tucker, 70 Ind. 18 (objection that "the hypothesis was not proved", overruled); 1880, Cowley *v.* People, 83 N. Y. 470 (question need not state "facts as they exist"); 1882, Sterns *v.* Field, 90 N. Y. 640 (objection that it "assumed what was not proved", overruled); 1891, Bowen *v.* Huntington, 35 W. Va. 686, 14 S. E. 217 (basis need not be facts exactly as they are).

(*d*) It is sometimes said[6] that "an opinion of an expert cannot be *based upon opinions expressed by other experts*"; but this is quite unsound. Keeping in mind that the ordinary distinction between "fact" and "opinion" has here no value (*ante*, § 672, *post*, § 1919), it will be seen that the basis for a hypothetical opinion may be either data observed or data inferred, and that inferred data presented by expert testimony may equally well become a part of the basis for a hypothetical question; *e.g.* (as in the case cited) a fireman may testify to coal in the furnace, and a chemist may testify that the gas generated would be carbon monoxide, and then another expert may be asked what would be the effect of an explosion of carbon monoxide on starch dust in the oven room. There is no mysterious logical fatality in basing "one expert opinion upon another"; it is done every day in business and in applied science.

§ 683. **Same: (3) Form of Question must be expressly Hypothetical.** Policy, as well as principle, require that the *form* of the question be expressly hypothetical;[1] because otherwise the jury, and perhaps the witness, may be misled by the statement, as a proved or admitted fact, of that which is as yet only an assertion of counsel or of witnesses.[2] But this requirement is capable of being insisted upon with finical and injurious exactness. The harm from its violation can seldom be serious, and Courts should not find fault with omissions to use a formal hypothetical statement where the jury could not have been misled. The question need be only substantially, not in exact form, hypothetical.[3]

For the *mode of stating* the assumed premises, there is no fixed rule. Where the facts have not yet been testified to at all, there is only one way, — the oral statement of the premises by counsel. But where testimony already offered is taken as the basis, either the testimony of a given witness may be read aloud, an assumption of its truth being then made, or an oral statement by counsel, in impersonal form, of such assumed premises may be used; the judge's discretion determining the choice.[4] Whether a uniform question asked of all the experts need be repeated for each witness, if the witness has already heard it read, will also rest in the discretion of the judge.[5]

[6] 1910, Kearner *v.* Tanner Co., 31 R. I. 203, 76 Atl. 833.

§ **683**. [1] A classical form is this: 1856, Shaw, C. J., in Woodbury *v.* Obear, 7 Gray 471: "If certain facts, assumed by the question to be established by the evidence, should be found true by the jury, what would be his opinion, upon the facts thus found true, on the question at issue?"

[2] 1895, Chalmers *v.* Mfg. Co., 164 Mass. 532, 42 N. E. 98; 1890, Jones *v.* R. Co., 43 Minn. 281, 45 N. W. 444; 1884, Reed *v.* State, 62 Miss. 409, *semble;* 1878, State *v.* Bowman, 78 N. C. 511, *semble;* 1886, State *v.* Cole, 94 N. C. 964; 1888, State *v.* Keene, 100 N. C. 511, 6 S. E. 91; 1907, Parrish *v.* High Point R. A. & S. R. Co., 146 N. C. 125, 59 S. E. 348 (cause of an injury); 1878, Gilman *v.* Strafford, 50 Vt. 725.

[3] 1870, Christiancy, J., in Kempsey *v.* McGinniss, 21 Mich. 139: 1910, Nolan *v.* Newton St. R. Co., 206 Mass. 384, 92 N. E. 505 (an electrical expert's testimony, referring to a car jumping "in the way that has been described" by the plaintiff when testifying, held proper); 1875, McCollum *v.* Seward, 62 N. Y. 318.

[4] 1860, Choice *v.* State, 31 Ga. 468; 1920, Aronovitz *v.* Arky. Mo., 219 S. W. 620 (but the hypothesized facts should be recited as facts, and not merely as the subject of former testimony).

[5] 1886, Gates *v.* Fleischer, 67 Wis. 509, 30 N. W. 674.

§ 684. **Hypothetical Questions on Cross-examination.** Just as the cross-examination of an ordinary witness may involve questions which test his memory, observation, and bias, so in cross-examining one who takes the stand as a skilled witness, his judgment upon germane matters may be tested by assuming premises and asking his conclusions.[1] The modes and purposes are substantially the same as in testing ordinary witnesses (*post*, §§ 994, 1000, 1018, 1362).

§ 685. **Length of Hypothetical Question.** On principle, the questioner is entitled (as already noted) to obtain an opinion upon any combination of facts, however few or however numerous. Hence, the mere *length* of a question of itself is no objection.[1] But, for the same reasons of policy as before, the Court may exclude a question which by its length tends to confuse or mislead the jury without being of appreciable service.[2] This discretion of the trial judge ought to be absolute, and should have been exercised much more frequently than it is in excluding tedious and useless questions.

§ 686. **Abolition of the Question as a Requirement.** What is to be the future of the hypothetical question?

The Hypothetical Question must go, as a requirement. Its abuses have become so obstructive and nauseous that no remedy short of extirpation will suffice. It is a logical necessity, but a practical incubus; and logic must here be sacrificed. After all, Law (in Mr. Justice Holmes' phrase) is much more than Logic. It is a strange irony that the hypothetical question, which is one of the few truly scientific features of the rules of Evidence, should have become that feature which does most to disgust men of science with the law of Evidence.

The hypothetical question, misused by the clumsy and abused by the clever, has in practice led to intolerable obstruction of truth.[1] In the first place,

§ 684. [1] 1916, Wilson *v.* State, 195 Ala. 675, 71 So. 115; 1887, People *v.* Sutton, 73 Cal. 246, 15 Pac. 86; 1910, Pensacola Electric Co. *v.* Bissett, 59 Fla. 360, 52 So. 367; 1897, West Chicago St. R. Co. *v.* Fishman, 169 Ill. 196, 48 N. E. 447 (on cross-examination, "any fact which, in the sound discretion of the Court, is pertinent to the inquiry, whether testified to or not", is usable in testing the expert); 1871, Davis *v.* State, 35 Ind. 498; 1885, Louisville N. A. & C. R. Co. *v.* Falvey, 104 Ind. 415, 3 N. E. 389, 4 N. E. 908; 1885, Geisendorff *v.* Eagles, 106 Ind. 41, 5 N. E. 743; 1888, Grubb *v.* State, 117 Ind. 284, 20 N. E. 257, 725; 1899, Taylor *v.* Star Coal Co., 110 Ia. 40, 81 N. W. 249 ("almost any state of facts" may be assumed); 1921, Bonderson *v.* Hovde, 150 Minn. 175, 184 N. W. 853 (discretion of trial Court); 1921, Levine *v.* Barry, 114 Wash. 623, 195 Pac. 1003 (questions assuming facts not yet in evidence; trial Court's discretion controls);

§ 685. [1] 1865, Mary Harris' Trial, (D. C.) Clephane's Rep. 100 (question of some 3800 words, allowed to be put); 1881, Guiteau's Trial, (D. C.) II, 1251, 1322, 1720 (question of more than 3400 words, allowed to be asked); 1886, Mayo *v.* Wright, 63 Mich. 43, 29 N. W. 832 (mere length is no objection). But these records of length have since been far surpassed.

[2] 1886, Forsyth *v.* Doolittle, 120 U. S. 78, 7 Sup. 408 (trial Court in discretion may exclude); 1898, Davis *v.* Ins. Co., 59 Kan. 74, 52 Pac. 67 (lengthy question held perhaps improper); 1896, Howes *v.* Colburn, 165 Mass. 385, 43 N. E. 125 ("It might be wiser to exclude such questions altogether, when they are very complicated or involve much detail"); 1909, Burk *v.* Reese, — Nebr. —, 121 N. W. 1016 (question of 8000 words held improper, because introducing the opponent's case on cross-examination).

§ 686. [1] Many of the articles cited *ante*, § 563 (securing unbiassed experts), on the defects of present practice with expert testimony, set forth the grounds for this statement.

it has artificially clamped the mouth of the expert witness, so that his answer to a complex question may not express his actual opinion on the actual case. This is because the question may be so built up and contrived by counsel as to represent only a partisan conclusion. In the second place, it has tended to mislead the jury as to the purport of actual expert opinion. This is due to the same reason. In the third place, it has tended to confuse the jury, so that its employment becomes a mere waste of time and a futile obstruction.

No partial limitation of its use seems feasible, by specific rules. Logically, there is no place to stop short; practically, any specific limitations would be more or less arbitrary, and would thus tend to become mere quibbles.

How can the extirpating operation be performed? By exempting the offering party from the *requirement* of using the hypothetical form; by according him the *option* of using it, — both of these to be left to the trial Court's discretion; and by permitting the opposing party, *on cross-examination*, to call for a hypothetical specification of the data which the witness has used as the basis of the opinion. The last rule will give sufficient protection against a misunderstanding of the opinion, when any actual doubt exists.

The foregoing proposals, be it understood, represent a mere practical rule of thumb. They do violence to theoretical logic. But in practice they would produce less actual misleading of the jury than the present complex preciosities. After all, the only theoretical object of the hypothetical question (*ante*, § 672) is to avoid misunderstanding; and "if the salt have lost its savor, wherewith shall it be salted? It is thenceforth good for nothing but to be cast out and trodden under foot of men." The present proposal does not trod under foot the hypothetical question, but merely transfers its function to the hands of the cross-examiner.

The proposed rules can be stated in legislative form as follows:

1. *Where an expert witness has not had personal observation of matters of fact in the case in hand, but has listened to or read any or all of the testimony or depositions to such matter of fact, he may be asked, by the party calling him, to state his conclusion, without specifying in the question the data forming the basis of the conclusion; unless the trial Court otherwise directs or permits.*

2. *Where an expert witness has considered data presented him otherwise than through the testimony or deposition of a witness in the case, he may not be asked to state his conclusions thereon, by hypothetical question or otherwise; except so far as he is qualified by personal observation or by general reading, on the principle of § 687, post, in which case the question need not be in hypothetical form; and except also that the trial Court may permit or direct otherwise.*

3. *In either of the foregoing classes of cases, the opposite party on cross-examination may require the witness to specify the data on the hypothesis of which his conclusion was based.*

B. Knowledge required for Special Subjects

1. Medical Matters

§ 687. **Physician's General Knowledge based on the Study of Books.** The general principle has already been considered (*ante*, § 657) that a witness' knowledge must be based upon personal observations of his own senses. It has also been noted that exceptions to this rule are conceded, — in particular, for professional men testifying to a matter of general scientific truth (*ante*, § 665). It remains to consider the application of the principle to the testimony of *physicians* concerning *truths of medical science.*

Here it is necessary to distinguish two considerations. Are we objecting to the bookish source of their knowledge (1) because it implies a lack of skill and experience as affecting their expert capacity for judgment, or (2) because it involves accepting, as a knower of a given fact, one who has not really observed for himself but is trusting to others? In other words, is the objection directed against the quality of the witness' Experience or the quality of his Knowledge?

(1) From the former point of view, if, as is usual, the objection is directed against a professional man, because he has merely *graduated from an acceptable medical school* and has not practised extensively, the objection is unpractical. According to the old methods by which a medical training was gained mainly from actual service in an apprenticeship, an active and prolonged experience in practice for a considerable period might be essential. But the modern training of a medical school does not involve merely the perusal of books; it embraces a personal observation of disease and its remedies. The cultivation of judgment which may be attained in such a school ought to qualify without any requirement of a term of subsequent practice. — There is little definite authority on the subject; but the matter should rest in the trial judge's discretion.[1]

(2) The objection from the second point of view is equally vain. To deny the competency of a physician who does not know his facts *from personal observation alone* is to reject medical testimony almost in its entirety. To allow any physician to testify who claims to know solely by personal experience is to appropriate the witness-stand to impostors. Medical science is a mass of transmitted and collated data from numerous quarters; the generalizations which are the result of one man's personal observation ex-

§ 687. [1] 1850, Pollock, C. B., in Bristow *v.* Sequeville, 5 Exch. 277 ("In a case depending on medical testimony, would the evidence of a person be admissible who had studied medicine at one of the universities but had never practised it?", intimating the negative); 1847, Tullis *v.* Kidd, 12 Ala. 650 (actual practice is not necessary); 1895, State *v.* Dixon, 47 La. An. 1, 16 So. 589 (admitting a medical student who had treated similar diseases).

The retirement from active practice involves no disqualification: 1874, Roberts *v.* Johnson, 58 N. Y. 617.

A similar question arises sometimes under another principle, *i.e.* whether a physician of *general practice*, whose knowledge on a *special topic* (such as poisoning) is gained by reading only, is of sufficient experience or judgment to testify on that topic (*ante*, § 569). The rulings do not always distinguish the two points of view, but the result in both classes should be substantially the same.

clusively are the least acceptable of all. The law must recognize the methods of medical science. It cannot stultify itself by establishing, for judicial inquiries, a rule never considered necessary by the medical profession itself. It is enough for a physician, testifying to a medical fact, that he is by training and occupation a physician; whether his source of information for that particular fact is in part or entirely the hearsay of his fellow-practitioners and investigators, is immaterial: [2]

1893, HOLMES, J., in *Finnegan* v. *Gas Works Co.*, 159 Mass. 312, 34 N. E. 523 (receiving testimony that after asphyxiation there is a period of conscious suffering before death, the physician having had no cases of the kind): "Although it might not be admissible merely to repeat what a witness had read in a book not itself admissible, still, when one who is competent on the general subject accepts from his reading as probably true a matter of detail which he has not verified, the fact receives an authority which it would not have had from the printed page alone, and, subject perhaps to the exercise of some discretion, may be admitted."

The great dramatist knew this well enough:

Pericles, III, 2 (Cerimon explains his skill in physic):

"... I ever
Have studied physic, through which secret art
By turning o'er authorities, I have —
Together with my practice — made familiar
To me and to my aid the blest infusions."

§ 688. **Physician's Knowledge of Symptoms based on Hearsay of Patients and Others.** Here, again, the law cannot afford to stultify itself by refusing to recognize, in testimonial rules, the safe and accepted practices of medical science. When a physician examines a patient to ascertain his ailment and to prescribe for it, a portion of his reasons for action must be the patient's

[2] *Admitted:* 1888, Preeper v. R., 15 Can. Sup. 401, 404, 408, 410, 416 (medical witness to the 'indicia' of distance in shot-marks on a body, speaking "not from personal experience, but from books", admitted; two judges diss.); 1894, Jackson v. Boone, 93 Ga. 662, 20 S. E. 46; 1901, Boswell v. State, 114 Ga. 40, 39 S. E. 897 (physicians allowed to testify to the poisonous nature of bluestone, though deriving their knowledge solely from books); 1851, Carter v. State, 2 Ind. 619 (poison; knowledge based on reading); 1901, Isenhour v. State, 157 Ind. 517, 62 N. E. 40 (chemist's knowledge, acquired "wholly from reading, study, and conversations with other physicians"); 1905, State v. Donovan, 128 Ia. 44, 102 N. W. 791 (possibility of a surgical operation under hypnotism); 1886, State v. Baldwin, 36 Kan. 16, 12 Pac. 318 (a knowledge partly founded on books); 1909, United R. & E. Co. v. Corbin, 109 Md. 442, 72 Atl. 606 (approving the above passage); 1894, Hardiman v. Brown, 162 Mass. 585, 39 N. E. 192 (reading is sufficient, at least for specialties); 1883, Marshall v. Brown, 50 Mich. 148, 15 N. W. 55 (the effect of a substance on the human system; knowledge based chiefly on books); 1869, Taylor v. Railway, 48 N. H. 306 (founded on study alone); 1873, State v. Wood, 53 N. H. 495 (same); 1859, State v. Terrell, 12 Rich. L. S. C. 327 (strychnia-poisoning; knowledge acquired from "books, lectures, and oral instruction").

Excluded: 1898, Erb v. Popritz, 59 Kan. 264, 52 Pac. 871 (statements as to probable duration of life, by one speaking solely from acquaintance with mortality tables); 1870, Dole v. Johnson, 50 N. H. 452, 459 (one who proposed to testify as to the contagiousness of foot-rot in sheep, after having "as editor of a stock-journal read extensively on the subject"); 1888, Soquet v. State, 72 Wis. 666, 40 N. W. 391 (arsenic; testimony based solely on books); 1904, Kath v. Wisconsin C. R. Co., 121 Wis. 503, 99 N. W. 217 ("what he learns entirely from medical works, unsupported by practical experience of his own", is inadmissible).

For the right to *cross-examine a medical man* upon the scope of his reading, see *post*, § 1700.

For analogous cases, under a slightly different principle, see *ante*, § 569.

own statements. To exclude testimony not wholly independent of this foundation for opinion is, in strictness, to exclude almost always medical testimony based on a personal examination.[1]

Yet there are distinctions to be taken. The hearsay source of information may be that of the patient as to (1) present symptoms, (2) past symptoms, (3) cause of the injury or illness, (4) or that of a nurse or other third person.

(1) A diagnosis based *in part* on hearsay from the *patient* himself stating *present symptoms* is generally and properly considered receivable.[2] To ex-

§ 688. [1] It is said that Prince von Bismarck was once ruffled by the number of questions put to him by his medical attendant, an eminent physician of no less individuality and self-possession than the Chancellor. The latter intimated that the physician could do his duty without putting so many intrusive questions. "Very well, Highness," said the other; "but if you wish to be cured without questions asked, you had better send for a veterinary surgeon." Those who object to testimony of the sort here considered must expect to surrender the medical witness-stand to veterinary surgeons exclusively.

[2] *Accord*, except as otherwise noted: *Federal:* 1894, Union P. R. Co. *v.* Novak, 15 U. S. App. 400, 414, 9 C. C. A. 629, 61 Fed. 573; 1915, Kansas City So. R. Co. *v.* Clinton, 8th C. C. A., 224 Fed. 896, 900 (attending physician's opinion of the patient's suffering, based in part on the patient's statements, receivable; distinguishing U. S. *v.* McMican, *infra*); *Alabama:* 1855, Eckles *v.* Bates, 26 Ala. 659; *Arkansas:* 1915, Biddle *v.* Riley, 118 Ark. 206, 176 S. W. 134 (medical witness giving a clinical history may include the patient's statement of symptoms); 1920, Subiaco Coal Co. *v.* Krallman, 143 Ark. 469, 220 S. W. 664 (following Biddle *v.* Riley); *Columbia* (Dist.): 1913, Washington A. & M. U. R. Co. *v.* Fincham, 40 D. C. App. 412 (examination for vision, by using a perimeter and the patient's statements as to its effect on him, admitted); *Georgia:* 1896, Western & A. R. Co. *v.* Stafford, 99 Ga. 187, 25 S. E. 656, *semble*, *Illinois:* 1867, Illinois C. R. Co. *v.* Sutton, 42 Ill. 440; 1884, Chicago B. & Q. R. Co. *v.* Martin, 112 Ill. 17; 1907, Chicago *v.* McNally, 227 Ill. 14, 81 N. E. 23 (testimony admitted on the facts); *Indiana:* 1885, Louisville N. A. & C. R. Co. *v.* Falvey, 104 Ind. 419, 3 N. E. 389, 4 N. E. 908; 1887, Louisville N. A. & C. R. Co. *v.* Wood, 113 Ind. 548, 14 N. E. 572, 16 N. E. 197; 1888, Louisville N. A. & C. R. Co. *v.* Snyder, 117 Ind. 436, 20 N. E. 284; 1892, Chicago, St. L. & P. R. Co. *v.* Spilker, 134 Ind. 380, 392, 33 N. E. 280, 34 N. E. 218; 1893, Ohio & M. R. Co. *v.* Heaton, 137 Ind. 1, 35 N. E. 687; *Massachusetts:* 1865, Barber *v.* Merriam, 11 All. 324 (perhaps overruling Rowell *v.* Lowell, 11 Gray 420, 1858); *Minnesota:* 1891, Johnson *v.* R. Co., 47 Minn. 430, 50 N. W. 473 ("an opinion based in part upon statements" by the patient as to his present condition, admissible); *New Jersey:* 1896, Consolidated Traction Co. *v.* Lambertson, 59 N. J. L. 297, 36 Atl. 100; 1897, Traction Co. *v.* Lambertson, 60 N. J. L. 452, 38 Atl. 683 (physician's opinion, founded "wholly or in part" on inadmissible declarations of patient, admissible where there was other evidence of facts so declared); *New York:* 1866, Matteson *v.* R. Co., 35 N. Y. 491; *North Dakota:* 1908, Walters *v.* Rock, 18 N. D. 45, 115 N. W. 511; *Oklahoma:* 1917, Chicago R. I. & P. R. Co. *v.* Jackson, 63 Okl. 32, 162 Pac. 823; *South Dakota:* 1895, State *v.* Chiles, 44 S. C. 338, 22 S. E. 340; *Washington:* 1911, Myhra *v.* Chicago M. & P. S. R. Co., 62 Wash. 1, 112 Pac. 939; *Wisconsin:* 1879, Quaife *v.* R. Co., 48 Wis. 521, 4 N. W. 658; 1895, Block *v.* R. Co., 89 Wis. 371, 61 N. W. 1102; 1919, Bell *v.* Milwaukee E. R. & L. Co., 169 Wis. 408, 172 N. W. 791 (allowable where the patient consulted the physician for treatment; but not, as here, where he consulted him merely to qualify him as a witness).

Contra: Federal: 1895, Delaware, L. & W. R. Co. *v.* Roalefs, 70 Fed. 23, 16 C. C. A. 601, *semble* (where possibly the Court would have admitted the opinion on the hypothesis of the truth of the statements); *Arkansas:* 1913, Lee *v.* Kansas C. S. R. Co., D. C. W. D. Ark. 206 Fed. 765 (physician called in to qualify as a witness may testify to an opinion based on objective symptoms only, not on the patient's statements in part or entirely; it is regrettable to see a Federal Court giving in to this modern heresy, which commits the exploded fallacy of totally prohibiting weak evidence instead of merely ensuring the exhibition of its weaknesses); *Illinois:* 1905, Stevens *v.* People, 215 Ill. 593, 74 N. E. 786 (abortion; physician's opinion based in part on "information derived from the patient", excluded; unsound); 1905, Chicago City R. Co. *v.* McCaughna, 216 id. 202, 74 N. E. 818 (personal injury; similar ruling); 1907, Chicago U. Traction Co. *v.* Giese, 229 Ill. 260, 82 N. E. 232 (ignoring the above Illinois cases); 1908, Greinke *v.* Chicago City R. Co., 234 Ill. 564, 85 N. E. 327 (this opinion, while carefully avoiding mention of physician's diagnosis as ordinarily obtained, confines itself to excluding testimony of a physician who (*a*) has not treated the injured party, but (*b*) has

clude it when this was the *exclusive* source may sometimes be proper, though such a case can rarely be presented, and the distinction would result in vain quibbles.[3]

(2) As to hearsay from the *patient* detailing *past symptoms*, no line can be drawn between this and the preceding source; the policy of the case is the same for both.[4] Courts seem usually not to take any distinction; but occasionally the principle is expressly spoken of as covering the present case.[5]

examined him solely to qualify as a witness in a personal injury trial, and (c) bases his opinion upon the statements of the injured party; and applies this rule to exclude an opinion based on voluntary acts such as walking, hand-pressing, etc.); 1908, Shaughnessy *v.* Holt, 236 Ill. 485, 86 N. E. 256 (personal injury; physician's opinion based on tests involving the patient's sensations and answers, at an examination solely to qualify as witness, excluded); *Iowa:* 1895, Van Winkle *v.* R. Co., 93 Ia. 509, 61 N. W. 929; *Kansas:* 1906, Federal B. Co. *v.* Reeves, 73 Kan. 107, 84 Pac. 560 (Porter, J., diss.); 1915, Smith *v.* St. Louis & S. F. R. Co., 95 Kan. 451, 148 Pac. 759 (physician's opinion, "based partly upon the history of the case as it was related to him", held inadmissible); 1916, Switzer *v.* Baker, 178 Ia. 1063, 160 N. W. 372 (personal injury; physician consulted to qualify him to testify, excluded where his opinion is based wholly or in part on the statements of the party and of third persons); *Kentucky:* 1909, Chesapeake & O. R. Co. *v.* Wiley, 134 Ky. 461, 121 S. W. 402 (applied to testimony of physicians called solely to qualify as witnesses, and not for treatment; yet this should make no difference to exclude the testimony; how unpractical Courts continue to be, in thinking that the way to get at the truth is to exclude all testimony which may often be based upon a lie; that is the old-fashioned notion, applied in the disqualification of a witness for interest, but now exploded; it is a helpless, mechanical rule, which is suited for a solemn game, but not to a practical virile determination to get at the facts); *Missouri:* 1904, Holloway *v.* Kansas City, 184 Mo. 19, 82 S. W. 89 (not appreciating the precise nature of the question); 1910, Dean *v.* Wabash R. Co., 229 Mo. 425, 129 S. W. 953 (objective and subjective symptoms may be distinguished; though of course not when the physician is testifying on a hypothetical question); *New York:* 1886, People *v.* Murphy, 101 N. Y. 130, 4 N. E. 326, *semble;* 1892, Davidson *v.* Cornell, 132 N. Y. 236, 30 N. E. 573, *semble;* 1909, People *v.* Hill, 194 N. Y. 16, 87 N. E. 813 ("an expert witness cannot be permitted to give an opinion as to the mental condition of a person at the time of the commission of a criminal act, based upon a statement not in evidence, made by a party in his own behalf after the commission of the act, which pertains to his past conduct"; this may be not in itself logically unreasonable, but the judicial tendency to lay down unpractical rules which are preposterously opposed to ordinary medical practice ought to be checked if justice is to maintain the respect of the other learned professions); *Wisconsin:* 1893, Abbot *v.* Heath, 84 Wis. 318, 54 N. W. 574 (distinguishing Quaife *v.* R. Co., *supra*, partly because there physicians from both parties attended, and partly because here the proportion of hearsay was so large).

Not decided: 1913, Cooper *v.* Seaboard A. L. R. Co., 163 N. C. 150, 79 S. E. 418.

[3] The following rulings are erroneous, for the reasons noted: 1899, State *v.* Soper, 148 Mo. 217, 49 S. W. 1007 (physician's testimony to defendant's insanity, founded on defendant's own statements, excluded); 1895, People *v.* Strait, 148 N. Y. 566, 42 N. E. 1045, *semble* (where the opinion was excluded partly because the statements of the alleged insane person were made too long after the alleged insane act; but the Court confused the present rule, which does not apply to an alleged insane person's conversation (for that is not hearsay, *ante*, § 227), with the doctrine that insane conduct long after the alleged insane act is not relevant (*ante*, § 233), which was here the true reason for exclusion).

But the following ruling is sound: 1897, People *v.* Ebanks, 117 Cal. 652, 49 Pac. 1049 (excluding a hypnotist, who based his testimony solely on the defendant's protestation of innocence).

[4] Though statements of past symptoms may not be independently admissible under the Hearsay exception (*post*, § 1718).

[5] *Accord:* Eckles *v.* Bates, Barber *v.* Merriam, in note 2, *supra;* 1918, District *v.* White, 48 D. C. App. 44 (a diagnosis based in part on an operation and in part on the patient's history of the case, admitted);

Contra, R. Co. *v.* Frazier, in the following note.

The following ruling seems doubtful: 1825, Gardner Peerage Case, Le Marchant's Rep. 77, 170, 174 (the issue involving the 'ultimum tempus' of gestation, and a physician being called to testify to specific instances of a period exceeding nine calendar months from conception, the physician's statement of the date of conception, based wholly on the woman's statement to him, was excluded; otherwise, of his opinion in general as to the length of the

(3) As to hearsay from the *patient* as to the *cause* of the injury or illness, no such necessity exists for accepting the testimony, in so far as the physician, in testifying to the cause of it, merely repeats what the patient said. But if the physician's estimate of the cause is based also on other data independent of these statements, and is not a mere repetition carrying no weight of its own, there is no reason to exclude this testimony.[6] Any attempt to draw the line in rulings, and to exclude a physician's testimony because his diagnosis is based in part on such statements, is unpractical, and defies the usual processes of medical thought. Hence it should be avoided.

(4) As to hearsay *symptoms told by third persons*, a diagnosis based on sundry information from third persons in general has no claims for admission.[7] But where the information is that of an *attending nurse or physician* having personal observation and an interest in learning and describing accurately, there seems every reason for admitting testimony based in part on this. Every physician relies upon it, and there are periods of sleep or other unconsciousness or mental incapacity which make it impossible to resort to the patient for information. It should be immaterial whether the informant is a professional person, or is the wife or other member of the household, so long as the information is based on attendance and personal observation.[8] The rulings have thus far seldom accepted this view; yet the language of some of their opinions may well seem to a physician a pedantic enforcement of legal nicety inconsistent with the needs of practical life.

(5) Distinguish here (1) the inquiry as to the *grounds of a physician's knowledge* and the admissibility of his answers (*ante*, § 655); (2) the admis-

'ultimum tempus' in general); 1904, Schissler *v.* State, 122 Wis. 365, 99 N. W. 593 (opinion based on the patient's statement of a past illness, excluded).

[6] *Contra:* 1912, Union Pacific R. Co. *v.* M'Mican, C. C. A., 194 Fed. 393 (physician's opinion based in part on the plaintiff's history of the injury as given to the physician and not stated hypothetically, excluded; the opinion confuses this principle and that of § 1918, *post*); 1867, Illinois C. R. Co. *v.* Sutton, 42 Ill. 440; 1882, Atchison T. & S. F. R. Co. *v.* Frazier, 27 Kan. 463; 1908, Federal Betterment Co. *v.* Reeves, 77 Kan. 111, 93 Pac. 627 (following A. T. & S. F. R. Co. *v.* Frazier); 1872, Morrissey *v.* Ingham, 111 Mass. 65; 1913, Hintz *v.* Wagner, — S. D. —, 140 N. W. 729;

Accord: 1865, Barber *v.* Merriam, 11 All. 324.

[7] *Excluded:* 1888, U. S. *v.* Faulkner, 35 Fed. 732; 1910, Davis *v.* State, 96 Ark. 7, 130 S. W. 547; 1898, Flannagan *v.* State, 106 Ga. 109, 32 S. E. 80 (medical man's opinion of insanity, based in part upon what he had heard); 1887, Brown *v.* Ins. Co., 65 Mich. 315, 32 N. W. 610; 1899, State *v.* Peel, 23 Mont. 358, 59 Pac. 169 (opinion based in part on hearsay in regard to the crime); 1895, People *v.* Strait, 148 N. Y. 566, 42 N. E. 1045 (like Flannagan *v.* State, *supra*); 1868, Rouch *v.* Zehring, 59 Pa. 78 (opinion of insanity, founded partly on hearsay); 1890, Vosburg *v.* Putney, 78 Wis. 87, 47 N. W. 99 (knowledge of the cause of a wound, predicated upon indefinite hearsay).

[8] *Accord:* 1896, Southern K. R. Co. *v.* Michaels, 57 Kan. 474, 46 Pac. 938 (history of a case given by other physicians to one who was called in; his testimony, founded on this and on personal examination, not excluded).

Contra: 1882, Atchison T. & S. F. R. Co. *v.* Frazier, 27 Kan. 463; 1858, Heald *v.* Thing, 45 Me. 395 ("The declarations of the nurse, wife, and attending physician are all clearly inadmissible", and therefore also "the information obtained from those sources"); 1895, Miller *v.* R. Co., 62 Minn. 216, 64 N. W. 554 (opinion as to cause of symptoms, based in part on another physician's "history of the case", given at the time of consultation, excluded); 1920, Aronovitz *v.* Arky, — Mo. —, 219 S. W. 620 (opinion based in part on "the history of the case as given to you" by the patient and members of the family as to prior causes etc., excluded); 1865, Wetherbee's Ex'rs *v.* Wetherbee's Heirs, 38 Vt. 454.

sion of the *patient's statements themselves* as testimony under the Hearsay exceptions (*post*, § 1918); though Courts do not always distinguish the two.

§ 689. **Layman's or Physician's Acquaintance with the Person Diseased or Insane.** According to the principle already examined (*ante*, § 659), one element of a sufficient means of knowledge is the adequacy of the extent or scope of observation. In medical matters (speaking broadly) may be considered under this head (1) sundry instances in which health, injury, or disease, are concerned, (2) the condition of sanity or insanity, in which the question may arise as to the extent of the witness' observation, whether a medical man or a layman.

(1) *Health, Injuries.* Here all that needs to be said is that the witness must appear to have had adequate opportunities of observation of the person, and, if the matter calls for it, to have directed his attention particularly to the particular ailment. The discretion of the trial judge should govern.[1]

(2) *Sanity and Insanity.* It is here assumed that laymen, as well as others, may, under the Opinion rule, express opinions as to sanity and insanity (*post*, § 1933). The inquiry will still remain (since each and every witness must fulfil the requirement of Knowledge) whether the particular person put forward to express the opinion has had an opportunity, by observation of the conduct of the one whose mental condition is in issue, to learn something upon the subject and to form a belief worth listening to.

That such an opportunity is necessary, no one has doubted. The doubt comes only as to the exact phrasing of the test to be applied. A precise definition, which shall be at once both flexible enough to meet various situations and exact enough to be a rule at all, is difficult, if not impossible. It has at any rate not been devised to the satisfaction of all the Courts. The truth is that the test should be left in the hands of the trial judge. Neither its exact phrasing, nor its application in a given instance, should be made to occupy the time of the highest Courts. The attempt to invent an all-sufficient form of words is as inexpedient as it is vain:[2]

§ 689. [1] *Examples:* (1) *Health and Illness:* 1885, Carthage Turnpike Co. *v.* Andrews, 102 Ind. 143, 1 N. E. 364; 1874, People *v.* Olmstead, 30 Mich. 433; (2) *Injuries requiring special examination:* 1879, Ebos *v.* State, 34 Ark. 522 (that a head-wound was the cause of death by concussion, though the witness had not opened the skull in his examination, admitted); 1884, Louisville N. A. & C. R. Co. *v.* Shires, 108 Ill. 627 (personal injuries; physician-witness who had known the plaintiff before the injury and examined him afterwards, admitted); 1878, Grand Rapids & I. R. Co. *v.* Huntley, 38 Mich. 542 (excluded on the facts).

[2] In spite of the sensible utterances above quoted, the reports are still cumbered with rulings which should have been left to the trial Court. In this note are given the forms of the various tests proposed; where no quotation follows, the ruling merely illustrates the application of the general principle to a particular witness, with or without the enunciation of some general test; for additional minor rulings in some of the jurisdictions, see *post*, § 1938, where the Opinion rule is discussed with reference to lay testimony to sanity:

ENGLAND: 1865, R. *v.* Southey, 4 F. & F. 884.

UNITED STATES: *Federal:* 1815, Lessee of Hoge *v.* Fisher, 1 Pet. 164; 1903, Queenan *v.* Oklahoma, 190 U. S. 548, 23 Sup. 762 (a lay witness who had known the accused "for some years", not allowed to say whether "since the killing he had formed an opinion as to the prisoner's mental condition at the time", on the ground that the opinion might, without further specification of its reasons, have been based on improper data); 1909, Turner *v.* American Security & T. Co., 213 U. S. 257, 29 Sup. 420 ("We are asked to review that discretion [of the

1841, GASTON, J., in *Clary* v. *Clary*, 2 Ired. 85: "Unquestionably, before a witness can be received to testify as to the fact of capacity, it must appear that he had an adequate opportunity of observing and judging of capacity. But so different are the powers and habits of observation in different persons that no general rule can be laid down as to what shall be deemed a sufficient opportunity of observation, other than that it has in fact

trial Court]. . . . We have no hesitation in declining to do this");
Alabama: 1845, Bowling v. Bowling, 8 Ala. 541; 1849, Norris v. State, 16 Ala. 778 ("such as from long intimacy or familiar and frequent intercourse, with the party alleged to be insane are peculiarly fitted to judge"); 1854, Florey v. Florey, 24 Ala. 247 ("whose acquaintance with the party has been such as to enable him to form a correct opinion as to his mental condition"); 1854, Powell v. State, quoted *supra;* 1860, Re Carmichael, 36 Ala. 514 ("of an intimate character, such as, etc."; a disposition here to lay down a strict test, limiting the trial Court's discretion, and thus departing from Powell v. State, *supra*); 1868, Stuckey v. Bellah, 41 Ala. 707; 1882, Ford v. State, 71 Ala. 397 (going back to the rule of Powell v. State); 1895, Murphree v. Sam, 107 Ala. 424, 18 So. 264; 1900, Dominick v. Randolph, 124 Ala. 557, 27 So. 481 (witness here held not to have a sufficiently "long and intimate knowledge"); 1905, Breham v. State, 143 Ala. 28, 38 So. 919 (witness held not qualified by observation); 1911, Odom v. State, 174 Ala. 4, 56 So. 913; 1913, Jones v. State, 181 Ala. 63, 61 So. 434; 1914, Woods v. State, 186 Ala. 29, 65 So. 342 (physician observing in jail); 1915, Woodward Iron Co. v. Spencer, 194 Ala. 285, 69 So. 902;
Arkansas: 1855, Kelly's Heirs v. McGuire, 15 Ark. 600; 1860, Beller v. Jones, 22 Ark. 95 ("those who, from habits of daily or common intercourse with or observation of appellee, could make an intelligent comparison of his mental manifestations with his conduct when he was admitted to enjoy the full use of his natural faculties"); 1895, Shaeffer v. State, 61 Ark. 241, 32 S. W. 679; 1915, Dewein v. State, 120 Ark. 302, 179 S. W. 346 (accused);
California: C. C. P. § 1870, par. 10 (opinion of "an intimate acquaintance", admissible); this is applied in the trial Court's discretion, according to the following cases: 1882, People v. Pico, 62 Cal. 53; 1887, People v. Levy, 71 Cal. 623, 12 Pac. 791; 1888, People v. Fine, 77 Cal. 149, 19 Pac. 269; 1892, Carpenter's Estate, 94 Cal. 414, 29 Pac. 1101; 1893, Wheelock v. Godfrey, 100 Cal. 584, 35 Pac. 317; 1895, People v. Schmitt, 106 Cal. 48, 39 Pac. 204; 1895, Re Wax's Estate, 106 Cal. 343, 39 Pac. 624; 1894, Holland v. Zollner, 102 Cal. 633, 540, 36 Pac. 930 (one who is not an "intimate acquaintance" may testify to rationality of appearance at the time of acts observed, though not to sanity in general); 1896, People v. McCarthy, 115 Cal. 258, 46 Pac. 1073 (Code rule does not apply to "rational" appearance at a given time; discretion of trial Court here applied to admit a jailer having the defendant for months in his charge); 1897, People v. Hill, 116 Cal. 562, 48 Pac. 711; 1898, People v. Barthleman, 120 Cal. 7, 52 Pac. 112; 1901, Keithley's Estate, 134 Cal. 9, 66 Pac. 5; 1904, People v. Manoogian, 141 Cal. 592, 75 Pac. 177 (Holland v. Zollner and People v. McCarthy, *supra*, followed; this distinction is now a settled and important one in this court); 1904, People v. Suesser, 142 Cal. 354, 75 Pac. 1093 (trial Court's determination controls as to who are "intimate acquaintances"); 1904, McKenna's Estate, 143 id. 580, 77 Pac. 461 (same); 1906, Dolbeer's Estate, 149 Cal. 227, 86 Pac. 695 (question based in part upon "the facts you have learned" by hearsay, excluded); 1907, People v. Clark, 151 Cal. 200, 90 Pac. 549 (trial Court's discretion controlled); 1910, People v. Vaughn, 14 Cal. App. 201, 111 Pac. 620 (the Code requirement of "intimate acquaintance" does not apply where the injury is only as to the appearance at a certain time; apart from this, a jailer who has had an accused in custody for three months is qualified; following People v. McCarthy); 1910, People v. Loper, 159 Cal. 6, 112 Pac. 720;
Columbia (Dist.): 1895, Taylor v. U. S., 7 D. C. App. 27, 34 (witness excluded for lack of "adequate opportunity to observe the conduct and appearance of the party");
Connecticut: 1831, Kinne v. Kinne, 9 Conn. 103;
Idaho: 1895, State v. Hurst, 4 Ida. 345, 39 Pac. 554; 1897, State v. Larkins, 5 Ida. 200, 47 Pac. 945; 1897, Kelly v. Perrault, 5 Ida. 221, 48 Pac. 45 (attesting witness to a deed); 1903, State v. Shuff, 9 Ida. 115, 72 Pac. 664;
Illinois: 1897, Grand Lodge v. Wieting, 168 Ill. 408, 48 N. E. 59 (one who had a "passing acquaintance" only, held properly excluded); 1904, Chicago U. T. Co. v. Lawrence, 211 Ill. 373, 71 N. E. 1024 (certain witnesses held qualified on the facts); 1912, Martin v. Beatty, 254 Ill. 615, 98 N. E. 996 (largely left to trial Court's discretion); 1921, People v. Limberry, 298 Ill. 355, 131 N. E. 69 (murder);
Indiana: 1854, Kenworthy v. Williams, 5 Ind. 379 ("long acquaintance"); 1877, Sutherland v. Williams, 55 Ind. 349; 1881, Colee v. State, 75 Ind. 514 ("some knowledge of the acts and conduct of the person"); 1883, Sage v. State, 91 Ind. 143 ("an acquaintance with the person, or conversations, business dealings, or social intercourse with him"); 1884, Goodwin v. State, 95 Ind. 558 ("if the witness shows an acquaintance with the accused, if he has had conversation with him, or has had business dealings or social intercourse with him"); 1888, Johnson v. Culver, 116 Ind. 289, 19 N. E. 129

enabled the observer to form a belief or judgment thereupon. . . . It is admissible whether the opportunity for observation has been frequent or rare, . . . the weight of which must depend upon a consideration of all the circumstances under which it was formed."

1854, GOLDTHWAITE, J., in *Powell* v. *State*, 25 Ala. 27: "In every case where this question arises, the character of the insanity is a matter of no small importance in determining correctly as to the admissibility of the opinions of witnesses. If the evidence tended to es-

(need not be "extensive or intimate"; enough if it be "such as to enable the witnesses to form an opinion"); 1888, Grubb *v.* State, 117 Ind. 282, 20 N. E. 257, 725 (admitted, where witness talked 10 or 15 minutes with the defendant);
Iowa: 1875, State *v.* Stickley, 41 Ia. 237 (knowledge long previous; excluded); 1875, State *v.* Geddis, 42 Ia. 268; 1887, Re Norman's Will, 72 Ia. 86, 33 N. W. 374; 1888, Blake *v.* Rourke, 74 Ia. 523, 38 N. W. 392 (distinguishing knowledge long before from past knowledge at a past time in issue); 1896, Fenton's Will, 97 Ia. 192, 66 N. W. 99 (a stenographer who had taken the testator's deposition, occupying two hours, admitted); 1902, Hull's Will, 117 Ia. 738, 89 N. W. 979; 1904, Stutsman *v.* Sharpless, 125 Ia. 335, 101 N. W. 105;
Kansas: 1898, State *v.* Beuerman, 59 Kan. 586, 53 Pac. 874 ("a fair basis for an opinion"); 1906, Kempf *v.* Koppa, 74 Kan. 153, 85 Pac. 806; 1909, State *v.* Rumble, 81 Kan. 16, 105 Pac. 1 (no general rule);
Kentucky: 1904, Irvine *v.* Gibson, 117 Ky. 306, 77 S. W. 1106; 1922, Feree *v.* Com., 193 Ky. 347, 236 S. W. 246 (murder);
Louisiana: 1904, State *v.* Lyons, 113 La. 959, 37 So. 890 (there must be an adequate opportunity of observation);
Maine: 1885, Fayett *v.* Chesterville, 77 Me. 33 (an expert examining once *ex parte*, rejected); 1895, Hall *v.* Perry, 87 Me. 567, 33 Atl. 160;
Maryland: 1848, Brooke *v.* Townshend, 7 Gill 29; 1852, Steward *v.* Redditt, 3 Md. 78 ("facts of such a nature as will enable him to form a knowledge of the party's intellect"); 1872, Waters *v.* Waters, 35 Md. 542 ("an opportunity of forming a rational opinion"); 1895, Crockett *v.* Davis, 81 Md. 134, 31 Atl. 710; 1910, Grill *v.* O'Dell, 113 Md. 625, 77 Atl. 984;
Massachusetts: (owing to the exclusion of lay opinions, *post*, § 1938, the question is rarely presented in this State);
Michigan: 1893, O'Connor *v.* Madison, 98 Mich. 183, 188, 57 N. W. 105 (must have "the means of observation");
Mississippi: 1876, Russell *v.* State, 53 Miss. 379; 1881, Wood *v.* State, 58 Miss. 743 ("such acquaintance or such opportunities of observation as are likely to make his opinion valuable"); 1884, Reed *v.* State, 62 Miss. 408 ("who has had opportunities of knowing and observing the conversation, conduct, and manners of the person");
Missouri: 1862, Farrell's Adm'r *v.* Brennan's Adm'x, 32 Mo. 334 ("opportunities for knowing and observing the conversation, conduct, and manners of the person"); 1870, State *v.* Klinger, 46 Mo. 227; 1877, Moore *v.* Moore, 67 Mo. 195 ("adequate opportunity of observing and judging of his capacity"); 1882, Appleby *v.* Brock, 76 Mo. 318 ("adequate opportunity of observing and judging"); 1891, State *v.* Williamson, 106 Mo. 171, 17 S. W. 172;
Montana: Rev. C. 1921, § 10531, par. 10 (like Cal. C. C. P. § 1870); 1888, Terr. *v.* Hart, 7 Mont. 498 ("acquainted with the defendant and have observed his actions and manner of life"); 1889, Terr. *v.* Roberts, 9 Mont. 15, 22 Pac. 132; 1899, State *v.* Peel, 23 Mont. 358, 59 Pac. 169 (opinion must relate to time of witness' observation, not time of trial); 1907, State *v.* Penna, 35 Mont. 535, 90 Pac. 787 (trial Court's discretion controls; but here two reporters who had interviewed the party for half an hour only were held not qualified); 1911, State *v.* Leakey, 44 Mont. 354, 120 Pac. 234; 1921, State *v.* Davis, 60 Mont. 426, 199 Pac. 421 (Rev. C. § 7887 applied);
Nebraska: 1893, Shults *v.* State, 37 Nebr. 481, 496, 55 N. W. 1080 (must be "of an intimate character and his associations of sufficient duration to justify him in forming a correct judgment"); 1895, Pflueger *v.* State, 46 Nebr. 493, 64 N. W. 1094; 1902, Clarke *v.* Irwin, 63 Nebr. 539, 88 N. W. 783; 1912, Larson *v.* State, 92 Nebr. 24, 137 N. W. 894 (a bizarre opinion; Rose, J., diss., and Letton and Fawcett, JJ., declining to join in the reasoning);
Nevada: 1889, State *v.* Lewis, 20 Nev. 347, 22 Pac. 241 (largely in discretion of trial judge);
New Hampshire: (see the citations under § 1938, *post;* they are complicated by the peculiar history of the Opinion rule in this State);
New York: 1901, People *v.* Krist, 168 N. Y. 19, 60 N. E. 1057 (physician allowed to state his opinion as based on defendant's acts at the very time of the homicide); in this State the question rarely arises, owing to the exclusion of lay opinions (*post*, § 1938);
North Carolina: 1863, McDougald *v.* McLean, Winst. 120 ("opportunities of knowing and observing"); 1918, Stock's Will, 175 N. C. 224, 95 S. E. 360 (testator); and other cases under § 1938, *post;*
Oregon: Laws 1920, § 727, par. 10 (like Cal. C. C. P. § 1870); 1897, State *v.* Feister, 32 Or. 254, 50 Pac. 561 (a deputy sheriff who had the defendant in charge four months, admitted); 1911, State *v.* Hassing, 60 Or. 81, 118 Pac. 195 (like State *v.* Feister);
Pennsylvania: 1861, Bricker *v.* Lightner's Ex'r, 40 Pa. 205 ("opportunities for observing the conduct of the party and the developments of the intellectual faculties"); 1893,

tablish that the prisoner, from mental imbecility, was incapable of distinguishing between right and wrong, or that his case was one of general insanity, by which we mean madness on all subjects, it is obvious that it would not require the same degree of observation to discover the existence of the disease under such circumstances as in cases of monomania or partial derangement, where the particular delusion might frequently escape the attention of the most acute observer or the most intimate association. . . . It is impossible to lay down any precise rule as to the length or character of acquaintance which would render the opinion of a witness admissible on this question. All we can say is that the circumstances must be such as to have afforded the opportunity to form an accurate judgment as to the existence or the non-existence of the disease considered with reference to the character or degree in which it is alleged to exist."

1860, LUMPKIN, J., in *Choice* v. *State*, 31 Ga. 467: "It has been truly remarked that so different are the powers and habits of observation in different persons that no general rule can be laid down as to what shall be deemed a sufficient opportunity of observation, other than that in fact it has enabled the observer to form a belief or judgment thereon."

1864, CAMPBELL, J., in *Beaubien* v. *Cicotte*, 12 Mich. 503: "From the nature of things no rule can be laid down declaring what amount of acquaintance or what opportunities are necessary to enable an observer to become a witness. There are cases of insanity open to the slightest scrutiny, while others defy the keenest search. But no testimony can be of any real value unless it appears the witness had adequate means and opportunities for forming some conclusion."

1892, TEMPLE, C., in *Carpenter's Estate*, 94 Cal. 414, 29 Pac. 1101 (commenting on the Code restriction to "intimate acquaintances"): "The witnesses are [at common law] only required to have had sufficient opportunity to observe the person whose sanity is in question. Different rulings have been made as to what shall be considered a sufficient showing of opportunity of observation to enable a witness to form an opinion which can be received as evidence; or, expressed in the language of our Code, what degree of intimacy there must be. In general, the idea seems to be that no rule can be prescribed on this subject. . . . Now, when we take into consideration the rule as it exists in most jurisdictions where the common law prevails, we must conclude that our Code has attempted what has been said to be impracticable, — to establish a rule as to what opportunities of observation shall entitle a witness to speak. . . . Since it requires the drawing of a definite line between things which are separated only by degrees of difference, the rule is and must remain more or less indefinite. A very large discretion must be conceded to the trial Court."

There is one class of witnesses who, by long tradition, have been received to testify to mental capacity and may speak without being qualified in the foregoing manner, namely, *persons attesting a will as witnesses*.[3] Long before

Com. *v.* Buccieri, 153 Pa. 535, 549, 26 Atl. 228 (one who had seen insane; indications months before, but had not seen the defendant for some time, not allowed to speak as to his condition at the time charged); 1899, Com. *v.* Brown, 193 Pa. 507, 44 Atl. 497;
Philippine Isl. C. C. P. 1901, § 298, par. 10 (like Cal. C. C. P. § 1870);
Tennessee: 1907, Atkins *v.* State, 119 Tenn. 458, 105 S. W. 353;
Texas: 1874, Thomas *v.* State, 48 Tex. 65 (acquaintance enabling witness "to form correct opinions of his mental condition") Holcomb *v.* State, 41 Tex. 125 ("good opportunities of forming an opinion");
Utah: 1917, Hansen's Will, 50 Utah 207, 167 Pac. 256;
Vermont: 1918, Martin's Will, 92 Vt. 362, 104 Atl. 100 (trained nurse, an attendant for a month, admitted); 1921, Re Wood's Will, — Vt. —, 115 Atl. 231 (witnesses who saw testator once only, admitted, in trial Court's discretion);
Washington: 1918, Rust *v.* Washington T. & H. Co., 101 Wash. 552, 172 Pac. 846;
Wisconsin: 1875, Boorman *v.* Relief Ass., 90 Wis. 144, 62 N. W. 924 (excluded, where the witness' only grounds were that the person had once become angry with him for supposed misconduct).

[3] 1683, Hudson's Case, Skinner 79; 1884, McCurry *v.* Hooper, 12 Ala. 827; 1918, Miller *v.* Whittington, 202 Ala. 406, 80 So. 499. Cal. C. C. P. 1872, § 1870, par. 10 ("the opin-

any tests for the general subject were devised, these persons were received, and the tradition seems everywhere to have kept its place, in spite of the change of theory of attestation (*post*, § 1288) and of the probable incompetency of a will-witness under modern tests:

1794, *Heyward* v. *Hazard*, Bay 349; *Per Curiam*: "The third requisite is the attestation. The true construction of the law under this head has always been that the act called the attention of the witnesses to the situation of the testator himself, and this particularly relates to his sanity. . . . The business, then, of the persons required by statute to be present at executing a will is not barely to attest the corporal act of signing, but to try, judge, and determine whether the testator is 'compos' to sign."

2. Foreign Law

§ 690. **Knowledge of Foreign Law as based on Study alone.** (1) It ought not to be doubted to-day that, so far as a knowledge of our *domestic system of law* is concerned, it may be adequately gained from a study of the printed sources alone, without any practice whatever in the conduct of litigation. "Two things are established," says Professor Langdell, in a passage of classical value,[1] "first, that the law is a science; secondly, that all the available materials of that science are contained in printed books." From the point of view, then, either of that skill which is required to make an estimate of the state of the law, or of that observation of data which is the necessary foundation of knowledge, practice at the forum is not indispensable:[2]

ion of a subscribing witness to a writing" respecting the signer's "mental sanity", is admissible); 1849, Potts *v.* House, 6 Ga. 335; 1897, Kelly *v.* Perrault, 5 Ida. 221, 48 Pac. 45; 1854, Kenworthy *v.* Williams, 5 Ind. 379, *semble;* 1843, Hunt's Heirs *v.* Hunt, 3 B. Monr. Ky. 577, *semble;* 1831, Ware *v.* Ware, 8, Me. 55; 1852, Cilley *v.* Cilley, 34 Me. 163 (when the facts observed are also given); 1890, Williams *v.* Spencer, 150 Mass. 349, 23 N. E. 105 (but relates to time of attestation only); 1917, Holbrook *v.* Seagrave, 228 Mass. 26, 116 N. E. 889 (opinion formed subsequent to time of will's execution, excluded); 1864, Beaubien *v.* Cicotte, 12 Mich. 495, per Campbell, J.; 1859, Carlton *v.* Carlton, 40 N. H. 17, *semble;* 1866, Boardman *v.* Woodman, 47 id. 134; 1853, DeWitt *v.* Barley, 9 N. Y. 381, per Mason, J.; 1863, McDougald *v.* McLean, Winst. N. C. 120; 1884, Barker *v.* Pope, 91 N. C. 168, P. R. Rev. St. & C. 1911, § 1403, par. 8 (like Cal. C. C. P. § 1870, par. 10); 1835, Gibson *v.* Gibson, 9 Yerg. Tenn. 331; 1877, Garrison *v.* Blanton, 48 Tex 303; 1918, Swan's Estate, 51 Utah 410, 170 Pac. 452; 1877, Jarrett *v.* Jarrett, 11 W. Va. 584, 626; 1882, Nicholas *v.* Kershner, 20 W. Va. 255; 1888, Kerr *v.* Lunsford, 31 W. Va. 680, 8 S. E. 493.

Compare also the cases cited *post*, § 1511 (attestation as implying a statement of sanity).

See further the citations under § 1936, *post*, dealing with that detail of the Opinion rule, which in some jurisdictions receives the will-witness' opinion without calling for his reasons.

Note that a witness may not be qualified to express an opinion on general sanity; but may yet have observed *particular occasions or transactions*, and therefore may of course (if otherwise admitted under the Opinion rule) characterize them as rational or not: 1886, People *v.* Lavelle, 71 Cal. 352, 12 Pac. 226; 1892, Carpenter's Estate, 94 Cal. 414, 29 Pac. 1101.

§ 690. [1] Proceedings at the 250th Anniversary of the Founding of Harvard University, 1886, p. 85. "To put an end to reports," said Edmund Burke, on a great occasion, "is to put an end to the law of England" (31 Parl. Hist. 311).

[2] *Accord:* Brailey *v.* Rhodesia Consolidated [1910], 2 Ch. 95, 102 (lecturer on Roman-Dutch law in London, admitted to testify on the law of Rhodesia, though "he is not actually practising in Rhodesia").

Contra: 1831, Tindal, C. J., in Collier *v.* Simpson, 5 C. & P. 74, *semble;* 1845, Lord Langdale, M. R., in Nelson *v.* Bridport, 8 Beav. 539, *semble.*

1844, COLERIDGE, J., in *Baron de Bode's Case*, 8 Q. B. 263: "I take it nobody can doubt that a lawyer who, without ever having held a brief or practiced out of his chambers, had acquired all his knowledge by reading, would be as competent to give evidence respecting the state of the English law as if he had been engaged in the most extensive practice. . . . It is, I think, conceded that though the witness should state that all his knowledge is derived from reading a particular book or a particular decision, he still might give us the result of all his knowledge of the state of the unwritten law."

(2) But the case may be different in testing one's acquaintance with a *foreign* law. From the point of view of the principle of Knowledge, to be sure, little difficulty arises; for the fact that a consideration of text-writers' hearsay enters in part into a study of legal sources is no objection to a knowledge thus founded, since these very opinions go in part to make up the general consensus of interpretation which constitutes a portion of all law. From the point of view of Expert Capacity, however (*ante*, § 564), it may well be argued that residence, and perhaps practice, in the foreign country is essential to an ability to discriminate between the values of different sources and the standing of different authorities. It may even be argued that a Knowledge of recent possible changes is not to be expected of those who do not by practice or residence have an interest or an opportunity to keep up regularly with such changes. These considerations would hardly apply to the law of a country where the foreign system was germane in its general features to the domestic one — as that of England is to that of the United States — where skill in the domestic forum would equally equip for an examination of the foreign sources. But for a system foreign in essence as well as in name some such requirements as the above might occasionally be demanded; much being left to the discretion of the trial judge. The decisions reflect, in their conflict, the necessity for some such latitude of rule.[3] On the whole, the English courts have been more strict in this respect than the courts of this country:

[3] *England:* 1852, R. *v.* Povey, 6 Cox Cr. 83 (bigamy; to prove a valid first marriage, the woman's sister, who was present at the ceremony in Scotland, was offered to testify that "parties were always married in Scotland" in the form seen by her; excluded; "it may not be necessary in all cases to have a professional person to tell us what the foreign law is"; but "the witness does not profess to know the law"; this ruling well illustrates the distinction between the present principle and that of § 564, *ante*); 1875, *Re* Bonelli's Goods, L. R. 1 P. D. 69 (an English lawyer who had studied Italian law in England, rejected); 1878, Cartwright *v.* Cartwright, 26 W. R. 864, Hannen, P. (an English barrister practising before the Privy Council, held not a competent expert as to the law of those dependencies whence appeals are heard in the Council; this is unsound); 1880, Goods of Dost Aly Khan, L. R. 6 P. D. 6 (Persian minister plenipotentiary, admitted to testify to Persian law, having stated that "all persons in the diplomatic service of Persia are required to be thoroughly versed in the law, and that therefore he had studied and become acquainted with it").

Canada: 1916, Re Goodman, 28 D. L. R. 197, 29 id. 725, Man. (extradition for defrauding creditors; attorney admitted to practice in Massachusetts and in the U. S. District Court for Massachusetts, received);

United States: 1901, Barber *v.* International Co., 73 Conn. 587, 48 Atl. 758 (American lawyer who had spent six months in England, held qualified on the facts); 1903, De Sonora *v.* Bankers' M. C. Co., — Ia. —, 95 N. W. 232 (an attorney held on the facts not qualified to testify to the law of Mexico); 1874, Consolidated Ins. Co. *v.* Cashow, 41 Md. 79 (a lawyer residing, but not shown to be practising, in the foreign State, held qualified); 1891, People *v.* McQuaid, 85 Mich. 123, 125, 48 N. W. 161 (to prove that a certain edition of Pennsylvania statutes was there commonly used as correct, a clergyman was admitted who had consulted the statutes of that State in performing his duty for marriage ceremonies and had observed the use of that edition in the courts); 1868, Hall *v.* Costello, 48 N. H. 179

1850, *Bristow* v. *Sequeville*, 5 Exch. 275; the witness to the law of Cologne, in Prussia, had studied law at the University of Leipsic, in Saxony. *Counsel*: "Whether that knowledge was acquired by study or practice is only a ground for observation on the value of his evidence." ALDERSON, B: "If a man who has studied law in Saxony, and never practised in Prussia, is a competent witness to prove the law of Prussia, why may not a Frenchman, who has read books relating to Chinese law, prove what the law of China is? Would a person who had never been in England, but had studied the law of England at a foreign university, be competent to prove what the law of England is?"

Distinguish here certain other questions concerning foreign law: (1) Whether the witness is sufficiently *skilled as a lawyer* (*ante*, § 564); (2) where a foreign *statute* must be proved by *copy* (*post*, § 1271); (3) whether *printed copies* of a statute (*post*, § 1684), or *legal treatises* (*post*, § 1697), or *reports of decisions* (*post*, § 1703), may be used; and (4) whether the *Opinion rule* interposes any obstacle (*post*, § 1953).

3. Reputation (of Character)

§ 691. **Witness must expressly appear Qualified.** When the character of a party or of a witness is to be evidenced by reputation (*post*, § 1608), the reputation must itself be proved by a witness qualified by an opportunity to obtain knowledge of it. The first rule here consists in an application of the general principle (*ante*, § 654) that a witness must *expressly appear to have had the means of knowledge*, before his testimony can proceed:[1]

(New Hampshire lawyers, who as counsel had had special interest and opportunity, admitted with reference to a topic of Canadian law); 1905, Massucco *v.* Tomassi, 78 Vt. 188, 62 Atl. 57 (an Italian priest, allowed to testify that a religious ceremony alone was not valid in Italy).

§ 691. [1] *Accord: Federal:* 1859, Teese *v.* Huntington, 23 How. 2, 13; *Ala.* 1898, McClellan *v.* State, 117 Ala. 140, 23 So. 653 ("ordinarily" the witness' means of knowledge will not be inquired into, if he says that he knows); *Ga.* 1907, Moore *v.* Dozier, 128 Ga. 90, 57 S. E. 110 (testimony based merely on hearing witnesses at a former trial, excluded); *Ill.* 1859, Crabtree *v.* Kile, 21 Ill. 183; 1861, Crabtree *v.* Hagenbaugh, 25 Ill. 233, 238; 1887, Spies *v.* People, 122 Ill. 1, 208, 12 N. E. 865; *La.* 1906, State *v.* Rester, 116 La. 985, 41 So. 231; *Md.* 1919, Sappington *v.* Fairfax, 135 Md. 186, 108 Atl. 575; *Mass.* 1883, Com. *v.* Rogers, 136 Mass. 158 (the judge may inquire whether the witness has any knowledge, but not into its means or extent); *Miss.* 1884, Pickens *v.* State, 61 Miss. 563, 566; 1885, French *v.* Sale, 63 Miss. 386, 393 (in effect disposing of the contrary dictum in Powers *v.* Presgroves, 38 id. 227, 242); *N. Y.* 1895, Carlson *v.* Winterson, 147 N. Y. 652, 42 N. E. 347; *N. Car.* 1829, State *v.* Boswell, 2 Dev. 210; 1843, State *v.* O'Neale, 4 Ired. 88 ("the regular mode is to inquire whether they have the means of knowing the general character"); 1843, State *v.* Parks, 3 Ired. 296 (the witness must profess to know the general reputation before testifying); 1873, State *v.* Speight, 69 N. C. 72, 75 ("whether he knew the general character of the witness, and the means by which he had acquired that knowledge", must be asked); 1894, State *v.* Coley, 114 N. C. 879, 883, 19 S. E. 705.

The following case is apparently no longer law: 1849, Bates *v.* Barber, 4 Cush. Mass. 107 (making the strange statement that "there is no question of competency for the Court to settle, in regard to the knowledge of witnesses . . . to reputation for truth and veracity").

On this subject compare the principle admitting *good* reputation when it consists in *not having heard anything against* the person (*post*, § 1614). It is sometimes sought to strike out the testimony of such a witness when on cross-examination he states that he has heard nothing against the person. Such an objection is erroneous, both on the present principle and on that of § 1614, *post*. Therefore the following case is without support in principle or policy: 1922, People *v.* Willy, 301 Ill. 307, 133 N. E. 859 (murder; the prosecution's witnesses in rebuttal testified to defendant's bad character, but on cross-examination admitted that they had heard nothing about him for 20 years past; held, that since the testimony was not properly qualified, it should have been struck out on motion; unsound; the time for the defendant's objection to the witness' qualification was at the opening of the direct examination). *Con-*

1870, MORTON, J., in *Wetherbee* v. *Norris*, 103 Mass. 566: "The ruling of the presiding judge that each of the witnesses called to impeach the plaintiff should be first asked the question, 'Do you know the reputation of the plaintiff for truth and veracity?' is not the subject of exceptions. The practice upon this subject differs in different courts. In this State no practice is established as a rule of law; but it is within the discretion of the presiding judge to require the preliminary question above stated to be asked of each witness, if he shall deem that the interests of justice require it. The same principle is applicable to the examination of witnesses upon other subjects. . . . If the presiding judge sees that there is danger that the witness, in answer to the usual question, 'What is his general reputation for truth and veracity?', may give incompetent testimony", he may require the preliminary question; but this rests in his discretion.

§ 692. **Knowledge must be based on Residence in the Place of Repute, not on mere Inquiry.** The admissible reputation is that which is built up in the neighborhood of a man's domicile or in the circle where his livelihood is followed (*post*, § 1615); and it is of slow formation. It is the sum of all that is said or not said for or against him. Consequently, its tenor can be adequately learned only by a residence in the place, not by a mere visit of inquiry, or by a casual sojourn, or by a conversation with a resident who reports the reputation:[1]

1802, KENYON, L. C. J., in *Mawsom* v. *Hartsink*, 4 Esp. 102 (rejecting the question, "Whether the witness in consequence of a trial had made particular inquiries as to the witness' general character?"): "That cannot be evidence. . . . If this was allowed, when it was known that a witness was likely to be called, it would be possible for the opposite party to send round to persons who had prejudices against him and from thence to form an opinion, which was afterwards to be told in court to destroy his credit."

1829, MARCY, J., in *Douglass* v. *Tousey*, 2 Wend. 354: "As a general rule, there is much reason to fear that this method [of ascertaining reputation] would prove a very unsafe one. The general character is the estimation in which a person is held in the community where he has resided, and ordinarily the members of that community are the only proper witnesses to testify as to such character. It would be unsafe to depend upon the testimony of the defendant's agent sent into that community, an entire stranger, it may be, to collect information to subserve the defendant's views in the suit. Such witness would not speak of his knowledge of the plaintiff's character, or give his own opinion in relation thereto, but barely state his conclusion upon the information received from others."

How long this residence must have been, or how near to the place of domicile or occupation, cannot be defined by fixed rule. The qualification has varied according to circumstances;[2] and it should be left entirely to the trial Court.

Contra to the foregoing: 1918, State v. Hooker, 99 Wash. 661, 170 Pac. 374 ("any lack of knowledge of the reputation assailed shown on cross-examination went to the credibility . . . rather than to its competency").

§ **692.** [1] *Accord:* 1907, Tingley v. Time M. Co., 151 Cal. 1, 89 Pac. 1097 (a witness from Arkansas who went to Newburyport, Mass., and stayed a few days to make the inquiries, excluded); 1920, People v. Burch, — Cal. App. —, 189 Pac. 716 (injunction under the red-light abatement law; testimony to bad repute of a house must come from residents of the community, not visiting agents of a law enforcement league); 1864, Reid v. Reid, 17 N. J. Eq. 101 (like the above cases); 1817, Kimmel v. Kimmel, 3 S. & R. Pa. 336 ("the witness shall not be permitted to say 'he was told' that the person had either a good or bad character in his own neighborhood; but that is a very different thing from knowledge of common report acquired, as in this case, from common report itself");

Contra: 181, Foulkes v. Sellway, 2 Esp. 236 (where the witness went to the place where the person in question lived, to inquire into her reputation).

[2] *Federal:* 1912, Young v. Corrigan, D. C.

4. Handwriting

§ 693. **General Question defined; Identifying an Illiterate's Mark.** The identification of handwriting as genuine involves the double testimonial knowledge already spoken of (*ante*, § 653), — an acquaintance by the witness with the type of handwriting in question, and an observation of the disputed specimen, the witness comparing the two in his mind and stating whether the latter is to be regarded as genuinely an instance of the type in question. How to evidence the type of handwriting circumstantially — *i.e.* by individual specimens — is a different matter, dealt with elsewhere (*ante*, § 383, *post*, §§ 2001, 2016). The inquiry here concerns the mode of proving it by testimonial evidence, *i.e.* by a witness who declares that he is acquainted with the type of handwriting in question.

To satisfy this situation the witness (1) must *observe the specimen in dispute;* this we may assume he will do;[1] and (2) must bring to this examination a *knowledge of the type of writing* with which it is desired to affirm or deny a connection. It is the adequacy of this knowledge which is here to be examined.

N. D. Ohio, 208 Fed. 43 (detective employed to inquire into reputation, excluded, citing the text above); *Alabama:* 1846, Sorrelle *v.* Craig, 9 Ala. 536, 540 (one who lived 20 miles away, and was ignorant of the other witness' neighborhood-reputation, excluded); 1848, Hadjo *v.* Gooden, 13 Ala. 720, 722 (one who lived 12 miles away, but claimed to know the opinion in the witness' neighborhood, admitted); 1853, Dove *v.* State, 22 Ala. 23, 39 (excluded, because knowledge not shown); 1854, Elam *v.* State, 25 Ala. 53 (knowledge may appear on examination, as well as beforehand); 1859, Dupree *v.* State, 33 Ala. 388 (persons living more than 20 miles away, admitted); 1889, Holmes *v.* State, 88 Ala. 29, 7 So. 193 (excluded, on the facts); 1896, Buchanan *v.* State, 109 Ala. 7, 19 So. 410 (witness living 25 miles away, excluded); *Indiana:* 1904, South Bend *v.* Turner, 163 Ind. 194, 71 N. E. 657 (a witness who has heard only one person speak to the repute of another, and does not know the latter personally, is not qualified); *Louisiana:* 1896, State *v.* Fontenot, 48 La. An. 305, 19 So. 111 (witnesses not residing in the neighborhood for 11 and for 7 years, rejected); *Massachusetts:* 1866, Com. *v.* Lawler, 12 All. 585 (after the impeaching witness had admitted that he had not, as to the other witness' reputation, "heard it talked of a great deal", further questions as to the reputation were excluded); *Michigan:* 1883, Bathrick *v.* Post & Tribune Co., 50 Mich. 642, 16 N. W. 172; *Missouri:* 1899, State *v.* McLaughlin, 149 Mo. 19, 50 S. W. 315 (resident of town 5 miles distant, admitted); 1900, State *v.* Hudspeth, 159 Mo. 178, 60 S. W. 136 (one not living in the neighborhood, nor having an opportunity to learn of the reputation there, excluded); 1901, State *v.* Haines, 161 Mo. 555, 61 S. W. 621 (witness from another State, excluded on the facts); *New Hampshire:* 1860, Kelley *v.* Proctor, 41 N. H. 139 ("whether he is acquainted with the reputation of the former witness for truth or has the means of knowing the former witness' general character for truth"); *New Jersey:* 1916, State *v.* Bloom, 89 N. J. 418, 99 Atl. 125 (residence in the same neighborhood suffices); *South Carolina:* 1892, State *v.* Turner, 36 S. C. 539, 15 S. E. 602; *Texas:* 1879, Johnson *v.* Brown, 51 Tex. 65, 77; *Wisconsin:* 1879, Dufresne *v.* Weise, 46 Wis. 290, 297, 1 N. W. 59 (not clear); 1883, Wallis *v.* White, 58 Wis. 26, 29, 15 N. W. 767 (one residing in the same city, but not the same ward, admitted).

But *personal acquaintance* with the *one bearing the reputation* is not necessary; 1817, Kimmel *v.* Kimmel, 3 S. & R. Pa. 336; 1918, Com. *v.* Principatti, 260 Pa. 587, 104 Atl. 53. *Contra:* South Bend *v.* Turner, Ind., *supra, semble.* Compare (1898) Peeples *v.* State, 103 Ga. 629, 29 S. E. 691 (inquiries as to the length of acquaintance with the person, etc. held proper).

The question where the *reputation* itself must prevail is a different one (*post*, § 1615).

§ **693.** [1] For the authorities on the question whether a witness to handwriting may testify to a *lost disputed document* or whether a *deponent* must have the *document shown to him* at the time of taking the deposition, see *post*, § 1185.

Invaluable observations on all aspects of this subject will be found in the works of Albert S. Osborn: Questioned Documents: a Study of Questioned Documents, with an Outline of Methods by which the Facts may be Discovered and Shown (Rochester, N. Y., 1910); The Problem of Proof (N. Y., 1922).

When may the witness properly claim that his *opportunities of observation* have been such as to give him a *fair knowledge of the general type or character of the person's hand?* That this is the question has always been clearly recognized by the Courts:[2]

1816, DALLAS, J., in Holt N. P. 421: "What are the materials of judgment to which a witness has recourse when he says that he believes a particular signature to be the handwriting of a particular person? He has seen the person write, and he is presumed to have formed a standard in his mind, and with that standard to compare the writing in question. This standard will be more or less perfect according as the instances have been more or less frequent."

1839, BRONSON, J., in *Cunningham* v. *Bank*, 21 Wend. 558: "A witness must in some way have acquired a knowledge of the general character of the party's handwriting before he can be qualified to testify on that subject."

1840, GASTON, J., in *Pope* v. *Askew*, 1 Ired. 16, 20: "The testimony now received is that of the belief of a witness as to the identity of character between the writing in question and the exemplar of the party's handwriting in the mind of the witness, which exemplar has been formed upon previous sufficient means of observation. The enquiry is, What does the law hold to be those adequate and sufficient means of observation?"

What, then, are the various recognized modes of obtaining knowledge? It must be understood that this does not involve the testimony of one who saw the very disputed document being written. Such a witness makes no comparison; he saw the act of writing, as he might have seen the act of ploughing a field; and he needs no knowledge of the general character of the writer's hand. Excluding this kind of testimony, then, the various possible modes are three: (*A*) Knowledge obtained by *seeing the person write* some *other documents or signatures*, — indicated by the phrase 'ex visu scriptionis'; (*B*) Knowledge obtained by seeing *documents otherwise known to have been written* by the person in question, — indicated by the phrase 'ex scriptis olim visis'; (*C*) Knowledge obtained by an *examination*, in or out of court, for the *express purpose of obtaining such knowledge*, of *documents said to have been written* by the person in question, — indicated by the phrase 'ex comparatione scriptorum' or 'ex scripto nunc viso.' Within one or the other of these modes must fall any source of knowledge.

In each of these modes *two elements* are involved, giving rise to different difficulties and different rules. The witness who says that he has, in one way or another, learned the character of the person's writing by the observation of specimens of it necessarily predicates two things, — (1) first, that certain specimens of handwriting were considered by him, and (2) secondly, that they were genuinely written by the person in question. The second of these circumstances is as essential as the first; and, under each mode of knowledge, it is to be considered whether both are present.

Before taking up in order the three modes of acquiring knowledge, it may be noted that (on the principle of § 654, *ante*), the witness must, before pro-

[2] The following opinions also expound the principle: 1852, Brayton, J., in Kinney v. Flynn, 2 R. I. 319, 326; 1872, Boyden, J., in State v. Woodruff, 67 N. C. 90.

ceeding with his testimony, *expressly appear* to have had the means of knowledge;[3] for the possession of it is not presumed beforehand.

It may also be noted that the question has occasionally been raised whether one can testify at all from the present basis to the genuineness of a *marksman's mark* — *i.e.* whether there is any constancy of peculiarity in the mark of an illiterate which can serve as a type or standard. There should be no hard-and-fast rule; the discretion of the trial Court should control.[4]

A. *Ex Visu Scriptionis* (*Seeing the Person Write*)

§ 694. **Number of Times.** Whether one could obtain a sufficient notion of the general character of a person's hand by seeing him write once only might well have been doubted. Tradition, however, has handed down a fixed rule that *seeing the person write once only* is as a matter of law sufficient:[1]

[3] 1893, Richardson *v.* Stringfellow, 100 Ala. 416, 419, 14 So. 283 (omission of preliminary question later cured); 1892, Riggs *v.* Powell, 142 Ill. 453, 456, 32 N. E. 482 (he need not say "in so many words" that he knows it, if he shows knowledge); 1893, State *v.* Minton, 116 Mo. 605, 614, 22 S. W. 808 (that he is acquainted with the hand is sufficient); 1895, State *v.* Harvey, 131 Mo. 339, 32 S. W. 1110; 1916, McGilora *v.* Minneapolis St. P. S. S. M. R. Co., 35 N. D. 275, 159 N. W. 854 (that he knows the signature, may suffice).

In Georgia, however, it would seem that the statute, literally construed, dispenses with any prior inquiry into the witness' means of knowledge: Ga. Code 1910, § 5835, P. C. 1910, § 1042 ("any witness is competent to testify as to his belief who will swear that he knows or would recognize the handwriting. The source of his knowledge is a question for investigation, and goes entirely to the credit and weight of his evidence").

[4] Such testimony seems generally to have been treated as allowable: *Eng.* 1830, George *v.* Surrey, M. & M. 516 (here the mark was an habitual one, and had a certain peculiarity); 1848, Sayer *v.* Glossop, 12 Jur. 464; 1849, Pearey *v.* Dicker, 13 id. 997; *U. S.* 1850, Strong *v.* Brewer, 17 Ala. 706, 710 (good opinion by Dargan, C. J.); 1904, Ballow *v.* Collins, 139 Ala. 543, 36 So. 712 (an illiterate mortgagor may identify his own mark, but perhaps not the attestation of the witness thereto; but here the execution was held not sufficiently proved, because it appeared that the illiterate mortgagor was not actually testifying from a knowledge of the peculiarity of his mark, but from having been told by C. that this was the mortgage he signed); 1910, Ausmus *v.* People, 47 Colo. 167, 107 Pac. 204; 1895, Little *v.* Rogers, 99 Ga. 95, 24 S. E. 856; 1809, Jackson *v.* Van Dusen, 5 Johns. N. Y. 155 (here there were two initials as a mark); 1897, State *v.* Tice, 30 Or. 457, 48 Pac. 367; 1868, Carson's Appeal, 59 Pa. 493, 498, 503 (will); 1842, Fogg *v.* Dennis, 3 Humph. Tenn. 47 *semble.*

Contra: 1850, Carrier *v.* Hampton, 11 Ired. N. C. 307, 311 ("Generally, a mark, a mere cross, cannot be identified"); 1807, Engles *v.* Bruington, 4 Yeates Pa. 345, 346, *obiter;* 1851, Shinkle *v.* Crock, 17 Pa. 159, 161 (inadmissible, where the mark has no peculiarity; yet here a witness who said that it had was excluded).

§ 694. [1] *Accord: England:* 1801, Garrells *v.* Alexander, 4 Esp. 37, Kenyon, L. C. J.; 1817, Powell *v.* Ford, 2 Stark. 164; 1838, Willman *v.* Worrall, 8 C. & P. 381; 1836, Williams, J., and Patteson, J., in Doe *v.* Suckermore, 5 A. & E. 719, 730; 1839, Warren *v.* Anderson, 8 Scott 384 (with other circumstances); 1806, Evans' Pothier, ii, 160 ("I have known the admission of this evidence carried so far as for an attorney, after the failure of other attempts, to stand up and swear to a knowledge of the writing of the opposite party from having once looked over his shoulder when writing a letter at an alehouse"); 1910, Derrick's Case, 5 Cr. App. 162.

Canada: 1899, Marcy *v.* Pierce, 4 N. W. Terr. 246.

United States: 1906, State *v.* Bond, 12 Ida. 424, 86 Pac. 43 (general principle approved); 1847, Woodford *v.* McClenahan, 9 Ill. 89, *semble;* 1873, Burdick *v.* Hunt, 43 Ind. 386, *semble;* 1905, Frank *v.* Berry, 128 Ia. 223, 103 N. W. 358, *semble*; 1910, Murphy *v.* Murphy, 146 Ia. 255, 125 N. W. 191 (a blind girl who before blindness had once seen an autograph 19 years before and then the disputed letter a year later when 13 years of age; the testimony held to be of little value); 1885, State *v.* Goodwin, 37 La. An. 713, 715; 1849, Smith *v.* Walton, 8 Gill Md. 82; Edelen *v.* Gough, 8 Gill Md. 91; 1850, Hoitt *v.* Moulton, 21 N. H. 590; 1852, Bowman *v.* Sanborn, 25 N. H. 110, *semble;* 1858, Burnham *v.* Ayer, 36 N. H. 184, *semble;* 1873, Hammond *v.*

1803, ELDON, L. C., in *Eagleton* v. *Kingston*, 8 Ves. 473: "You called a witness, and asked whether he had ever seen the party write. If he said he had, whether more or less frequently, if ever, that was enough. . . . You might call one who had not seen him write for twenty years, and if he said he believed it was the writing of the person, that evidence might go to the jury."

It is true that one may even now be deemed incompetent if, though he saw the act of writing done, he in fact formed no idea of its character;[2] that a tendency is perhaps growing to leave the matter to the discretion of the trial court;[3] and that judges have sometimes expressed dissatisfaction with a rule of such blind and unquestioning dogmatism. Nevertheless, the rule is a settled one.

§ 695. **Length of Time beforehand.** The accepted tradition is also that it makes no difference how long it was beforehand that the act of writing was observed:[1]

1836, WILLIAMS, J., in *Doe d. Mudd* v. *Suckermore*, 5 A. & E. 720: "Subject to the qualification of Lord Eldon [that there must have been formed some belief about the writing], which seems to be the criterion and to decide the question in each case, I am aware of no rule attempting to prescribe the quantity of knowledge which is requisite to enable a witness to speak to his belief; what degree of freshness and recency in the correspondence to admit, or what antiquity to exclude, may (as the reason of the thing would induce one to expect) in vain be looked for. To the jury it must go, in the language of Lord Eldon, from the highest to the lowest."

Here again, modern policy is ignored in the rigidity of a rule which makes no allowance for dimness of recollection; but it cannot be said that the judicial discretion is given, as it ought to be, any limits.

§ 696. **Quantity of Writing seen.** The quantity of writing that was seen is wholly immaterial.[1] It has even been conceded that one who testifies to

Varian, 54 N. Y. 400; 1906, State *v.* Freshwater, 30 Utah 442, 85 Pac. 447; 1896, Diggins' Estate, 68 Vt. 198, 34 Atl. 696; 1909, State *v.* Kent, 83 Vt. 28, 74 Atl. 389; 1872, Pepper *v.* Barnett, 22 Gratt. Va. 406.

The statement that seeing writing once is sufficient has been repeated 'obiter' again and again, and it would be unprofitable to record here each time.

[2] 1781, De la Motte's Trial, 21 How. St. Tr. 810, Buller, J., *semble;* 1849, Hopper *v.* Ashley, 15 Ala. 462; 1856, McNair *v.* Com., 26 Pa. 390 (seeing once only suffices, if an impression of the character of the writing was gained). The following ruling goes rather on the principle of § 570, *ante*, that an illiterate is not expert enough to testify to handwriting at all: 1895, People *v.* Corey, 148 N. Y. 476, 42 N. E. 1066, by a divided court (an illiterate person who had seen the defendant write once and could practically neither read nor write: the testimony rejected, on the principle that "before a witness should be permitted to testify to the handwriting of another, . . . he should have an intelligent acquaintance with the handwriting of the party, so that he can determine with a reasonable degree of certainty whether the writing offered is his genuine handwriting").

[3] 1889, Wilson *v.* Van Leer, 127 Pa. 377, 17 Atl. 1097.

§ 695. [1] *Accord:* 1803, Eagleton *v.* Kingston, 8 Ves. 475, Eldon, L. C. (quoted *ante*, § 694); 1910, Murphy *v.* Murphy, 146 Ia. 255, 125 N. W. 191 (cited *supra*, § 694, n.); 1917, O'Connor's Estate, 101 Nebr. 617, 164 N. W. 570 (one who had seen the person's signature "only twice, and this was 20 years or more before the trial", not improperly excluded in the trial Court's discretion); 1889, Wilson *v.* Van Leer, 127 Pa. 377, 17 Atl. 1097 (three times, very long before); 1901, Renshaw *v.* First National Bank, — Tenn. —, 63 S. W. 194 (one who saw the handwriting in 1857–60, admitted); 1896, Diggins' Estate, 68 Vt. 198, 34 Atl. 696 (once, 20 years before, admitted).

§ 696. [1] 1907, Rinker *v.* U. S., 151 Fed. 755, 760, C. C. A. (witness of "limited acquaintance" admitted); 1891, Gibson *v.* Trowbridge, 96 Ala. 357, 361, 11 So. 365 (one

the genuineness of a signature need only have seen the surname written.[2] But it ought to be remembered, by those Courts which have not ruled on the foregoing topics, that the unwise liberality of these rules is explainable by the history of the law (*post*, § 1991). It was the product of a time when this mode of knowledge was the only orthodox one, when even the second mode ('ex scriptis olim visis') was just obtaining acceptance, and when the third mode ('ex scripto nunc viso') was not recognized at all; so that the paucity of recognized modes of proof upon a subject so common and so important forced the judges to concede a looseness in applying the primary and orthodox mode. This laxity the Courts of to-day would do well to abandon, now that the stress of necessity does not exist.

§ 697. **Writing post litem motam; After-acquired Knowledge.** It is obvious that one who denies the genuineness of a writing which an opponent affirms, or 'vice versa', will be tempted to form his writing to suit his claim if he writes *after controversy* for the purpose of showing the type of his writing. It is true that one cannot vary his handwriting entirely at his pleasure; but it is safe, as a rule, to accept no testimony founded on such specimens;[1] though the matter should be left to the trial Court's discretion.[2] But no such objection attaches to specimens thus written at the *opponent's request*, for here the opponent in effect takes the risk of the hand being feigned, and waives the objection.[3] There is, moreover, no objection to testimony based on an act of *writing subsequent to the date of the disputed writing* (if no controversy had arisen);[4] the type of writing is always assumed to have been substantially the same, — an assumption forced, but practically necessary. So, too, the knowledge may be acquired *after the witness saw the disputed writing*, — a question which becomes important when the original is lost.[5]

who "saw considerable writing of E.", excluded); 1899, Marchall's Est., 126 Cal. 95. 58 Pac. 449 (knowledge of signature alone, sufficient); 1893, Salazar *v.* Taylor, 18 Colo. 538, 545, 33 Pac. 369 (bank clerk and attorney, who had often seen the party write his name, admitted); 1895, Kendall's Ex'r *v.* Collier, 97 Ky. 446, 30 S. W. 1002 (sufficient on the facts); 1895, Com. *v.* Hall, 164 Mass. 152, 41 N. E. 133 (sufficient on the facts); 1885, State *v.* Stair, 87 Mo. 273 (sufficient on the facts); 1902, State *v.* Hall, 16 S. D. 6, 91 N. W. 235 (sufficient on the facts); 1896, Poncin *v.* Furth, 15 Wash. 201, 46 Pac. 241 (sufficient on the facts).

[2] 1827, Lewis *v.* Sapio, Moo. & M. 39, Abbott, C. J.; 1849, Smith *v.* Walton, 8 Gill. Md. 83. *Contra*, 1817, Powell *v.* Ford, 2 Stark. 164, C. C. J. Ellenborough; 1917, Burden *v.* State, 147 Ga. 412, 94 S. E. 232 (murder; witness who had seen defendant "write one word sometime before the trial", not admitted to prove a signature).

§ **697.** [1] 1890, Dakota *v.* O'Hare, 1 N. D. 44, 44 N. W. 1003 (since trial begun); 1879, Reese *v.* Reese, 90 Pa. 93 (during trial).

[2] 1872, Thompson *v.* Bennett, 22 U. C. C. P. 393, 401 (testimony based on signatures written by the alleged makers in the witness' presence expressly to illustrate their handwriting, received, per Gwynne, J.); 1895, Tucker *v.* Hyatt, 148 Ind. 471, 42 N. E. 1047 (the mere fact not enough to exclude, if no abuse of Court's discretion appears).

[3] Compare the analogies of § 2009 and § 2018, *post*.

[4] 1852, Keith *v.* Lothrop, 10 Cush. Mass. 457; 1902, Ratliff *v.* Ratliff, 131 N. C. 425, 42 S. E. 887 (one who knew the hand after 1873, allowed to testify to the genuineness of a document of 1869).

[5] *Accord: Canada:* 1888, Vye *v.* Alexander, 28 N. Br. 89, 95, 117 (witness to the writing of a lost document may speak from knowledge of the type of handwriting acquired afterwards; "if he can carry down the mental impression . . . and apply it to the paper that is in question and then produced in court, why may he not reverse the process and apply his knowledge of a paper produced in court to the mental impression formed in his mind with regard to the first

§ 698. **Quality of Witness' Opinion.** The witness' belief as to the genuineness or non-genuineness of the disputed writing need not be a positive or unqualified one; it is enough if he "believes" or "thinks" it to be one or the other.[1] But his belief must be founded solely on the type of handwriting as known to him, — not on the person's moral character or other circumstances.[2]

B. *Ex Scriptis olim Visis (Seeing known Genuine Documents)*

§ 699. **General Principle.** The difficulties that arise for this mode of testimony are precisely the opposite of those arising under the preceding mode. There the second element of knowledge (*ante*, § 693) — namely, that the specimen seen was genuinely written by the person in question — gives no difficulty, because the very act of writing it was seen, and therefore the witness must necessarily know who wrote the specimen from which his knowledge of the type was gained. Here, on the other hand, the document has come to the observation of the witness without his seeing any person in the act of writing it. Hence the main source of controversy is the sufficiency of his grounds for believing that the person in question *was genuinely the writer*.

Taking up first, then, this element, of his grounds of knowledge of the type, the simple question is: Has the witness adequate grounds for believing that the writing he observed was that of the person in question? That this is the real inquiry, and that in this mode of testimony, as distinguished from the preceding one, it is the peculiarly necessary one, has been clearly expounded in an early Virginia decision:

1829, COALTER, J., in *Rowt's Adm'x* v. *Kile's Adm'r*, 1 Leigh 225: "The reason why a witness must see another write in order to form an opinion of the character of his handwriting is not, I apprehend, because seeing the party write gives you a knowledge of the

paper?"); 1889, Alexander *v.* Vye, 16 Can. Sup. 501 (foregoing case affirmed);

United States: 1912, Cochran *v.* Stein, 118 Minn. 323, 136 N. W. 1037; 1850, Porter *v.* Wilson, 13 Pa. 646.

Contra: 1910, Murphy *v.* Murphy, 146 Ia. 255, 125 N. W. 191 (here the witnesses had seen, 15 years before, a letter purporting to be from M., and material as an admission, but now lost; they were shown three signatures proved to be M.'s, and testified that the writing was the same; this was held improper, on the ground of § 2004, *post*, that lay testimony based on comparison is inadmissible; but the opinion misses the point that the real reason for that rule is that comparison may equally well be made by the jury and hence lay testimony is not needed, and that here the disputed letter was lost, hence the jury would not compare it; the unsoundness of the decision may be seen by its result, viz. that all testimony to the lost letter's handwriting was virtually shut out, at least, if it be assumed that the witnesses were not qualified by the mere perusal of the lost letter to state that it was in M.'s hand).

That the genuineness of a *lost document*, not produced, may be proved by testimony to the handwriting, see *post*, § 1185.

§ 698. [1] *Ante*, § 658, *post*, §§ 726, 727.

Of course, on the principle of § 655, *ante*, the witness may *point out* the peculiarities that affect his opinion: 1909, Nagle *v.* Schnadt, 239 Ill. 595, 88 N. E. 178.

[2] 1797, Dacosta *v.* Pym, Peake N. P. 144 (the witness said the writing "was like to but he did not think it was the plaintiff's handwriting, because he knew the plaintiff to be a man too well acquainted with the world to sign such an account"; Lord Kenyon ruled that the witness must consider "the character of the handwriting only").

But this is a different thing from testing them as to the *strength of their belief:* 1893, Holmes *v.* Goldsmith, 147 U. S. 150, 163, 13 Sup. 288 (question to qualified witnesses to handwriting, whether they would act on a note as genuine, allowed).

character of his hand; he must see the handwriting itself, after the act of writing is performed, in order to acquire that knowledge. But when he sees the manual operation himself, he knows that the handwriting which he at the same time or afterwards inspects is the handwriting of the party. He thus acquires a knowledge . . . of a handwriting which he knows to be that of a certain individual. . . . Being accustomed to see the operation is only full evidence that the writing, which you have thus seen and the character of which is more or less distinctly impressed on your mind according to circumstances, is the character of the manual writing of that individual. [On the other hand] in the course of business and correspondence you acquire an equally perfect knowledge of the *handwriting* of the individual. . . . But this writing may have been performed by the clerk of the person in whose name it is; and if so, you have no knowledge of the handwriting of *that person*, though you have of that of his clerk, . . . [and the relevancy of such knowledge] would be entirely defeated by proof that the letters were written by the clerk, and is weakened in proportion to any doubts that may exist whether the party whose handwriting is to be proved wrote the letters or not."

This being the reason for the inquiry, there is no special virtue in any particular rule as to the nature of the correspondence — whether business or otherwise —, or as to the consequences of the correspondence — whether it was "acted upon" or not. Nor is it 'a priori' essential that there should be mutual correspondence at all. The inquiry concerns the sufficiency of the witness' grounds of belief that A was the writer of what the witness received under A's name; and this, that, or the other rule must ultimately be tested by this general nature of the inquiry:

1839, BRONSON, J., in *Cunningham* v. *Bank*, 21 Wend. 559: "The authenticity of the specimens may be established by presumptive as well as by direct evidence. . . . [After giving illustrations], other cases might be mentioned where the circumstances will well warrant the inference of authenticity, although there may be no direct evidence to that effect. But in some way the fact that the specimens are genuine must be satisfactorily proved. . . . Standing alone, the fact that the witness *has acted on the letters* has no tendency to prove them genuine. It only proves, and that merely by inference, that the witness believed the letters authentic. His belief is of no importance unless it is founded upon some good reason, — such a reason as will satisfy the Court and jury as well as the witness. Although the fact that the witness has acted on the letters is, when standing alone, of no importance, it may be of great value in a chain of circumstantial evidence."

The use of this class of testimony is comparatively new; its orthodoxy was not established until the last century (*post*, § 1993). But in the early leading case, *Lord Ferrers* v. *Shirley*, decided before the doctrine had become entirely orthodox, the principle now to be examined — the necessity for adequate ground to believe the genuineness of the letters — were clearly brought out:

1731, *Lord Ferrers* v. *Shirley*, Fitzgibbon 195: "Amongst other witnesses was called one J. J., who would have swore to the hand-writing of one J. Cottington, whose name was to the deed [of Robert Earl Ferrers] as a witness, because he had seen several letters wrote by J. Cottington. Thereupon he was asked, whether he had ever seen the said Cottington write; to which he answered, that he never did, nor never saw the person that wrote the said letters; but that his master, to whom the said letters were wrote for the rent of a part of the estate of the late Earl Robert Ferrers, which his said master held,

informed him, they were the letters of J. Cottington, the Lord Ferrers' steward, who was the person pretended to have attested the deed in question. Hereupon it was objected to his testimony, because he could not say with any certainty, whether or no the writer of the letters was the same person that attested the deed; for that the J. Cottington, that was supposed to write the letters, might get some other person to write those very letters for him; and the counsel insisted, that in all cases, where a witness would swear to the hand-writing, he must be able to say, that he saw such person write. The Court rejected the said J. J. because he could not ascertain the identity of the person. But my Lord RAYMOND said, that it is not necessary in all cases that the witness have seen the person write, to whose hand he swears; for where there has been a fixed correspondence by letters, and that it can be made out that the party writing such letters is the same man that attested a deed, that will entitle a witness to swear to that person's hand, tho' he never saw him write. PAGE, Justice, said, If a subscribing witness to a deed lives in the West-Indies, whose hand-writing is to be proved in England, a witness here may swear to his hand, by having seen the letters of such person wrote by him to his correspondent in England, because under the special circumstances of that case, there is no other way, or at least, the difficulty will be great, to prove the hand-writing of such subscribing witness. But my Lord RAYMOND differed, and said, that those special circumstances could not vary the reason of the thing."

The various circumstances that may be regarded as affording adequate ground for such a belief may be grouped under three heads:

(1) *Admissions expressly* made to the witness by the person in question; (2) *implied admissions;* (3) *other circumstances.*

§ 700. (1) **Express Admissions as the source of belief.** There can be no question that an *express acknowledgment* by the purporting writer affords an adequate ground of belief in the authenticity of the writing received, and this is generally accepted.[1]

§ 701. (2) **Implied Admissions as the source of belief.** An implied admission is universally considered as equally satisfactory, — *i.e.* any *conduct which amounts to a recognition* by the person in question of the genuineness of the writing received. There is no fixed test;[1] perhaps the most accurate and most flexible is given in the following passage:

§ 700. [1] *Examples:* 1898, Redd *v.* State, 65 Ark. 475, 47 S. W. 119; 1838, State *v.* Spence, 2 Harringt. Del. 348; 1822, Hammond's Case, 2 Me. 33; 1860, Woodman *v.* Dana, 52 Me. 9; 1873, Hammond *v.* Varian, 54 N. Y. 400.

Unnecessary discriminations have sometimes been made: 1880, Hynes *v.* McDermott, 82 N. Y. 52 (possible exclusion because the witness gets the admission expressly for the trial); 1840, Pope *v.* Askew, 1 Ired. N. C. 16 (exclusion because the admission was made to another than the witness).

§ 701. [1] *Examples* of testimony *admitted: England:* 1832, Smith *v.* Sainsbury, 5 C. & P. 196 (where the witness had merely as counsel seen an affidavit used by the opponent); *Canada:* 1913, Langley *v.* Joudrey, N. Sc. 13 D. L. R. 563 (forgery of two notes; bank manager admitted, through whose bank had been negotiated paper given by the parties); *United States: Fed.* 1917, Murray *v.* U. S., 4th C. C. A., 247 Fed. 874 (placing poison in the mail; persons "familiar with" the party's hand, admitted); *D. C.* 1904, Shaffer *v.* U. S., 24 D. C. App. 417, 430 (various persons held qualified on the facts); *N. H.* 1873, State *v.* Hastings, 53 N. H. 452 (a jailer who had read letters handed to him by the prisoner as hers and forwarded by him as such); *N. Y.* 1821, Johnson *v.* Daverne, 19 Johns. 136 (where the witness had received payment of notes purporting to be those of the signer of the disputed document); 1839, Cunningham *v.* Bank, 21 Wend. 559, *semble* (same); *N. Car.* 1839, 1849, Gordon *v.* Price, 10 Ired. 387 ("[notes] established in the mind of the witness to be genuine by the fact that they were so treated by the party from time to time, by paying them"); *Pa.* 1819, Com. *v.* Smith, 6 S. & R. 571 (where a cashier had habitually made payments and received receipts from another cashier purporting to be the person in question); *Ut.* 1906, State *v.* McBride, 30 Utah 422, 85 Pac. 440 (here the

1839, BRONSON, J., in *Cunningham* v. *Bank*, 21 Wend. 560: "The acts done in pursuance of the letters may be followed by such acts of approval or acknowledgment on the part of the supposed author as can only be accounted for on the supposition that he was in truth the writer of the letters; and there can be no doubt that in this way, as well as by a direct admission, the fact of authenticity may be satisfactorily established."

§ 702. (3) **Exchange of Correspondence: is this sufficient or must it be "acted upon"?** As soon as those sources of belief are reached which do not consist in implied admissions, debatable ground appears. The first matter to be noticed is that source of belief which rests on the certainty of the course of the mails. If A receives a letter purporting to come from B, he cannot be allowed to presume, for testimonial purposes, that it was in fact written by B; this all concede.[1] But if he writes to B and receives a purporting answer from B, intelligently treating the matter and showing an acquaintance with facts such as only B could know, is not this sufficient? Here the controversy begins:

(*a*) A number of judges have been unwilling to accept this source of belief; they require something more, and that something is that A's belief shall have been further confirmed by sundry events ensuing upon the letter or by

offer was treated as being in effect a comparison of specimens; Straup, J., correctly dissents); *Va.* 1876, Cody *v.* Conly, 27 Gratt. 323 (where the party had drawn orders on the witness which the latter paid and the former honored).

Examples of testimony *excluded*: *England*: 1826, Greaves *v.* Hunter, 2 C. & P. 477 (witness to the defendant's hand excluded, who had seen "other papers in the master's office, which were admitted to be of his handwriting by the defendant's attorney", and had acted on them); 1850, R. *v.* Crouch, 4 Cox Cr. 163 (policeman, who had paid money to the defendant and obtained a receipt, for the express purpose of informing himself, excluded; unsound); *U. S. Ill.* 1866, Putnam *v.* Wadley, 40 Ill. 346, 348 (witness excluded who had seen other documents purporting to be signed by defendant, but not shown to have been "recognized as signed" by the defendant); 1875, Board *v.* Misenheimer, 78 Ill. 22, 24 (witness to a surety's signature, who had merely "examined his signature to his reports as guardian" filed in the county clerk's office, and had done so for the express purpose of informing himself, excluded); *Kan.* 1888, Arthur *v.* Arthur, 38 Kan. 691, 17 Pac. 187 (witness to a wife's signature, who had seen it only on one document bearing a notary's certificate of acknowledgment, excluded on the facts).

The following *statutes* aim to cover this general principle: *Cal.* C. C. P. 1872, § 1943 (any one who has "seen writings purporting to be his [the author's], upon which he has acted or been charged, and who has thus acquired a knowledge of his handwriting" is qualified); *Mont.* Rev. C. 1921, § 10591 (like Cal. C. C. P. § 1943); *Or.* Laws 1920, § 787 (like Cal. C. C. P. § 1943); *P. I.* C. C. P. 1901, § 327 (like Cal. C. C. P. § 1943); *P. R.* Rev. St. & C. 1911, § 1458 (like Cal. C. C. P. § 1943, adding after "charged" the clause "or which consists of letters received by the witness in due course of mail in response to letters duly addressed and mailed by him to the supposed writer"); 1914, People *v.* Marti, 20 P. R. 112 (Evid. Act § 90 applied); 1914, Houston Packing Co. *v.* Pagán, López & Co., 20 P. R. 233 (People *v.* Marti affirmed).

In *Louisiana*, the Code provision for proof of hand-writing has been held to exclude testimony founded on knowledge of the present sort: La. C. C. P. § 325 ("If the defendant deny his signature [to a document in the pleading] in his answer, or contend that the same has been counterfeited, the plaintiff must prove the genuineness of such signature either by witnesses who have seen the defendant sign the act, or who declare that they know it to be his signature because they have frequently seen him write or sign his name"); 1812, Sauvé *v.* Dawson, 2 Mart. 202 (under the old Civil Code, testimony was receivable only from one who saw the writing executed, or from experts appointed by the Court); 1869, Huddleston *v.* Coyle, 21 La. An. 148 (under C. C. P. § 325, witness speaking from knowledge acquired by paying drafts not disputed by the party, excluded); 1869, Leonard's Succession, 21 La. An. 523, *semble* (same).

§ 702. [1] Although that circumstance may be sufficient *circumstantial* evidence that the letter was at least sent by *B's authority*: *post*, § 2153.

A's finding that B has acted upon it. The language of the judges is not uniform nor definite; but they require at least *something more than a mere exchange of intelligent correspondence:*[2]

1799, KENYON, L. C. J., in *Batchelor* v. *Honeywood*, 2 Esp. 715: "If persons are in the habit of corresponding, and letters are received from one to the other, upon which any transaction takes place, that may enable the party to swear to his correspondent's handwriting."

1836, *Doe d. Mudd* v. *Suckermore*, 5 A. & E. 705; COLERIDGE, J: "[The requirement is that] transactions have taken place between them upon the faith that letters purporting to have been written or signed by him have been so written or signed." DENMAN, L. C. J.: "The letters forming one side of a correspondence do not prove the handwriting because addressed to a particular person; that person's evidence may be requisite to show that A had in some way recognized the letters bearing A's signature, and was therefore probably the individual who wrote them; but this is quite different from a knowledge of the handwriting, [*i.e.* the matter of knowing] whether they proceeded from A or any other."

1889, CAMPBELL, J., in *Pinkham* v. *Cockell*, 77 Mich. 272, 43 N. W. 921: "The mere receipt of letters purporting to be from a person never seen, and with whom no subsequent relations existed which were based on them as genuine, has no vaue as means of knowledge. Where there is no direct knowledge of handwriting, there must be something which assures the recipient of the letters in a responsible way of their genuineness."

Two things must be noted about this form of the rule. (1) In the first place, it is not clear whether the judges mean that the required transaction or act must involve an implied admission *known* to be B's or merely an implied admission *inferred* to be his. Thus, if a letter purporting to be B's orders a ton of coal and it is delivered and then B comes in person and pays for it, the implied admission is known to be B's. But suppose, instead, that a check purporting to be B's comes by mail; or suppose that A receives an offer and orders a box of soap from B, and a box of soap then comes in a wagon purporting to be B's; these are admissions or recognitions which only purport to be B's, and personal observation by A is still lacking. Or suppose that A writes to a theatre-clerk inclosing the money for a ticket; the ticket is sent, with a letter of receipt, and A goes to the theatre and is given a seat on the ticket;

[2] *Accord*, with minor variations: 1825, Thorpe *v.* Gisburne, 2 C. & P. 22 (witness to the defendant's hand who had "received letters from him, upon which he had acted", received); 1897, Hightower *v.* Ogletree, 114 Ala. 94, 21 So. 934 (one who merely received letters purporting to come from one who could not write, not competent to authenticate them); 1846, Pate *v.* People, 8 Ill. 664; 1847, Woodford *v.* McClenham, 9 Ill. 89; 1856, McClain *v.* Esham, 17 B. Monr. Ky. 146, 155 (one who had received a letter and answered but received no further letter, not competent); 1860, Chaffee *v.* Taylor, 3 All. Mass. 601, *semble;* 1873, Nunes *v.* Perry, 113 Mass. 275 (merely receiving a letter in care, excluded); 1894, Violet *v.* Rose, 39 Nebr. 660, 672, 58 N. W. 216 (one who had sent and received and acted upon letters, admitted); 1852, Bowman *v.* Sanborn, 25 N. H. 110, Eastman, J. ("having seen genuine signatures or writings of the person, either in transacting business with him so that the papers have been acted upon and recognized by him as genuine, or by an intimate acquaintance with signatures which have been adopted into the ordinary business transactions of life"); 1858, Burnham *v.* Ayer, 36 N. H. 185 (following the preceding case); 1854, Power *v.* Frick, 2 Grant Pa. 307 (not sufficient under the circumstances); 1900, State *v.* Hall, 14 S. D. 161, 84 N. W. 766 (one receiving a letter "in due course of mail", excluded); 1894, Flowers *v.* Fletcher, 40 W. Va. 103, 20 S. E. 871 (a correspondence of mere friendship, not involving business transactions acted upon, insufficient).

Compare the cases cited *post*, § 2153 (reply-letter received by mail).

here is an act done by somebody which indicates the genuineness of the letter, but the admission was not necessarily made by the ticket-clerk. Looking at the judges' language, we find some prescribing merely "any transaction that takes place", or "something which assures the recipient"; while others go further and require that B's letter should be "acted upon and recognized *by him*", or the transactions should have "taken place *between them*", meaning apparently acts by the person known to A to be B, and not merely acts by a person probably B. It is impossible to say what are the judicial requirements of this doctrine in that respect.

(2) It has sometimes been supposed (and the language of some judicial opinions has naturally induced the error) that the "acting upon" which is necessary may be or must be *on the part of the witness A*. This, however, it will be seen, is impossible as a test; the "acting upon" which induces the faith must always ultimately be that of B, the person in question. Thus, if a letter purporting to be B's invites an investment, A may "act upon" this by investing a thousand dollars in the offered enterprise; but the extent of A's action, however great a faith it shows on A's part, affords no further reason to us for sanctioning the sources of his belief. If, however, interest on the investment is regularly received from B's office — in other words, if B himself appears to have "acted on" A's answer — then, but only then, we have that sort of action which tends to show the genuineness of the original letter purporting to be B's. It must be remembered, then, that the force of subsequent transactions as a ground for belief lies not in A's part in them but in B's part in them.

(*b*) But the majority of Courts (and this is the orthodox doctrine) prefer to be satisfied with something short of this test, and accept an *exchange of correspondence alone* as sufficient to justify belief in genuineness.[3] That is,

[3] *Accord*, with variations: ENGLAND: 1645, Lord Macguire's Trial, 4 How. St. Tr. 653, 685 ("he hath written to me many letters"); 1767, Buller, Nisi Prius, 236; 1763, Gould *v.* Jones, 1 W. Bl. 384, Lord Mansfield; 1797, Barnes *v.* Trompowsky, 7 T. R. 265, Kenyon, L. C. J., *semble;* 1845, Ovenston *v.* Wilson, 2 C. & K. 1, Pollock, C. B.; 1849, Murieta *v.* Wolfhazen, 2 C. & K. 744, *semble;* 1909, Turner's Case, 3 Cr. App. 103, 155 [1910], 1 K. B. 346 (document of consent signed by Director of Public Prosecutions: "it is sufficient if somebody, for instance, who has been in correspondence with the Director of Public Prosecutions says 'I received this in ordinary course, and I believe it to be signed by the Director of Public Prosecutions.' . . . All that the Court say is, that there must be some kind of proof of it, but it must not necessarily be proof of somebody who says, 'I have seen the gentleman write', which, in the old-fashioned days, at any rate, was the technical way of proving the signature").

UNITED STATES: *Ala.* 1887, Campbell *v.* Woodstock Iron Co., 83 Ala. 359, 3 So. 369 (witness admitted who had mailed one or more letters to C., directed to his known place of residence, and received replies purporting to come from that place and to be signed by him); *Colo.* 1874, Kansas Pac. R. Co. *v.* Miller, 2 Colo. 442, 452, 460 (one who had corresponded for 18 years with a person purporting to be a friend of his youth in Germany, admitted); *Ga.* 1878, Pearson *v.* McDaniel, 62 Ga. 100 (business correspondence, sufficient); 1869, Bruce *v.* Crews, 39 Ga. 544, 547 (a clerk in a commercial house who had seen letters purporting to come from C., but not in reply to others, held not qualified to C.'s handwriting); *Ind.* 1860, Clark *v.* Wyatt, 15 Ind. 272 ("from authentic papers derived in the course of business"); 1885, Thomas *v.* State, 103 Ind. 429, 2 N. E. 808; *Ia.* 1895, Bullis *v.* Easton, 96 Ia. 513, 65 N. W. 395; 1907, Nichols & Shepard Co. *v.* Ringler, 135 Ia. 181, 112 N. W. 543 (testimony based on "correspondence", admitted); *Mich.* 1881, Empire Mfg. Co. *v.* Stuart, 46 Mich. 484, 9 N. W. 527 (where the

when A writes to B and receives in due course an answer purporting to be B's, intelligently dealing with the original letter, the composite data of the course of the mails, the accuracy of the directory, the likely conduct of the receiver of a letter, and the improbability of a forger being able to send an intelligent answer or series of answers, avail for practical purposes as an adequate source of belief. It is of course B's *answer* to A's letter, and not merely a first letter of B (however intelligent), nor an answer by A to it, that can have this effect, — though this discrimination is not always made:

1797, KENYON, L. C. J., in *Carey* v. *Pitt*, Peake Add. Cas. 130: "That evidence was admitted on sound principles; for if, when letters are sent directed to a particular person on particular business, an answer is received in due course, it is a fair presumption that the answer was written by the person whose handwriting it purported to be."

1814, ELDON, L. C., in *Wade* v. *Broughton*, 3 Ves. & B. 172: "Where there has been correspondence by letters the contents of which are such as to render it probable that they were received [by the genuine person], perhaps impossible to suppose the contrary that course of correspondence will do; and that has grown up in modern times."

1836, *Doe* v. *Suckermore*, 5 A. & E. 727; WILLIAMS, J.: "I averted to an expression in frequent use, and which indeed has almost grown into the currency of a proverb upon this subject, that the letter or letters '*must have been acted upon.*' If, however, by this expression, it be meant to imply that any business must be transacted, or, in any sense of the word, *act done*, the observation is without foundation, for nothing of the sort is necessary. . . . Anything, I presume, from which the identity of the writer is established may suffice." PATTESON, J.: "The knowledge may have been acquired by the witness having seen letters or other documents professing to be the handwriting of the party, and having afterwards communicated personally with the party upon the contents of those letters or documents, or having otherwise acted upon them by written answers producing further correspondence or acquiescence by the party in some matter to which they relate, or by the witness transacting with the party some business to which they relate, or by any other mode of communication between the party and the witness which is the ordinary course of the transactions of life induces a reasonable presumption that the letters or documents were the handwriting of the party."

1820, TAYLOR, C. J., in *State* v. *Allen*, 1 Hawks 8: "Thirdly, by a witness who has received letters from the supposed writer of such a nature as renders it probable that they were written by the person from whom they purport to come. Such evidence is only admissible where there is good reason to believe that the letters from which the witness has derived his knowledge were really written by the supposed writer of the paper in question."

answer "I have seen letters that came from their office: I have had correspondence with them so that I could know their signature", was held to show sufficient certainty); *Miss.* 1866, Southern Exp. Co. *v.* Thornton, 41 Miss. 221; *N. J.* 1906, State *v.* Goldstein, 72 N. J. L. 336, 62 Atl. 1006 (business correspondence with a tenant for three years, held to qualify); 1903, Hoisting Machinery Co. *v.* Goeller I. Works, 84 N. J. L. 504, 87 Atl. 331 (one who had received letters from J. G. and had been paid for contracts based on them, admitted); *N. Y.* 1839, Cunningham *v.* Bank, 21 Wend. 559, *semble; N. C.* 1820, State *v.* Allen, 1 Hawks 9 ("in the course of correspondence in which pertinent answers have been received"); 1917, Universal Oil & F. Co. *v.* Burney, 174 N. C. 382, 93 S. E. 912 (cottonseed contract; one who had "received letters from him in the course of business", admitted); *Pa.* 1854, Shitler *v.* Bremer, 23 Pa. 413, *semble* (a school teacher receiving and acting on written orders from a director); 1855, Clark *v.* Freeman, 25 Pa. 133; *P. R.* Rev. St. & C. 1911, § 1458 (quoted *ante*, § 701); *Texas:* 1885, Ullman *v.* Babcock, 63 Tex. 71; *Vt.* 1897, Redding *v.* Redding's Est., 69 Vt. 500, 38 Atl. 230; *Va.* 1829, Coalter, J., in Rowt's Adm'x *v.* Kile's Adm'r, 1 Leigh 226.

The truth is that this course of correspondence may vary in probative value according to circumstances, and hence probably the disinclination of the Courts first mentioned to be satisfied with that alone. The true solution is to leave the matter to the trial judge's determination. The necessity for this flexibility has been recognized by the Courts in the additional classes of cases which are now to be considered.

§ 703. **Clerks familiar with Accounts, Letters, etc.** In part involving the foregoing doctrine, and yet not made to depend upon it, is a line of precedents admitting as qualified a *clerk* through whose hands his *employer's business correspondence* or other documents have passed and who has thus become familiar with what purports to be the hand of a customer or of his employer.[1] There seems to be no requirement that an "acting upon" shall be expressly shown; but the doctrine really rests on the quite proper assumption that there must have been numerous and convincing acts of the customer or employer which have verified the genuineness of the documents. On this probability a rule of thumb is based, without requiring special inquiry in each instance. The rule is satisfactory enough; it goes to show that the discretion of the trial judge should be given great latitude.

§ 704. **Official Custodians of Predecessor's Records, Family Records.** Another class of persons seem properly to possess safe sources for estimating authenticity, though they have not received implied admissions from the supposed makers, namely, persons who, having the *custody of official records*, have thus become familiar with the official signature of a predecessor in the office, whether of superior or the same grade, or, having the custody of *family records*, thus obtain familiarity with the handwriting.[1] The propriety of the

§ 703. [1] 1832, R. *v.* Slaney, 5 C. & P. 218, Tenterden, L. C. J. (putting the case of a merchant's clerk who has become acquainted with the handwriting of the merchant's correspondents); 1884, Re Stambro, 1 Manit. 263, 267 (one who had examined, as part of his duty, accounts sent in by an agent, held qualified); 1900, Tyler *v.* Mutual D. M. Co., 17 D. C. App. 85, 93 (the manager of a messenger office, who had seen telegrams and receipt tickets purporting to be signed by Mr. & Mrs. T. and had had correspondence with them, allowed to testify to their signatures); 1850, Com. *v.* Webster, 5 Cush. Mass. 300, Bemis' Rep. 197, 208 (a writing-master who as such had written diplomas was admitted to speak of the handwriting of the defendant, whose signature he had seen appended to the diplomas of the college in which the defendant was an instructor; Shaw, C. J., "papers have passed under his notice, in a business or official capacity which have given him a long and familiar acquaintance with the defendant's handwriting"); 1847, Reyburn *v.* Belotti, 10 Mo. 598 (a clerk through whose hands letters came); 1801, Titford *v.* Knott, 2 Johns. Cas. N. Y. 214 (a clerk who had become familiar with the person's business correspondence with his employer); 1831, Hess *v.* State, 5 Oh. 7 (a teller in a bank, who had seen correspondence of the president and the cashier).

§ 704. [1] The witness was admitted, except as otherwise noted:

England: 1767, Buller, Nisi Prius, 236; 1762, Gould *v.* Jones, 1 W. Bl. 384; 1818, Randolph *v.* Gordon, 5 Price 317 (where the witness was rejected because his right to assume the genuineness of the probated will, which he had taken as a standard, did not sufficiently appear); 1820, Taylor *v.* Cook, 8 id. 652 (where the old registers taken as the standard were presumably genuine); 1824, Doe *v.* Tarver, R. & Moo. 143, *semble;* 1843, Fitzwalter Peerage Case, 10 Cl. & F. 193 (a family solicitor who had gained his knowledge by repeated perusals of the family title-deeds, etc., kept by him and examined in the course of the business); 1844, R. *v.* Barber, 1 C. & K. 436 (possessor of old documents); 1847, Doe *v.* Davies, 10 Q. B. 324 (where a parish-clerk testified to a clergyman's marriage-certificate signature through having seen the same signature at various places in the marriage-register; it was assumed that a necessity must

place of custody and the general reliance upon the documents for legal, mercantile, and family purposes, are a sufficient ground for belief in authenticity:

1836, DENMAN, L. C. J., in *Doe d. Mudd* v. *Suckermore*, 5 A. & E. 740: "In ancient documents, knowledge of an officer's handwriting is frequently obtained by an observation of his signature to papers which he would be called upon officially to sign; and a witness speak-

exist, such as the probable death of the curate).

UNITED STATES: *Federal:* 1870, Rogers *v.* Ritter, 12 Wall. 320 (a keeper of records); 1899, U. S. *v.* Ortiz, 176 U. S. 422, 20 Sup. 466 (one employed for many years as clerk, translator, and custodian of Spanish and Mexican archives, held sufficiently acquainted with the signatures of a Mexican Governor and Secretary of 1846 as occurring in those archives); *Alabama:* 1896, White *v.* Tolliver, 110 Ala. 300, 20 So. 97 (one who had merely seen writing "purporting" to be A.'s, excluded); *Connecticut:* 1901, Hamilton *v.* Smith, 74 Conn. 374, 50 Atl. 884 (surveyor, familiar by experience with all the maps in a town-clerk's office and with their premises, allowed to testify to the handwriting of one H., whose signature was on many of the maps); *Florida:* 1905, Wooldridge *v.* State, 49 Fla. 137, 38 So. 3 (a member of a school board who had often seen the superintendent's handwriting on warrants, held qualified); *Georgia:* 1904, Gress Lumber Co. *v.* Georgia P. S. Co., 120 Ga. 751, 48 S. E. 115 (clerk of a city council, who had many times seen the signature of O. in the minutes of the city council, in former years, held not qualified to O.'s signature; wholly erroneous; none of the cases on this part of the doctrine are considered); *Maryland:* 1849, Smith *v.* Walton, 8 Gill 86; *New York:* 1832, Jackson *v.* Brooks, 8 Wend. 431, 15 Wend. 112 (old deeds kept in the witness' custody); 1847, Willson *v.* Betts, 4 Denio 205, 214 (signature to court documents by judge and clerk deceased, the witness not being the custodian); *North Carolina:* 1820, State *v.* Allen, 1 Hawks 9, *semble* ("ancient authentic documents"); 1887, Tuttle *v.* Rainey, 98 N. C. 514, 4 S. E. 475 (where the witness had seen many letters from the writer, his uncle, to his father, dealing with private family matters and a photograph of the uncle, subscribed by him, had been publicly kept in the family; admitted); 1895, Jarvis *v.* Vanderford, 116 N. C. 147, 21 S. E. 302 (seeing old documents in one's possession, apparently forgotten; excluded); *Pennsylvania:* 1826, Vickroy *v.* Skelley, 14 S. & R. 373 (a deputy county-surveyor, who had seen the writing of a former surveyor; this mode of knowledge was declared not admissible without corroboration, "except in case of public officers, who have been so long dead that better proof could not be expected", and here it was not shown that witnesses who had seen him write were not still alive); 1836, Goddard *v.* Groninger, 5 Watts 209, 218 (admitting a witness who as surveyor-general had often acted upon documents purporting to be signed by the person in question as clerk in the receiver-general's office; but the transactions were ancient); 1848, Sweigart *v.* Richards, 8 Pa. 439 (accepting testimony of an official of the land-office, who had there seen surveys, etc., of a deceased official surveyor; also accepting a son who had seen his father's writing in the family Bible and in letters possessed by his mother; here the Court seems to make it a condition that living witnesses who have seen the person write cannot be had; and also applies to this sort of testimony the Pennsylvania rule of comparison of documents (*post*, § 2013) that the testimony must be of those who have seen the person write, or else evidence of equal authority); *South Carolina:* 1822, Cantey *v.* Platt, McCord 26 (instruments purporting to be signed by a deceased surveyor-general; the antiquity of the writing, and consequent lack of witnesses who had seen the person write, being the special condition of admission); 1911, Nicholson *v.* Eureka L. Co., 156 S. C. 59, 72 S. E. 86 (grandson having custody of grandfather's documents, admitted); *Texas:* 1905, Whitaker *v.* Thayer, 38 Tex. Civ. App. 537, 86 S. W. 364 (deceased deputy-clerk's writing in a land-office, proved by the officer); *Utah:* 1892, Tucker *v.* Kellogg, 8 Utah 11, 12, 28 Pac. 870 (administrator held qualified by seeing signatures on paid checks by the intestate found among his papers after death); *West Virginia:* 1919, Johnson *v.* Bee, 84 W. Va. 532, 100 S. E. 486 (letters written by a party to her daughter, in childhood, preserved by her for sentimental reasons, and frequently perused by the grandchildren; the latter held qualified; clerk of a county court, familiar with recorded deeds purporting to be by the party, and dating back some 30 years, held qualified).

Compare the cases cited *post*, § 2158 (official custody as circumstantial evidence of genuineness).

The following rulings on *signatures* formerly used to *frank letters* must be considered from the point of view of the present principle: 1797, Carey *v.* Pitt, Peake Add. Cas. 130, Kenyon, L. C. J. (excluding a post-office inspector who had merely seen in his business franks purporting, but not proved, to be the defendant's); 1799, Batchelor *v.* Honeywood, 2 Esp. 715 (excluding a post-office inspector who had passed Lord T.'s franks but had never seen Lord T. write nor ever received any acknowledgment of their genuineness).

ing from that knowledge may give an opinion whether any particular writing was made by the same person."

1820, TAYLOR, C. J., in *State* v. *Allen*, 1 Hawks 9: "The only methods of proving the handwriting of a person, sanctioned by law, are: . . . Fourthly, When a witness has become acquainted with his manner of signing his name by inspecting other ancient writings bearing the same signature and which have been regarded and preserved as authentic documents. This mode of proof is confined to ancient writings, and is admitted as being the best the nature of the case will allow."

1874, MCKINSTRY, J., in *Sill* v. *Reese*, 47 Cal. 344 (the witness was custodian of the Mexican archives in California and had consulted several hundred documents bearing the signature of the person in question): "If it can be assumed that the Mexican archives in the Surveyor General's office are genuine, the man who has read these archives and familiarized himself with the official signatures, several hundred in number, of the person whose signature is the subject of inquiry, has certainly as much knowledge of that person's handwriting as one who has received letters or bills purporting to be in the handwriting of a party whom he has never seen. . . . These documents and records have remained continuously in official custody, and although it is not impossible that in some instances forged papers have been surreptitiously or corruptly placed among them, the presumption that officers have done their duty in preventing such frauds applies. . . . There can be little danger in assuming the genuineness of the signatures from which the witness acquired his knowledge for a collateral purpose like that under consideration."

Upon two points under this principle the law can hardly be said to be settled: (1) whether the witness must be the *custodian* of the standard-document; (2) whether the documents must be *ancient*. The rulings of the 1700s answered the former question usually in the negative, the latter in the affirmative. But there is reason to-day to lay down precisely the opposite rule. (1) The witness has usually no good ground for believing in the authenticity of the documents unless he has in some way had charge of them and found them genuine by testing them — as, a surveyor in charge of his predecessor's surveys, or a family-solicitor in charge of the family's title-deeds. In general, some kind of familiar use would at least be necessary for the witness. (2) The traditional phrase is usually "ancient documents"; but it does not seem essential on principle that the documents should have been of a past generation or their author be deceased. A successor in public office or a member of a family may have the requisite knowledge of genuineness without either of these facts appearing. They should be no more essential here than they are in the case of knowledge resting on correspondence (*ante*, § 702), for which it is no longer (though it was at first) considered necessary that the correspondent should be abroad or deceased. The truth is that the limitation to ancient documents is a perpetuation of an historical anomaly.[2] It was an extension, based on necessity, of the original class 'ex visu scriptionis'; and it is to this that we owe the phrases in the judicial opinions allowing the testimony only from ancient documents. Today, when testimony 'ex scriptis

[2] 1767, Buller, Nisi Prius, 236: "In general Cases, the Witness should have gained his knowledge from having seen the Party write; but under some Circumstances that is not necessary, . . . so where the Antiquity of the Writing makes it impossible for any living Witness to swear he ever saw the Party write"; so also in 1785, Willis *v.* Singer, Suppl. Viner's Abr. "Evidence" T, b, 48. The history is examined *post*, § 1993.

olim visis' stands on an equal footing with testimony 'ex visu scriptionis', there is no propriety in keeping up the old limitation to ancient writings or to writings of a deceased official or family-member.

§ 705. **Bank Notes and other Paper Money.** The present principle involves peculiar considerations when the issue concerns the genuineness of a bank-note or other paper money. To qualify under the general principle (*ante*, § 693), the witness must be familiar with the genuine notes of the same type, so as to be able to judge of the one in issue. This familiarity he claims because he has seen many of the genuine notes of that class. But how can he know that the notes he has seen were in fact genuine ones? There are several possible grounds on which he may base his confidence.

(1) Some Courts have thought it sufficient if he has merely *received and passed away* the notes from time to time.[1] These Courts, however, seem to be thinking only of his having seen enough specimens to gain a clear impression of the general style, and to be forgetting the necessity of his having had some indication of their genuineness.

(2) Other Courts have been satisfied when it appeared further that the notes so dealt with had *passed current* and been *reputed as genuine*. This is a step towards recognizing that necessity, but it rests on no definite theory.[2]

(3) The strictest requirement, and the only one which is justifiable in theory, is that *none of the notes* thus received and passed *should have been returned* to the witness as counterfeit. This does not necessarily imply an admission of genuineness by the alleged issuers (*ante*, § 701). It rests on the fact that until the note has gone back to its alleged issuer there can be no fair certainty of its genuineness, since other persons receiving it may be equally deceived with the witness. If, then, sufficient time has elapsed for a fair number of the notes to be re-presented at the alleged issuer's, and none have been returned to the witness, the great probability is that the alleged issuer has treated them as genuine; and anything short of this is insufficient:

1824, TAYLOR, C. J., in *State* v. *Candler*, 3 Hawks 393, 400: "It appears to me that the witness' knowledge of the handwriting, acquired in the way he describes, is as much to be relied upon as if derived from a correspondence, and approaches nearly to that obtained from having seen the party write. It is scarcely possible, in the nature of things, that if any of the notes received by the witness throughout so long a period had been counterfeit, they should not have been returned. Their not returning shows their genuineness."[3]

§ 705. [1] 1823, Com. *v.* Carey, 2 Pick. Mass. 48 (officers of a bank who had received and paid out bank notes, to testify to signatures of president and cashier on the notes of another bank); 1851, State *v.* Check, 13 Ired. N. C. 120 (persons "who habitually receive and pass the notes of a bank for a long course of time, so as to become thoroughly acquainted with them"); 1830, Martin *v.* Com., 2 Leigh Va. 745 (bank-notes provable by "persons well acquainted with the notes of the bank", not necessarily by an officer of the bank).

[2] 1822, Furber *v.* Hilliard, 2 N. H. 483 *semble* (but here the witnesses were also experts in paper money); 1831, State *v.* Carr, 5 id. 373.

[3] Approved: 1844, State *v.* Harris, 5 Ired. N. C. 291; 1851, State *v.* Cheek, 13 id. 120 (which also laid down, without distinction, the less strict rule just preceding; see note 1, *supra*).

The Candler case (quoted *supra*) practically overruled U. S. *v.* Holtsclaw, 2 Haywood N. C. 379 (1805), where the fact of frequent dealings with bank-bills was held sufficient for testifying to the genuineness of the signatures, and

(4) The witness' source of knowledge may also be (but need not be) an *admission*, express or implied (*ante*, §§ 700, 701), by the alleged issuer of the notes.[4] Moreover, one may acquire a knowledge of the type of note from the *material*, color, design, and the like, apart from the signature; hence testimony to genuineness may be founded on a knowledge of these indicia without reference to the character of the signature.[5] Such witnesses will, however, usually be experts in the narrow sense, *i.e.* persons testifying 'ex scripto nunc viso.' The requirement of expertness, as applied to the present subject, has already been considered (*ante*, § 570).

§ 706. **Relative Value of foregoing Kinds of Knowledge.** Since the enactment of modern statutes permitting testimony by experts 'ex scripto nunc viso' ("comparison of hands", in the narrow sense), all the established common-law kinds of knowledge are of course still proper, when they are available.[1] It has been suggested that where a lost instrument is to be authenticated, knowledge of one of the weaker sorts is not admissible;[2] but this seems a consideration which should affect only the weight of evidence required for final decision.[3]

§ 707. **Number of Specimens; Writings Post Litem Motam.** Little or no question ever arises as to the sufficiency of the specimens in themselves to furnish an adequate knowledge of the type of writing, *i.e.* the *number of specimens* received, the distance of *time* when they were received, or the *quantity* of the person's writing contained in them. The liberal rules applied on these points under the foregoing mode of knowledge (*ante*, §§ 694–697) seem to have been accepted here without question.[1]

also practically overruled the Allen case (*infra*) so far as the latter intimated that nothing short of correspondence with the signers would suffice.

A singular decision is the following: 1895, Kendall's Ex'r *v.* Collier, 97 Ky. 446, 30 S. W. 1002 (a bank officer, who had already examined and discounted as genuine a note whose genuineness was disputed, was not allowed to state these facts as bearing on the strength of his belief that the note was genuine; there is no good reason for this ruling; compare § 698, *ante*).

[4] 1859, Johnson *v.* State, 35 Ala. 378 (bank-bill credited by bank; here the witness was also somewhat expert as to detecting counterfeits); 1820, State *v.* Allen, 1 Hawks N. C. 6 (here it did not expressly appear, as in State *v.* Candler, that the notes had been passed and not returned); 1842, Allen *v.* State, 3 Humph. Tenn. 367 (receiving from and paying to a bank its notes).

[5] 1851, Johnson *v.* State, 2 Ind. 654; 1859, Jones *v.* Finch, 137 Miss. 468; 1805, U. S. *v.* Holtsclaw, 2 Haywood N. C. 379, *semble* (on this point, this case is not to be regarded as having been overruled by State *v.* Candler, *supra*); 1842, Allen *v.* State, 3 Humph. Tenn. 368.

§ 706. [1] 1890, McKay *v.* Lasher, 121 N. Y. 482, 24 N. E. 711. As to their relative weight, consult the treatises of Mr. Osborn (cited *ante*, § 693).

[2] In Porter *v.* Wilson, 13 Pa. 646 (1850), the Court declined to hold that a knowledge acquired *after* seeing the lost instrument would be insufficient (*ante*, § 697); but did rule that the knowledge must be positive, "nothing short of seeing the party write or an acknowledgment distinctly and clearly made by the party himself"; but it is not clear how far the Court regarded this as limiting the ordinary qualification gained by correspondence.

[3] It was also at one time thought that the *person whose hand was alleged to be forged* must if available be first called, or may alone be called, and in particular, that the *officer of a bank*, if available, is alone competent to testify to the genuineness of his signature on its notes. But this notion soon disappeared, sometimes by express statute: persons having the knowledge required in other cases are of course equally competent; 1830, State *v.* Hooper, Bailey S. C. 39, and cases and statutes collected *post*, § 1339 (preferred witnesses).

§ 707. [1] A few casual rulings are to be found: 1853, McKonkey *v.* Gaylord, 1 Jones L. 94 (knowledge of signature only, acquired

§ 708. **Other Principles affecting Handwriting, distinguished.** In theory any person able to read and write is sufficiently qualified, as to *expert capacity*, to form an opinion of handwriting (*ante*, § 570), though perhaps special considerations apply to the proof of bank-notes and other paper-money (*ante*, § 570). The testimony of "experts" in the narrow sense is affected by the *Opinion rule;* and the question is a different one according as their testimony goes to the comparison of handwriting (*post*, §§ 2008–2015) or merely to the appearance of ink, paper, or other materials, with regard to dates, erasures, alteration, and the like (*post*, §§ 2023–2027). The use of specimens exhibited to the jury involves also the Opinion rule (*post*, §§ 2016–2021).

The expert, however, like other witnesses, must base his *knowledge* of the particular hand upon specimens observed by him; and the application of the present principle to that situation remains now to be noticed.

C. *Ex Scripto nunc Viso*, or *Ex Comparatione Scriptorum* (*Expert's Comparison of Specimens*)

§ 709. **General Principle.** 1. Where the witness does not testify from sight of the person writing (*ante*, § 694) or from writings received or possessed before the litigation and independently of it (*ante*, § 699), he may still acquire knowledge of the type of writing by a special examination of specimens expressly laid before him by others. Now the essence of the difference (so far as the present principle of Knowledge is concerned) between this and the other modes is simply a *difference in the grounds of belief in the genuineness* of the specimens. The witness who saw the act of writing has a sufficient ground of belief in his sight of the person in the act. The witness who received letters, or was custodian of records, had a sufficient ground in other circumstances, often consisting in admissions made to him by the person in question. But in this third mode, both of these grounds of belief are lacking.

Yet they must be supplied in some way. An opinion of the type of writing cannot be worth listening to unless the specimens examined appear to have been, with fair probability at least, genuinely those of the person in question. How this may be done, and what difficulties thus arise, can be examined presently. The important truth is that, apart from this, the theory of all three modes is identical; *i.e.* the witness must have knowledge of the type of handwriting, this knowledge must come from an adequate consideration of specimens, and these specimens must appear to be genuinely those of the person to whom they are attributed.

That the process is always the same, and that the theory of the witness'

by correspondence, is sufficient for identifying a signature; this would seem to be a proper rule to follow to-day for correspondence done in typewriting with the autograph signature only); 1850, Porter *v.* Wilson, 13 Pa. 646 (a correspondence after the date of the disputed document is sufficient).

As to correspondence 'post litem motam', it may well be not an unfair specimen; this should be entirely in the trial Court's discretion.

Compare §§ 2009, 2018, *post*.

knowledge of handwriting is identical for all modes, has often and clearly been pointed out by the Courts:

1822, Sir J. NICHOLL, in *Saph* v. *Atkinson*, 1 Add. 122, 216: "All evidence as to the handwriting of any party is the mere statement of an opinion formed by the witness, on comparing a writing said to be his [the author's], with *some* standard."

1836, *Doe d. Mudd* v. *Suckermore*, 5 A. & E. 705; COLERIDGE, J.: "On either supposition [lay or expert], the witness is supposed to have received into his mind an impression, not so much of the manner in which the writer has formed the letters in the particular instances, as of the general character of his handwriting; and he is called on to speak as to the writing in question by reference to a standard so formed in his mind." DENMAN, L. C. J.: "I must fairly say that I think the syllogism complete. Opinion is evidence of handwriting, where it is founded on knowledge obtained from inspection of documents proved to be written by the same party. The [expert] opinion tendered here was founded on such knowledge."

1842, GREEN, J., in *Allen* v. *State*, 3 Humph. 368: "All that the rule of law contended for requires is that a witness who is called to prove handwriting shall be able to show that he has had such means of knowledge as to furnish a reasonable presumption that he is qualified to form an opinion on the subject. And the opportunity of acquiring such knowledge, mentioned in the books on evidence — such as having seen the party write, having corresponded with him, or seen writings acknowledged by him to be genuine — are only illustrations of the principle, and are not to be understood as the only means whereby such knowledge can be acquired. If other means of knowledge, in the view of reason and common sense, will equally afford it, there can be no reason why the statement of such means of information shall not be held to be sufficient."

1860, RICE, J., in *Woodman* v. *Dana*, 52 Me. 13: "It is contended that all opinion based upon previous knowledge of or acquaintance with handwriting is in reality only the result of comparison, and of comparison made under much more unfavorable circumstances than when the admitted or proved specimens are brought in juxtaposition with that which is controverted; that in one case [of lay testimony] the image of the standard specimen, as it exists in the mind, is compared with the controverted specimen in the hand of the witness; while in the other [of expert testimony] the standard is before the eye of the witness and placed side by side with that which is contested; that in the former the characteristics of the standard are necessarily indistinct, shadowy, and uncertain, while in the latter they show out in all the distinctness of visible character. . . . In a certain sense the position of the counsel for the plaintiff is undoubtedly correct. 'All evidence of handwriting', says Mr. Greenleaf, in his work on Evidence, 'except where the witness saw the [disputed] document written, is in the nature of comparison. It is the belief which the witness entertains upon comparing the writing in question with its exemplar in the mind derived from some previous knowledge.'"

1874, MOSES, C. J., in *Bennett* v. *Mathewes*, 5 S. C. 484: "They both depend on the same faculty, — that of bringing into actual application impressions made on the mind, in the one case weakened by time, and in the other more vivid and lively because of more recent existence. One [the lay witness] recollects because he has seen the admitted writing before and can therefore now speak of its similarity with the one in question; the other [the expert witness] because by examining the admitted writing he has a present impression which he at once makes the standard of his comparison."[1]

2. So far, then, as concerns the theory of the testimonial knowledge, the only difference, for expert testimony, consists in the mode of supplying that certainty of genuineness of specimens which in the other two cases rests on

§ 709. [1] So also the following opinions: 1850, Hitchcock, C. J., in Hicks v. Person, 19 Oh. 441; 1830, State v. Hooper, Bailey S. C. 42.

the personal knowledge of the witness himself. How may this be done and what difficulties and rules arise in doing it?

(*a*) It is obvious, first, that as the expert witness does not and *cannot offer his own knowledge* of the genuineness of the specimens, this element must be made to appear by *other persons' evidence.* There are three conceivable ways: (1) By an *admission* in the pleadings or before the court; (2) By *testimony* directed *to the judge*, in the nature of ordinary proof preliminary to the admission of any piece of evidence and calling for the judge's decision only; (3) By *testimony* directed *to the jury*, like all ordinary evidence, — the jury, on retiring, to use the witness' opinion if the hypothesis of genuineness is proved, and to discard it, like other hypothetical testimony (*ante*, §§ 672, 680), if the hypothesis is not proved. Now under the second and the third modes, but particularly the third, the objection of Confusion of Issues immediately arises; and it is from that point of view mainly that the argument has been made against this kind of testimony to handwriting.

(*b*) There is, however, another consideration, also based on the present principle, *i.e.* that of the adequacy of the witness' sources of knowledge. The witness to the type of handwriting must have formed in his mind a standard based on the observation of specimens; and the inquiry must naturally be made (*ante*, §§ 694–698) whether the specimens he has seen have been sufficient in number and in quality. It has been seen that the first sort of witness —'ex visu scriptionis' — is liberally treated as to the number of specimens seen, while specimens written after litigation begun are in general not acceptable as sources of his belief. It has been seen also (*ante*, § 707) that for the second sort of witness — 'ex scriptis olim visis' — there is still no objection raised on the score of the number of specimens, while specimens written after litigation begun may equally be open to objection. Now the same questions must come for settlement in dealing with the third kind of witness, the expert. His sources of belief may be objected to (1) because the specimens laid before him are not sufficient in number, or (2) because they have been selected unfairly, for the purpose of aiding a particular view.

Thus the rules for expert testimony based on specimens are largely governed by the present principle of Knowledge. But the Opinion rule, excluding lay testimony under certain circumstances, also has a bearing; and the direct submission of specimens to the jury involves still other principles. The precedents and rules are thus so intertwined that it is impracticable to deal with them in this place; and they are most conveniently examined in detail under the Opinion rule (*post*, §§ 1991–2021).

5. Value

§ 711. **General Principle.** The judicial rulings upon a witness' qualifications to testify to Value are difficult to classify, — because the Court is often called upon to decide at the same time three distinct questions, namely, (1) the *experiential capacity* of the witness, (2) his *knowledge* of the *standard*

of value, and (3) his *knowledge* of the *object* to be valued. The theory of the first of these has already been examined (*ante*, §§ 558, 567). The theory of the second and the third (explained *ante*, § 653) rests upon the peculiar nature of the idea of Value, which calls for two acquirements in every witness, namely, knowledge of the class or standard of values, and acquaintance with the object which is to be put into the class or tested by the standard. In a great many rulings no means is given us of knowing whether the Court, in accepting or rejecting the witness, is doing so on the principle of Experiential Qualifications or on the principle of Knowledge. To some extent, then, mere rules of thumb must suffice; but some effort must be made to examine the decisions according to the principles involved. They may be arranged in four groups:

1. Whether *special experience* is necessary in estimating values, or whether merely ordinary experience suffices;

2. What tests are proper for deciding whether an adequate *knowledge of the value-standard* exists;

3. How far *acquaintance with the object to be valued* is necessary;

4. Miscellaneous topics.

§ 712. (1) **Experiential Qualifications.** The question here is whether (on the principle of § 556, *ante*) the cultivation of the judgment by special experience is necessary before one can be permitted to form and express an opinion upon values. It is here assumed provisionally that the witness possesses adequate knowledge or opportunity for knowledge of the facts; the doubt is whether in addition a special cultivation of the judgment is necessary before attempting to interpret those facts. For example, a merchant has had constant occasion during many years to employ lawyers; may he, on that basis alone, attempt to draw conclusions as to the value of legal services? A lawyer has for two years lived in a metropolitan suburb; may he, merely from knowing what he paid and what others have paid for land in the neighborhood, attempt to form estimates of land values in the suburb?

Two things are obvious: first, that the answer may be different for different things to be valued; and, next, that the answer may depend largely on the conditions by which the value is determined in commercial usage. Where the exchange of articles has reached such a degree of organization and control that at a particular place the rate is clearly settled by the processes of trade and clearly communicated by an accepted mode — as in a stock or produce exchange — it is easy to see that any person, by going to the proper source and possessing himself of the facts, may acquire a fairly satisfactory estimate of value, without having had previous special training. Where, on the other hand, circumstances of casual occurrence, of uncertain influence, and of wide range, may importantly affect that economic attitude of the community which we call value — as in medical and legal services —, it may be out of the question for any one to form an opinion who is not qualified by special experience to interpret the facts he has observed.

The general tendency of the Courts, however, is towards a broad principle that *no special training or occupation is necessary to enable one to estimate values.* Perhaps no Court has attempted to enforce such a rule as unvarying; certainly no Court could wisely do so. Nevertheless, there are frequent utterances pointing to the broad principle that, in general, knowledge alone is necessary.[1] The practical effect may be said to be that Courts will prefer to require no special training, except where it seems to be clearly essential.

Even where concrete rules are laid down for various kinds of values, there is little or no distinction taken between the doctrine of Experiential Qualifications and the doctrine of Knowledge; *i.e.* when a Court rules that a witness to land values must be a dealer in real estate, the Court does not necessarily mean that a dealer's experience is necessary to give experiential qualifications; it may be required merely to give adequate knowledge of the facts of value. All that is given us is a rule of thumb only. Hence, it is practically useless to attempt to distinguish the principles; and the rulings may best be placed together (in the following sections).

§ 713. (2) **Knowledge of Value-standard; what tests are proper?** A knowledge of the general value-standard of the class of things in question is of course essential (*ante*, § 653). The difficult question is to determine tests for the various grades and modes of knowledge. The most practical arrangement of the rulings is to consider them first as applied to the various kinds of things to be valued, and then to notice certain general questions arising for all kinds of values alike. It must be repeated that in any case we are here dealing mainly with mere rules of thumb.

§ 714. **Same: Land-value.** (1) Must the witness be by occupation a *dealer in land?* The Courts unanimously and sensibly answer this in the negative.[1]

§ 712. [1] 1890, Montana R. Co. *v.* Warren, 137 U. S. 353, 11 Sup. 96; Ala. § 3960 ("Direct testimony as to the market value is in the nature of opinion evidence. One need not be an expert or dealer in the article, but may testify as to value, if he has had an opportunity for forming a correct opinion"); Ga. Code 1910, § 5875 (need not be "an expert or dealer in the article"); 1885, Central R. Co. *v.* Wolff, 74 Ga. 666 (it suffices "if they have any knowledge of such values"); 1890, Central R. Co. *v.* Skellie, 86 Ga. 693, 12 S. E. 1017 ("any one possessing sufficient knowledge or information may express his opinion"); 1881, Bowen *v.* Bowen, 74 Ind. 474 (one who "shows himself acquainted with values"); 1877, Thompson *v.* Boyle, 85 Pa. 481 ("the safest course is to permit the examination of all having experience in the thing valued, leaving their authority to be tested on their cross-examination").

§ 714. [1] *Cal.* 1888, San Diego Land Co. *v.* Neale, 78 Cal. 76, 20 Pac. 372; *Ill.* 1884, Johnson *v.* R. Co., 111 Ill. 418; 1894, Snodgrass *v.* Chicago, 152 Ill. 600, 38 N. E. 790; 1895, Pike *v.* Chicago, 155 Ill. 656, 40 N. E. 567; (but compare the following: 1881, Green *v.* Chicago, 97 Ill. 372, "whose business in life has afforded them opportunities of acquiring information and of judging accurately upon the question"); *Kan.* 1888, Lawrence & W. R. Co. *v.* Hawk, 39 Kan. 640, 18 Pac. 943; 1889, Kansas City & S. W. R. Co. *v.* Ehret, 41 Kan. 26, 20 Pac. 538; Kansas City & S. W. R. Co. *v.* Baird, 41 Kan. 69, 21 Pac. 227; *Mich.* 1885, Huff *v.* Hall, 56 Mich. 458, 23 N. W. 88; *Miss.* 1903, Board *v.* Nelms, 82 Miss. 416, 34 So. 149; *Nebr.* 1875, Lincoln & B. H. R. Co. *v.* Sutherland, 44 Nebr. 526, 62 N. W. 859; 1902, Greeley Co. *v.* Gebhardt, — Nebr. —, 89 N. W. 753; *N. J.* 1909, Morrell *v.* Preiskel, — N. J. L. —, 74 Atl. 994 (pedantically strict); *N. Dak.* 1909, Schmidt *v.* Beiseker, 19 N. D. 35, 120 N. W. 1096; *N. Y.* 1866, Robertson *v.* Knapp, 35 N. Y. 92; *Okl.* 1913, Fire Ass'n of Phila. *v.* Farmers' Gin Co., 39 Okl. 162, 134 Pac. 443 (cotton gin); *Pa.* 1876, Philadelphia & N. Y. R. Co. *v.* Bunnell, 81 Pa. 426; 1877, Hanover Water Co. *v.* Iron Co., 84 Pa. 281, 285; 1905, Hope *v.* Phila. & W. R. Co., 211 Pa. 401, 60 Atl. 996; *W. Va.*

(2) Must the witness himself have made a *purchase* or a *sale* of land, or a number of them? This is generally answered in the negative.[2] Yet certainly such a personal participation in sales would be a sufficient qualification.[3]

(3) Must the witness at least have had knowledge, not merely of general value-rumor or the like, but of *specific sales* made? This, too, is generally regarded as not essential.[4] But certainly such knowledge of specific sales in the neighborhood is a sufficient qualification.[5]

(4) Occasionally all specific limitations or tests are abandoned, and the broad test adopted that " any person having knowledge of " or " acquainted with " the values may testify; the determination of the qualification thus being left open for each case.[6] This is perhaps the most satisfactory and sensible test, provided the application of it is left entirely to the discretion of the trial judge.[7] But it is doubtful if any Court, in spite of its proclamation of this broad principle, would consistently enforce it by refusing to multiply rulings based on particular circumstances.

(5) A sufficient qualification is usually declared to exist where the witness is a resident, land-owner, or farmer, *in the neighborhood*. The phrase differs in different jurisdictions and in different rulings of the same Court; the notion is that of a person who has both an interest and an opportunity to make himself acquainted with land values around him.[8]

1916, Monongahela V. T. Co. *v.* Windom, 78 W. Va. 390, 88 S. E. 1092.

In addition to the express decisions above given, the same result is of course reached by implication in those rulings in the next notes which accept anything less in the way of a requirement.

[2] 1851, Walker *v.* Boston, 8 Cush. Mass. 279; 1855, Russell *v.* R. Co., 4 Gray Mass. 607; 1869, Swan *v.* Middlesex, 101 Mass. 177; 1922, Johnson *v.* Lowell, — Mass. —, 134 N. E. 627; 1888, Northeastern Nebr. R. Co. *v.* Frazier, 25 Nebr. 54, 40 N. W. 609. The rulings in the ensuing notes imply the same result.

[3] 1855, West Newbury *v.* Chase, 5 Gray Mass. 421; 1859, Brainard *v.* R. Co., 12 Mass. 409; 1869, Swan *v.* Middlesex, 101 Mass. 177.

[4] 1886, Chicago & E. R. Co. *v.* Blake, 116 Ill. 166, 4 N. E. 488; 1888, Lawrence & W. R. Co. *v.* Hawk, 39 Kan. 640, 18 Pac. 943; 1889, Kansas City & S. W. R. Co. *v.* Ehret, 41 Kan. 26, 20 Pac. 538; Kansas City & S. W. R. Co. *v.* Baird, 41 Kan. 69, 21 Pac. 227; 1906, Lally *v.* Central V. R. Co., 215 Pa. 436, 64 Atl. 633.

The rulings in the ensuing notes imply also the same result.

[5] 1879, Cherokee *v.* R. Co., 52 Ia. 281, 3 N. W. 42; 1872, Wallace *v.* Finch, 24 Mich. 255; 1880 Pittsburg & L. E. R. Co. *v.* Robinson, 95 Pa. 428, 432; and the Massachusetts cases in note 3, *supra*.

[6] *E.g.:* San Diego Land Co. *v.* Neale, *supra*, note 1; Pike *v.* Chicago, *supra*, note 1; 1870, Ferguson *v.* Stafford, 33 Ind. 165 ("the necessary knowledge and information to enable them to form a proper estimate of his value"); 1908, Ex parte Sanchez, 14 P. R. 393, 396.

[7] The following Courts have professed to do this: 1920, Hoover *v.* Shott, 68 Colo. 385, 189 Pac. 848 (vineyard); 1899, Howland *v.* Westport, 172 Mass. 373, 52 N. E. 522; 1922, Johnson *v.* Lowell, — Mass. —, 134 N. E. 627 (land value); 1900, Fossum *v.* R. Co., 80 Minn. 9, 82 N. W. 979; 1917, Springfield F. & M. Ins. Co. *v.* Griffin, 64 Okl. 131, 166 Pac. 431 (mercantile stock); 1917, Portland & Or. C. R. Co. *v.* Sanders, 86 Or. 62, 167 Pac. 564; 1920, Salt Lake & U. R. Co. *v.* Schramm, — Utah —, 189 Pac. 90; 1897, Willett *v.* St. Albans, 69 Vt. 330, Atl. 72.

[8] 1921, Pacific Live Stock Co. *v.* Warm Springs I. D., 9th C. C. A., 270 Fed. 555; 1882, Hunnicutt *v.* Kirkpatrick, 39 Ark. 172 (farmers of the vicinity); 1893, Orange Belt R. Co. *v.* Craver, 32 Fla. 28, 42, 13 So. 444 (resident); 1884, Bradshaw *v.* Atkins, 110 Ill. 332 (farmers of the same sort in the vicinity); 1916, Kirkwood *v.* Perry T. L. & I. Co., 178 Ia. 248, 159 N. W. 774 (owner); 1895, Lincoln *v.* Com., 164 Mass. 368, 41 N. E. 489 (land-owner); 1874, Stone *v.* Covell, 29 Mich. 362 (farmers and land-owners); 1873, Lehmicke *v.* R. Co., 19 Minn. 481 (resident); 1868, Thomas *v.* Mallinckrodt, 43 Mo. 65 ("property-holders and residents of the neighborhood"); 1896, Union Elev. Co. *v.* R. Co., 135 Mo. 353, 36 S. W. 1071 (residents of the city and acquainted with the property); 1888, Northeastern Nebr. R. Co. *v.* Frazier, 25 Nebr. 54, 40 N. W. 609 (residents); 1898,

(6) The knowledge and experience of a *public office* — a county commissioner, or an assessor — in which it is a part of the duties to become familiar with land values, may also qualify the witness.[9]

(7) In numerous rulings the particular witness' qualifications are passed upon, without enunciating any general rule.[10] These should not be used as precedents.

§ 715. **Same: Services-value.** The general test, to be gathered from the

Chicago R. I. & P. R. Co. *v.* Buel, 56 Nebr. 205, 76 N. W. 571 (farmer familiar with realty-values in vicinity); 1876, Philadelphia & N. Y. R. Co. *v.* Bunnell, 81 Pa. 426 ("persons living in the neighborhood"); 1877, Hanover Water Co. *v.* Iron Co., 84 Pa. 281, 285 ("owned land in the neighborhood and was acquainted with its market value"); 1893, McElheny *v.* Bridge Co., 153 Pa. 108, 116, 25 Atl. 1021 (any one who knows); 1878, Brown *v.* R. Co., 12 R. I. 240 (a farmer may testify to farming value of land, but not to general value); 1898, Stolze *v.* Term. Co., 100 Wis. 208, 75 N. W. 987 (old resident, etc.).

[9] 1863, Fowler *v.* Middlesex, 6 All. Mass. 97; 1869, Swan *v.* Middlesex, 101 Mass. 177; 1878, Chandler *v.* J. P. Aqueduct, 125 Mass. 551; 1904, Muskeget Island Club *v.* Nantucket, 185 Mass. 303, 70 N. E. 61 (assessor).

[10] *Alabama:* 1878, Hudson *v.* State, 61 Ala. 339 (mill); *California:* 1901, Norris *v.* Crandall, 133 Cal. 19, 65 Pac. 571 (land); *Florida:* 1891, Jacksonville T. K. & W. R. Co. *v.* P. L. T. & M. Co., 27 Fla. 157, 9 So. 661 (cost of a building); *Illinois:* 1898, Sewell *v.* R. Co., 177 Ill. 93, 52 N. E. 302 (land); 1906, Lewis *v.* Englewood Elev. R. Co., 223 Ill. 223, 79 N. E. 44 (eminent domain); 1916, Alton & S. R. Co. *v.* Vandalia R. Co., 271 Ill. 558, 111 N. E. 531 (grade-crossing damage); 1921, Mauvaisterre drainage & L. Dist. *v.* Wabash L. Co., 299 Ill. 299, 132 N. E. 559 (land); 1922, Chicago *v.* Chicago City R. Co., 302 Ill. 57, 134 N. E. 44 (special assessment); *Indiana:* 1899, German-Amer. Ins. Co. *v.* Paul, 2 Ind. T. 625, 53 S. W. 442 (building); *Kansas:* 1895, Atchison T. & S. F. R. Co. *v.* Huitt, 1 Kan. App. 788, 41 Pac. 1051 (barn); *Louisiana:* 1897, Baillie *v.* Assur. Co., 49 La. An. 658, 21 So. 736 (land); 1906, Louisiana R. & N. Co. *v.* Morere, 116 La. 997, 41 So. 236 (land); *Maryland:* 1916, Park Land Co. *v.* Mayor etc. of Baltimore, 128 Md. 611, 98 Atl. 153; 1917, Western Union Tel. Co. *v.* Rasche, 130 Md. 126, 99 Atl. 991 (damage to ornamental trees); *Massachusetts:* 1861, Boston & W. R. Co. *v.* O. C. & F. R. R. Co., 3 All. 14 (land); 1867, Whitney *v.* Boston, 98 Mass. 315 (land); 1880, Bristol Co. Bank *v.* Keavy, 128 Mass. 303 (land); 1894, Amory *v.* Melrose, 162 Mass. 556, 39 N. E. 276 (land); 1895, Lyman *v.* Boston, 164 Mass. 99, 41 N. E. 128 (land); 1895, Teele *v.* Boston, 165 Mass. 88, 42 N. E. 506 (land); 1899, Manning *v.* Lowell, 173 Mass. 100, 53 N. E. 160; 1900, Cochrane *v.* Com., 175 Mass. 299, 56 N. E. 610 (one experienced in business of a bleaching-mill, etc., allowed to testify to value of land as a site for such a mill); *Missouri:* 1896, Union Elev. Co. *v.* R. Co., 135 Mo. 353, 36 S. W. 1071 (land); 1900, Steam S. C. Co. *v.* Scott, 157 Mo. 520, 57 S. W. 1076 (stone-quarry); 1906, St. Louis M. & S. E. R. Co. *v.* Continental B. Co., 198 Mo. 698, 96 S. W. 1011 (right of way through a brickmaking plant); *Nebraska:* 1896, Chicago B. & Q. R. Co. *v.* Shafer, 49 Nebr. 25, 68 N. W. 342 (land); *New Jersey:* 1899, Elvins *v.* Delaware & A. T. & T. Co., 63 N. J. L. 243, 43 Atl. 903 (shade-trees); 1904, Riley *v.* Camden & T. R. Co., 70 N. J. L. 289, 57 Atl. 444 (shade-trees); 1909, Van Ness *v.* New York & N. J. T. Co., 78 N. J. L. 511, 74 Atl. 456 (a witness who had bought and sold land in the town, held not qualified to testify to the damage to the land done by cutting a shade tree, because "none of the land dealt in by the witness had a single shade tree on it"; this is amusing quibbling; did any one ever hear of a real estate dealer specializing in shade-tree lots or cedar-of-lebanon back yards?); 1920, Burrough *v.* New Jersey Gas Co., 94 N. J. L. 536, 110 Atl. 915 (land with or without shade-trees; a large amount of judicial acumen was here misspent on a testimonial trifle); *New York:* 1880, Woodruff *v.* Ins. Co., 83 N. Y. 138 (construction of houses); *Oklahoma:* 1916, Sallisaw *v.* Priest, 61 Okl. 9, 159 Pac. 1093 (farmland); *Pennsylvania:* 1895, Spring City G. Co. *v.* R. Co., 167 Pa. 6, 31 Atl. 368 (land); 1895, Mewes *v.* Pipe-Line Co., 170 Pa. 364, 32 Atl. 1082 (land); 1896, Struthers *v.* R. Co., 174 Pa. 291, 34 Atl. 443 (land); 1905, Reed *v.* Pittsburg C. & W. R. Co., 210 Pa. 211, 59 Atl. 1067 (land); 1920, Hoffman *v.* Berwind-White C. M. Co., 265 Pa. 476, 109 Atl. 234 (damage to land); 1918, Tiffany *v.* Delaware L. & W. R. Co., 262 Pa. 388, 105 Atl. 101; *Rhode Island:* 1860, Howard *v.* Providence, 6 R. I. 514 (land); 1900, Williams *v.* Hathaway, 21 R. I. 566, 45 Atl. 578 (trees); *Tennessee:* 1905, Union R. Co. *v.* Hunton, 114 Tenn. 609, 88 S. W. 182 (land); *Texas:* 1905, Watkins L. M. Co. *v.* Campbell, 98 Tex. 372, 84 S. W. 424 (land); *Vermont:* 1916, Brown *v.* Aitken, 90 Vt. 569, 99 Atl. 265; *Washington:* 1902, Seattle & M. R. Co. *v.* Roeder, 30 Wash. 244, 70 Pac. 498 (stone quarry); 1905, Johnson *v.* Tacoma, 41 Wash. 51, 82 Pac. 1092 (realty benefits); *West Virginia:* 1922, Virginia Power Co. *v.* Brotherton, — W. Va. —, 110 S. E. 546 (land).

rulings, is that *any one sufficiently familiar* with the commercial value of such services may testify. Yet, when the services are of the sort generally termed *professional*, it is probable that a member of the same profession would invariably be insisted upon;[1] the practice in this respect is so settled that the question has seldom been raised. For other kinds of services, there seem to be no specific tests; a familiarity with their kind and value is the standard to be applied.[2]

Where the testimony is directed not so much to a class of services as to those of *a particular person* in view of his individual qualities, the testimony of a person who had employed that individual might be receivable, even though he had no general knowledge of such services as a class.[3] It would be a hard rule which would prevent a *plaintiff* from informing the jury of *his own estimate* of the value of his services; and the Courts seem inclined to impose no terms as to his general familiarity with the class of services; that he has rendered them justifies listening to his opinion.[4]

There are, in addition, numerous rulings passing upon the qualifications of particular witnesses and declaring no general rules.[5]

§ 715. [1] 1842, Mock *v.* Kelly, 3 Ala. 387 (medical services); 1905, Fuller *v.* Stevens, — Ala.—, 39 So. 623 (one testifying to the value of attorneys' services need not know the special value of the plaintiff's attorney's services); 1888, Turnbull *v.* Richardson, 69 Mich. 406, 411, 37 N. W. 499 (legal services); Kelley *v.* Richardson, 69 Mich. 432, 437, 37 N. W. 514 (how far an attorney is qualified to value the services of a legal adviser in managing an estate); 1896, Howell *v.* Smith, 108 Mich. 350, 66 N. W. 218 (a witness to the value of legal services must be an attorney; here a person who had employed many lawyers was excluded).

[2] 1896, Chamness *v.* Chamness, 53 Ind. 304 (value of board; receiving one not a boarding-house keeper); 1895, Jenney Electric Co. *v.* Branham, 145 Ind. 314, 41 N. E. 448 (value of services in negotiating a sale; familiarity with the "extent and character of the particular service", required); 1885, Alt *v.* Fig Syrup Co., 19 Nev. 118, 7 Pac. 174 (non-expert received, where the services were rendered in a secret manufacturing process).

[3] 1858, Doster *v.* Brown, 25 Ga. 25 (a mill-owner who had such work done); 1877, Eagle & P. Mfg. Co. *v.* Browne, 58 Ga. 110 (employer or co-employee, upon the facts of the cases); 1889, Kennett *v.* Fickel, 41 Kan. 213, 21 Pac. 93 (one who had hired such work); 1865, Kendall *v.* May, 10 All. Mass. 61, 67 (one who had furnished board to the same person); 1864, Cornell *v.* Dean, 105 Mass. 435 (pasturing cattle; one who has paid for or rendered such services); 1882, Ritter *v.* Daniels, 47 Mich. 618, 11 N. W. 409 (previous hiring of the same person); 1881, McPeters *v.* Ray, 85 N. C. 464 (previous employer of the same person).

[4] 1880, Richardson *v.* McGoldrick, 43 Mich. 476, 5 N. W. 672; 1895, Foley *v.* Platt, 105 Mich. 635, 63 N. W. 520; 1918, Matoole *v.* Sullivan, 55 Mont. 363, 177 Pac. 254 (housekeeping); 1922, Doane *v.* Marquisee, — Mont. —, 206 Pac. 426 (services as tailor; citing the above text with approval); 1898, Missouri P. R. Co. *v.* Palmer, 55 Nebr. 559, 76 N. W. 169 (services in nursing); 1901, McCormick H. M. Co. *v.* Davis, 61 Nebr. 406, 85 N. W. 390 (boarding horses); 1876, Mercer *v.* Bose, 67 N. Y. 58.

Contra, semble, that he must be otherwise expert: 1917, Washington B. & A. El. R. Co. *v.* Moss, 130 Md. 198, 100 Atl. 86 (services as agent, etc.); 1884, Loucks *v.* R. Co., 31 Minn. 534, 18 N. W. 651 (farm services).

Of course, an objection assuming his expertness and directed against a plaintiff's testifying in his own cause, is merely an attempt to argue that interest as a party disqualifies; such an objection has to-day no standing (*ante*, § 577).

[5] *Federal:* 1919, Coca-Cola Co. *v.* Moore, 8th C. C. A., 256 Fed. 640 (value of attorney's services rendered in Little Rock, Ark., in trade-mark litigation; testimony by attorneys not having experience in such litigation, held admissible; testimony of attorneys having such experience, but in other States, held admissible); *Ala.* 1896, American Oak Extr. Co. *v.* Ryan, 112 Ala. 337, 20 So. 644 (cost of cording wood); *Cal.* 1899, Cowdery *v.* McChesney, 125 Cal. 19, 58 Pac. 62 (services in personal attendance); *Ill.* 1892, Chicago & E. I. R. Co. *v.* Bivans, 142 Ill. 401 (services); 1895, Heffron *v.* Brown, 155 Ill. 322, 40 N. E. 583 (services); *Ind.* 1881, Board *v.* Chambers, 75 Ind. 410 (services); 1895, Jenney Electric Co. *v.* Branham, 145 Ind. 314, 41 N. E. 448 (services in negotiating a sale of machin-

§ 716. **Same: Personal-property value.** Here the general test, that *any one familiar* with the values in question may testify, is liberally applied, and with few attempts to lay down detailed minor tests.[1] The *owner of an article*, whether he is generally familiar with such values or not, ought certainly to be allowed to estimate its worth; the weight of his testimony (which often would be trifling) may be left to the jury; and Courts have usually made no objections to this policy.[2]

ery); *Ia.* 1898, Clark *v.* Ellsworth, 104 Ia. 442, 73 N. W. 1023 (customary charges of an attorney); 1899, Allison *v.* Parkinson, 108 Ia. 154, 78 N. W. 845 (services of a nurse); *Kan.* 1875, Ottawa Univ. *v.* Parkinson, 14 Kan. 163 (attorney's services); 1880, Central B. U. P. R. Co. *v.* Nichols, 24 Kan. 243 (services); *Mass.* 1905, Lawrence *v.* Methuen, 187 Mass. 592, 73 N. E. 860 (physician's services); *Mich.* 1914, Tolsma *v.* Tolsma's Estate, 183 Mich. 314, 149 N. W. 1050 (farm services); *Minn.* 1870, Allis *v.* Day, 14 Minn. 518 (legal services); 1897, Towle *v.* Sherer, 70 Minn. 312, 73 N. W. 180 (cost of a house); *N. H.* 1900, Chapman *v.* Tiffany, 70 N. H. 249, 47 Atl. 603 (storage); *N. J.* 1918, Ziegener *v.* Daeche, 91 N. J. L. 634, 103 Atl. 82 (legal services); *N. C.* 1898, McLamb *v.* R. Co., 122 N. C. 862, 29 S. E. 894 (services of a farmer); *Vt.* 1886, Stone *v.* Tupper, 58 Vt. 411, 5 Atl. 387 (services in a stable).

The following case seems contrary to the principle of § 654, *ante:* 1901, Birkel *v.* Chandler, 26 Wash. 241, 66 Pac. 406 (sources of knowledge of the value of services need not be stated beforehand).

§ **716.** [1] *Ala.* 1858, Ward *v.* Reynolds, 32 Ala. 389 (value of a slave; any person may testify); 1906, Moss *v.* State, 146 Ala. 686, 40 So. 340 (shoes); 1904, Southern R. Co. *v.* Morris, 143 Ala. 628, 42 So. 17 (mare); *Conn.* 1915, Coffin *v.* Laskan, 89 Com. 325, 94 Atl. 370 (automobile); *Ia.* 1886, State *v.* Finch, 70 Ia. 317, 30 N. W. 578 (one who had never bought or sold a seal-skin overcoat, nor seen one bought or sold, was allowed to testify to the value of such a coat); 1902, Houghtaling *v.* R. Co., 117 Ia. 540, 91 N. W. 811 (clothing and furniture: "any one familiar with its nature and use" is qualified); *Mass.* 1864, Brady *v.* Brady, 8 All. 101 (one who had bought and sold horses and wagons was received); 1900, Munro *v.* Stowe, 175 Mass. 169, 55 N. E. 992 (witness allowed to testify to the value of a lot of household goods, though unable to state the value of each article); *Mich.* 1873, Continental Ins. Co. *v.* Horton, 28 Mich. 175 (one who buys or is present at buying, received); 1879, Printz *v.* People, 42 Mich. 145, 3 N. W. 306 (one who had worn furs and had priced others, received); 1905, Withey *v.* Pere Marquette R. Co., 141 Mich. 412, 104 N. W. 773 (value of clothing, etc., damaged in a railroad collision); *Nebr.* 1899, Langdon *v.* Wintersteen, 58 Nebr. 278, 78 N. W. 501 (millinery goods; dealer not required); *Pa.* 1920, Wilhelm *v.* Uttenweiler, — Pa. —, 112 Atl. 94 (brewery machinery); *W. Va.* 1899, Hood *v.* Maxwell, 1 W. Va. 221, 238 (relation of flour-price to wheat-price; one not in the business was received).

[2] *Federal:* 1900, Gorman *v.* Park, 40 U. S. App. 537, 100 Fed. 553 (restaurant-keeper allowed to testify to value of tables, etc., used in his occupation); 1905, Union Pacific R. Co. *v.* Lucas, 136 Fed. 374, 69 C. C. A. 218 (land and buildings); 1922, Alaska Juneau G. M. Co. *v.* Larson, 9th C. C. A., 279 Fed. 420 (owner of a destroyed house); *Alabama:* 1906, Echols *v.* State, 147 Ala. 700, 41 So. 298 (sundry goods stolen); *Iowa:* 1885, Tubbs *v.* Garrison, 68 Ia. 48, 25 N. W. 921 (plaintiff and his wife, owners of household goods); 1895, Thomason *v.* Insurance Co., 92 Ia. 72, 61 N. W. 843 (owner of household furniture); 1897, State *v.* Hathaway, 100 Ia. 225, 69 N. W. 449; 1906, Tubbs *v.* Mechanics' Ins. Co., 131 Ia. 217, 108 N. W. 324 (owner of a building, etc.); 1918, State *v.* Strum, 184 Ia. 1165, 169 N. W. 373 (manager of a plant); 1920, Gay *v.* Shadle, —Ia.—, 176 N. W. 635 (automobile); 1920, Daugherty *v.* Advance-Rumely T. Co., —Ia.—, 180 N. W. 277 (tractor); *Massachusetts:* 1895, Shea *v.* Hudson, 165 Mass. 43, 42 N. E. 114 (owner of a horse and buggy); *Minnesota:* 1916, Fairmont G. E. & R. M. C. Co. *v.* Crouch, 133 Minn. 167, 157 N. W. 1090 (gasoline-engine); 1916, McGilora *v.* Minneapolis St. P. & S. S. M. R. Co., 135 Minn. 275, 159 N. W. 854 (hay); *Nebraska:* 1908, Jensen *v.* Palatine Ins. Co., 81 Nebr. 523, 116 N. W. 286 (stock of goods); 1909, Anderson *v.* Chicago B. & O. R. Co., 84 Nebr. 311, 120 N. W. 1114 (crops and land); *North Dakota:* 1912, Needham *v.* Halverson, 22 N. D. 594, 135 N. W. 203 (horses); *Pennsylvania:* 1840, Clark *v.* Spence, 10 Watts 336 (owner of a trunk and contents); 1843, Bingham *v.* Rogers, 6 W. & S. 501; 1845, Whitesell *v.* Crane, 8 id. 371 (owner of clothes); 1846, McGill *v.* Rowland, 3 Pa. St. 452 (same); 1859, Mish *v.* Wood, 34 Pa. 452; 1874, Adams Express Co. *v.* Schlessinger, 75 Pa. 248, 256; *Utah:* 1907, Smith *v.* Mine & S. S. Co., 32 Utah 21, 88 Pac. 683 (household goods); *Wisconsin:* 1906, Palmer *v.* Goldberg, 128 Wis. 103, 107 N. W. 478 (a farmer, held qualified as to the value of his own horses).

In sundry rulings, the qualifications of particular witnesses are passed upon, without affording precedents for general rules.[3]

§ 717. **Same: Witness must know the Market Value, if there is one.** Value is, of course, the rate at which an exchange would in fact be made at this moment by the purchasing and selling community; hence, a knowledge of what an article *ought* to exchange for is not a knowledge of value, — at least, in the sense in which Courts regard it. Nor is a knowledge of the various qualities and *uses* of an article sufficient, if it stops short of including the exchangeable rate which these qualities actually give it. In short, where there is a market value, the knowledge of the witness must be of this market value:[1]

1877, BERRY, J., in *Berg* v. *Spink*, 24 Minn. 138: "Where the thing whose value is in question is of a nature to possess a current price or market value, such current price or market value is in law the true value. To entitle a witness to testify to the value of such a thing, he must therefore be acquainted with the current or market value of things of the

Contra: 1905, Motton *v.* Smith, 27 R. I. 57, 62, 60 Atl. 681 (owner of jewelry, not shown to have knowledge, excluded; but on rehearing the Court conceded that "an owner is doubtless qualified to state the cost price of articles of personal property, and from that, with information as to age and wear, the jury may estimate value. . . . We did not attempt to lay down a general rule upon the subject").

Some uncertainty may have been created in the modern rulings, by a misapprehension of certain earlier ones, rendered while a party was still disqualified by interest, and dealing with the question, then a living one (*post*, § 612, n. 4), whether a husband or wife of a party, or a party generally, should be granted a special exception of necessity for testifying to the contents and value of a package lost by a carrier; *e.g.* 1860, Illinois C. R. Co. *v.* Taylor, 24 Ill. 323.

[3] *Ala.* 1857, Winter *v.* Burt, 31 Ala. 37 (machinery); 1885, Winter *v.* Montgomery, 79 Ala. 490 (personalty); 1896, Louisville J. C. Co. *v.* Lischkoff, 109 Ala. 136, 19 So. 436 (stock of dry goods, etc.); *Cal.* 1858, Polk *v.* Coffin, 9 Cal. 58 (cattle); *Conn.* 1919, Burn *v.* Metropolitan Lumber Co., 94 Conn. 1, 107 Atl. 609 (value of lumber not delivered); *Ga.* 1859, Walker *v.* Fields, 28 Ga. 237, *semble* (mill-machinery); *Haw.* 1904, Pacific Mill Co. *v.* Enterprise Mill Co., 16 Haw. 282, 288 (mouldings, etc.); *Ill.* 1901, Chicago & N. W. R. Co. *v.* Calumet Stock Farm, 194 Ill. 9, 61 N. E. 1095 (horses); *Ind.* 1881, Foster *v.* Ward, 75 Ind. 594 (hogs, feed); *Ia.* 1879, Haight *v.* Kimbark, 51 Ia. 14, 50 N. W. 577 (mules); 1885, Gere *v.* Ins. Co., 67 Ia. 275, 23 N. W. 137 (stallion); 1896, Leek *v.* Chesley, 98 Ia. 593, 67 N. W. 580 (horses); 1901, Cathcart *v.* Rogers, 115 Ia. 30, 87 N. W. 738 (cattle); *Kan.* 1886, Reed *v.* New, 35 Kan. 730, 12 Pac. 139 (horses); *Md.* 1905, Gossage *v.* Phila. B. & W. R. Co., 101 Md. 698, 61 Atl. 692 (ship); *Mass.* 1855, Haskins *v.* Ins. Co., 5 Gray 432 (machinery); 1871, Lawton *v.* Chase, 108 Mass. 241 (timber); 1899, Knight *v.* Rothschild, 172 Mass. 546, 52 N. E. 1062 (fur garments); 1899, Vandercook *v.* O'Connor, 172 Mass. 301, 52 N. E. 444 (bottlers' supplies); *Mich.* 1875, Browne *v.* Moore, 32 Mich. 257 (horses); *Minn.* 1876, Burger *v.* R. Co., 22 Minn. 343 (hay); 1900, Linde *v.* Gaffke, 81 Minn. 304, 84 N. W. 41 (wheat); *Mo.* 1878, Simmons *v.* Carrier, 68 Mo. 421 (lumber); 1896, Moffit *v.* Hereford, 132 Mo. 513, 34 S. W. 252 (shares of stock); *Mont.* 1898, Emerson *v.* Bigler, 21 Mont. 200, 53 Pac. 621 (cattle); 1903, Porter *v.* Hawkins, 27 Mont. 486, 71 Pac. 664 (hay and barn); 1909, Sullivan *v.* Girson, 39 Mont. 274, 102 Pac. 320 (diamond ring); *Nebr.* 1895, Smith *v.* Bank, 45 Nebr. 444, 63 N. W. 796 (dry goods); *N. H.* 1839, Whipple *v.* Walpole, 10 N. H. 131 (horses); *N. D.* 1901, Minneapolis Threshing M. Co. *v.* McDonald, 10 N. D. 408, 87 N. W. 993 (threshing machinery); *Okl.* 1896, Diebold S. & L. Co. *v.* Holt, 4 Okl. 479, 46 Pac. 512 (safes); 1903, Choctaw O. & G. R. Co. *v.* Deperade, 12 Okl. 367, 71 Pac. 629 (cattle); *Or.* 1897, Oregon Pottery Co. *v.* Kern, 30 Or. 328, 47 Pac. 917 (scow); *R. I.* 1856, Forbes *v.* Howard, 4 R. I. 367 (cost of fitting up a theatre); *Wash.* 1902, Lines *v.* Alaska C. Co., 29 Wash. 133, 69 Pac. 642 (piano); *W. Va.* 1905, Tucker *v.* Colonial F. Ins. Co., 58 W. Va. 30, 51 S. E. 86 (merchandise insured); *Wis.* 1867, Noonan *v.* Ilsley, 22 Wis. 35 (shares of stock).

§ **717.** [1] 1871, Cooper *v.* Randall, 59 Ill. 320; 1885, Daly *v.* Kimball Co., 67 Ia. 135, 24 N. W. 756; 1904, Sylvester *v.* Ammons, 126 Ia. 140, 101 N. W. 782 (stock of goods); 1854, Elfelt *v.* Smith, 1 Minn. 126; 1869, Brackett *v.* Edgerton, 14 id. 174; 1889, Russell *v.* Hayden, 40 id. 90, 41 N. W. 456; 1877, Berg. *v.* Spink, 24 Minn. 138 (horses); 1840, Beard *v.* Kirk, 11 N. H. 400.

class to which it belongs. This is a general rule, in the application of which much must be left to the sound discretion of the trial judge."

But not always is there a market value for an article. In such a case the value is the probable exchangeable rate so far as one can estimate it from the various attendant circumstances and conditions which would affect the disposal of the article; and it is with these that a witness must in such a case be familiar.[2]

§ 718. **Same: Knowledge must be of Value in the Vicinity.** Since value is the exchangeable rate accepted by the community, it is obvious that the rate may differ, in passing from one region to another, where different conditions prevail and a different judgment would be formed by the local community. Hence the question arises how far an acquaintance with value-standards in one place will suffice when the value in question is of a thing in another place.

The witness' competency must here depend upon whether the conditions of value in the two places are sufficiently similar to render his knowledge of values in one place adequate for estimating them in the other. The application of this principle must depend on the circumstances of each case, and no further detailed rules can be laid down.[1] This question, however, must be distinguished from that of the competency of a witness who, though having his business-quarters in one place, is by reason of his occupation familiar with values of goods in another, — for example, an importer, who is also necessarily acquainted with the values of goods at the foreign port of export; in such a case, his knowledge is sufficient.[2]

§ 719. **Same: Knowledge of Value-standards must generally be acquired by Personal Observation, not by mere Hearsay.** Knowledge of value does not necessarily rest on hearsay. It might be supposed that to know value is merely to know what other people say the thing is worth, — merely to have heard them offering and accepting prices. But the answer is that these vari-

[2] 1876, Burger *v.* R. Co., 22 Minn. 343.

§ 718. [1] *Iowa:* 1886, Raridan *v.* R. Co., 69 Ia. 531, 29 N. W. 599 ("the fact that the witness knew the value of stalks in his neighborhood, from six to nine miles from plaintiff's place, did not qualify him to testify to the value of stalks in plaintiff's neighborhood"; a narrow ruling); 1895, Stevens *v.* Ellsworth, 95 Ia. 231, 63 N. W. 683 (rejecting a witness not acquainted with attorney's services in that region); *Massachusetts:* 1863, Najac *v.* R. Co., 7 All. 328 (admitting one familiar with the use and value of an easement, though not of adjacent land); 1895, Amory *v.* Melrose, 162 Mass. 556, 39 N. E. 276 (knowledge in a metropolis, held sufficient for suburban values); 1895, Lyman *v.* Boston, 164 Mass. 99, 41 N. E. 128 (not necessary that knowledge should relate to the same place); *Michigan:* 1873, Greeley *v.* Stilson, 27 Mich. 155 (knowledge of value elsewhere rejected); 1874, Stone *v.* Covell, 29 Mich. 362 (farmer may testify only for land in vicinity); 1881, Kent Co. *v.* Ransom, 46 Mich. 417, 9 N. W. 454, *semble* (knowledge of value of services elsewhere, here held inadmissible); *New Jersey:* 1906, Walsh *v.* Board, 73 N. J. L. 643, 64 Atl. 1088 (a former owner of the land, not shown to know values in the locality, held properly, excluded); *North Carolina:* 1882, Fairley *v.* Smith, 87 N. C. 367 (knowledge of values elsewhere may be sufficient); *Pennsylvania:* 1903, Lynch *v.* Troxell, 207 Pa. 162, 56 Atl. 413 (land); *Texas:* 1922, Hartford Fire Ins. Co. *v.* Galveston H. & S. A. R. Co., — Tex. —, 239 S. W. 919 (cattle).

[2] 1843, Alfonso *v.* U. S., 2 Story 426 (Boston merchants testifying to prices at foreign ports); 1891, Cntral R. Co. *v.* Skellie, 86 Ga. 686, 12 S. E. 1017 (where a dealer residing in Georgia but receiving daily quotations from New York was held competent); 1894, Texas & P. R. Co. *v.* Donovan, 86 Tex. 378, 25 S. W. 10 (a Texas dealer receiving quotations from Chicago).

Compare the cases in the next section.

ous instances of offers or acceptances of prices, averaged into a mean or probable figure, are what constitute value. The statements of persons declaring their estimates of the prices they would give or receive are not taken, on the credit of those persons, as trustworthy assertions of the fact of value, but merely as items of conduct which themselves make up that total fact of conduct which we call value. Thus, if A sits in a merchant's office and listens to the terms accepted and rejected for a dozen articles, he acquires a first-hand knowledge of value; but if he goes in and asks the merchant to tell him the value of a given article, his knowledge is based on a belief in the truth of the merchant's assertion. In the former case, his knowledge is not based on hearsay.[1] But in the latter case his knowledge is based on the hearsay assertion of another person, and therefore is inadmissible (under the principle of § 657, *ante*). The distinction depends upon whether the utterances heard represent in themselves a series of individual offers or transactions, or are merely reports of the net result of offers or transactions already made.

The distinction is no doubt often difficult to draw in practice; in a newspaper, for example, some of the price-quotations may purport to represent actual individual transactions, or groups of transactions, while others may represent merely the editor's report or estimate of the net result of value. A witness may be said to be qualified, or not, according as the one or the other of these elements forms the chief source of his knowledge; and no more definite rule can be or ought to be laid down:[2]

§ 719. [1] 1843, Story, J., in Alfonso *v.* U. S., 2 Story 426; and the general principle of § 1772, *post*.

[2] The rulings show how much the result depends upon which source was the chief one for the particular witness: *Fed.* 1865, Cliquot's Champagne, 3 Wall. 141 (admitting knowledge based on "price current" lists); *Ark.* 1896, Little Rock & F. S. R. Co. *v.* Alister, 62 Ark. 1, 34 S. W. 82 (cost of excavation; knowledge based on hearsay, excluded); *Colo.* 1875, Thatcher *v.* Kautcher, 2 Colo. 700, 702 (admitting knowledge obtained by inquiring in the market); *Ga.* 1890, Central R. Co. *v.* Skellie, 86 Ga. 693, 12 S. E. 1017 (a fruit-dealer in Georgia, who in the fruit season received daily quotations from dealers in New York by telegrams and circulars, was allowed to testify to New York market value); 1900, Armour *v.* Ross, 110 Ga. 403, 35 S. E. 787 (testimony to market value from one who had received the price from dealers in the markets elsewhere, admitted); *Ill.* 1903, Spohr *v.* Chicago, 206 Ill. 441, 69 N. E. 515 (here an expert testifying to the price of land solely by having read the deed-recital of consideration was excluded); *Ind. Terr.* 1898, Walker *v.* Stilson, 1 Ind. Terr. 688, 43 S. W. 959 (testimony as to a sale, etc., founded on hearsay, excluded); *Ia.* 1894, Hudson *v.* R. Co., 92 Ia. 231, 60 N. W. 608 (admitting knowledge based on reading market reports); *Md.* 1860, Green *v.* Caulk, 16 Md. by mere inquiry); *Mass.* 1858, Lewis *v.* Ins. Co., 10 Gray 511 (excluding a knowledge of prices obtained by mere inquiry, not by dealing); *Mich.* 1866, Sisson *v.* Cleveland & T. R. Co., 14 Mich. 490 (admitting knowledge based on newspaper market reports, telegraphic reports, etc.); 1868, Cleveland & T. R. Co. *v.* Perkins, 17 Mich. 296, 301 (testimony to New York market prices of cattle, "derived from the newspapers", admitted); 1870, Comstock *v.* Smith, 20 Mich. 342, *semble* (same); 1872, Kost *v.* Bender, 25 Mich. 519 (excluding knowledge of price of oil lands learned by inquiry); 1875, Sirrine *v.* Briggs, 31 Mich. 446 (admitting a clerk in the business, who knew the value of merchandise from price-lists); *Minn.* 1889, Hoxsie *v.* Lumber Co., 41 Minn. 548, 43 N. W. 476 (admitting knowledge based on commercial reports received in the course of business); *Mo.* 1905, Fountain *v.* Wabash R. Co., 114 Mo. App. 676, 90 S. W. 393 (dealers in cattle, knowing in part from perusal of trade-journals, admitted); *N. Y.* 1830, Lush *v.* Druse, 4 Wend. 317 (admitting knowledge gained by inquiring at a merchant's office); 1878, Harrison *v.* Glover, 72 N. Y. 454 (admitting knowledge based on price-lists, and letters from dealers); *N. C.* 1882, Fairley *v.* Smith, 87 N. C. 367 (admitting knowledge based on newspapers; but not where a single newspaper at a remote point was the source);

1814, *De Berenger's Trial*, Gurney's Rep. 188; in this celebrated trial for swindling, De Berenger, Lord Cochrane, and others were charged with having falsely circulated a report of the death of Napoleon in order temporarily to raise the price of stocks and sell on the risen market; it was proved that on the day of the rise the defendants had sold more than £1,600,000 of stocks, recently bought; to prove the prices on those days, a witness was called who had been "employed by the House to take the prices of the day at the Stock Exchange." *Q.* "Where do you get those accounts from?" *A.* "I collect them from the Stock Exchange." *Q.* "Do you go about all day long taking the prices?" *A.* "I collect them at different times in the course of the day." *Q.* "You go about taking an account from all the persons who are there?" *A.* "I take them from different persons who are in the market." On objection by Mr. Serj. *Best*, ELLENBOROUGH, L. C. J., replied: "It is all hearsay; but it is the only evidence we can have; it is the only evidence we have of the price of sales of any description. I do not receive it as the precise thing, but as what is in the ordinary transactions of mankind received as proper information; and I suppose there is hardly a gentleman living who would not act on this paper."

1873, RODMAN, J., in *Smith* v. *R. Co.*, 68 N. C. 115: "The plaintiff in testifying said that he only knew the value in New York by accounts of sales received from his factors informing him of sums placed to his credit, being the proceeds of sales, by telegrams, circulars, and correspondence. . . . The result of all the sales of the day, or of a period shortly before or after, embodied in a reputation among dealers in the article, is the best evidence which the nature of the case admits. The reputation thus formed and circulated by telegrams, commercial circulars, and the prices current in newspapers, is such evidence as is acted on without hesitation by all dealers on their most important transactions."

1875, WELLS, J., in *Whitney* v. *Thacher*, 117 Mass. 53 (admitting value-testimony of New York prices from brokers in Boston whose knowledge was chiefly obtained from daily price-current lists and returns of sales daily furnished them in Boston from their New York houses): "It is not necessary, in order to qualify one to give an opinion as to values, that his information should be of such a direct character as would make it competent in itself as primary evidence. It is the experience which he acquires in the ordinary conduct of affairs, and from means of information such as are usually relied on by men engaged in business for the conduct of that business, that qualifies him to testify."

Distinguish the question whether *price-lists* or *trade-journals themselves* are admissible under an exception to the Hearsay rule (*post*, § 1704).

§ 720. (3) **Acquaintance with the Specific Object to be valued.** It has already been noticed (*ante*, § 653) that a person making an estimate as to identity, handwriting, or value, must possess a double knowledge, — (1) a knowledge of the classes into one of which the thing is to be put or the standard by which it is to be tested, and (2) a knowledge of the thing itself to be classed or measured or tested. The necessity of this double element of knowledge lies in the very nature of the mental process involved. The former element of knowledge — of the value-standard — has just been considered. The

N. D. 1922, Schnitz Bros. *v.* Bolles & Rogers Co., —N. D. —, 186 N. W. 96 (excluding witness whose knowledge was based solely on a market report, not admissible under the principle of § 1704, *post*); *Okl.* 1912, Midland V. R. Co. *v.* Adkins, 36 Okl. 15, 127 Pac. 867 (testimony to market value, based on talks with dealers and on newspaper quotations, admitted); *Tex.* 1894, Texas & P. R. Co. *v.* Donovan, 86 Tex. 378, 25 S. W. 10 (a person in Texas, receiving daily reports from Chicago, allowed to testify to price of sheep in Chicago); *Vt.* 1885, Railroad Co. *v.* Bixby, 57 Vt. 564, *semble* (admitting knowledge based on inquiry of prices); *Va.* 1899, Norfolk & W. R. Co. *v.* Reeves, 97 Va. 284, 33 S. E. 606 (testimony to value of cattle, based solely on price-quotations in a newspaper and on one price-list, excluded); 1900, Wadley *v.* Com., 98 Va. 803, 35 S. E. 452 (value of bonds; witness who had made inquiries for creditors, "a pretty searching investigation", excluded).

latter element — knowledge of the particular thing to be valued — is equally required by the rules of evidence, as Courts have often pointed out:[1]

1871, EARL, V., in *Bedell* v. *R. Co.*, 44 N. Y. 370: "There is no rule of law, and there can be none, defining how much a witness shall know of property before he can be permitted to give an opinion of its value. He must have some acquaintance with it sufficient to enable him to form some estimate of its value, and then it is for the jury to determine how much weight to attach to such estimate. Here the witnesses were carpenters and had a general acquaintance with the house; they knew its shape, location, external appearance, and, to some extent, its internal condition; and the Court did not err in allowing their opinions of its value to go to the jury for what they were worth."

1886, CLARK, J., in *Pittsburg V. & C. R. Co.* v. *Vance*, 115 Pa. 332, 8 Atl. 764: "[A witness to the market value of land] should have some special opportunity for observation — should, in a general way and to a reasonable extent, have in his mind the data from which a proper estimate of value ought to be made. If interrogated, he should be able to disclose sufficient actual knowledge of the subject to indicate that he is in a position to know what he proposes to state and to enable the jury to judge of the probable proximate accuracy of his conclusions. . . . J. B. stated in the most unequivocal manner that he was not much acquainted with the land in question; that he had been on the lower part of it, but that he knew nothing at all about the upper part. . . . It certainly does not require much argument to show that B. was an incompetent witness to testify on this question; he had not sufficient knowledge of the requisite facts upon which to base an opinion."

This general requirement is constantly enforced. The sufficiency of the witness' acquaintance with the thing to be valued should depend upon the discretion of the trial judge.

§ 720. [1] *Federal.* 1869, Chicago v. Greer, 9 Wall. 734; *Ala.* 1858, Ward v. Reynolds, 32 Ala. 390; 1861, Spiva v. Stapleton, 38 Ala. 174 (land); *Cal.* 1868, Central Pacific R. Co. v. Pearson, 35 Cal. 261 (land); *Colo.* 1920, Hoover v. Shott, 68 Colo. 385, 189 Pac. 848 (vineyard); *Ill.* 1881, Green v. Chicago, 97 Ill. 372 ("familiar with the subject of inquiry"); 1900, Chicago Terminal T. R. Co. v. Bugbee, 184 Ill. 353, 56 N. E. 386 (land); 1921, Elmhurst v. Rohmeyer, 297 Ill. 430, 130 N. E. 761 (real estate taken by condemnation); *Ind.* 1862, Crouse v. Holman, 19 Ind. 38 (land); 1870, Ferguson v. Stafford, 33 Ind. 165; *Ia.* 1879, Cherokee v. R. Co., 52 Ia. 281, 3 N. W. 42 (land); 1888, Pingery v. R. Co., 78 Ia. 440, 43 N. W. 285 (land); *Kan.* 1888, Lawrence & W. R. Co. v. Hawk, 39 Kan. 640, 18 Pac. 943 (land); 1889, Lawrence & W. R. Co. v. Ross, 40 Kan. 605, 20 Pac. 197 (land); Kansas City & S. W. R. Co. v. Ehret, 41 Kan. 26, 20 Pac. 538 (land); Kansas City & S. W. R. Co. v. Baird, 41 Kan. 69, 21 Pac. 227; Kennett v. Fickel, 41 Kan. 213, 21 Pac. 93; *Md.* 1895, Wallace v. Schaub, 81 Md. 594, 32 Atl. 324 (a nurse's services); *Mass.* 1851, Walker v. Boston, 8 Cush. 279 (land); 1854, Shaw v. Charlestown, 2 Gray 109 (land); 1855, Russell v. R. Co., 4 Gray 607 (land); *Mich.* 1881, Dyer v. Rosenthal, 45 Mich. 590, 8 N. W. 560 (one who had been within a store but had not inspected the goods whose value was in question, excluded); 1895, Metzger v. Assur. Co., 102 Mich. 334, 63 N. W. 647 (insufficient examination of a stock of goods); 1899, Michaud v. Grace H. L. Co., 122 Mich. 305, 81 N. W. 93, *semble* (ship); *Minn.* 1873, Lehmicke v. R. Co., 19 Minn. 482 (land; seeing it, without actually going upon it, may suffice); 1876, Burger v. R. Co., 22 Minn. 343 (personalty); 1883, Sherman v. R. Co., 30 Minn. 228, 15 N. W. 239 (land); 1884, Scurer v. Horst, 31 Minn. 480, 18 N. W. 283 (services); 1889, Russell v. Hayden, 40 Minn. 90, 41 N. W. 456 (personalty); *Mo.* 1860, Newmark v. Ins. Co., 30 Mo. 165 (personalty); 1886, Springfield & S. R. Co. v. Calkins, 90 Mo. 543, 3 S. W. 82 ("acquainted with the premises, location, and surroundings"); *N. Y.* 1888, Slocovich v. Ins. Co., 108 N. Y. 61, 14 N. E. 802 (excluding one who had not seen the ship for several years); *N. D.* 1905, Keeney v. Fargo, 14 *N. D.* 423, 105 N. W. 93 (rental); *Oh.* 1876, Williams v. Brown, 28 Oh. St. 552 (services); *Pa.* 1895, Mewes v. Pipe-Line Co., 170 Pa. 364, 32 Atl. 1082 (land); 1903, Shimer v. R. Co., 205 Pa. 648, 55 Atl. 769 (land); 1905, Hope v. Phila. & W. R. Co., 211 Pa. 401, 60 Atl. 996 (land); *S. Car.* 1903, Wilson v. Southern R. Co., 65 S. C. 421, 43 S. E. 964 (land); *Vt.* 1858, Laurent v. Vaughn, 30 Vt. 94 (personalty).

As with other kinds of knowledge (*ante*, § 672), so with knowledge of values, the place of this element may be supplied by a *hypothetical question*. Thus, where a witness is competent to speak of house-values but has not seen the house in question, the specifications and other particulars may be placed before him hypothetically for an opinion, and then his knowledge of the value-standard may become available; or, in some cases, his attention may be called to a thing assumed to be substantially similar to that in question, and his judgment may be given on the hypothesis of this similarity. This hypothetical basis is legitimately and frequently employed as a substitute for actual observation.[2]

§ 721. **Other Principles, distinguished.** The subject of value involves the rules of evidence in still other ways not here concerned. (1) Whether the *values* or *sale prices* of *other things of the same sort* are admissible to show the value of the article in question, involves a question of circumstantial relevancy (*ante*, § 463). (2) What are the general *factors of value* has already been briefly noticed (*ante*, § 463). (3) Whether an estimate of value is excluded by the *Opinion rule* is dealt with under that head (*post*, § 1940). (4) The old doctrine of *Norman* v. *Wells*, that an estimate of value is too speculative and uncertain to be listened to has already been noticed under the present principle (*ante*, § 663). (5) Whether *market reports* and *trade journals* are admissible to prove value involves an exception to the Hearsay rule (*post*, § 1704).

[2] 1894, State *v.* Tennebom, 92 Ia. 551, 61 N. W. 193 (the value of a stock of goods); 1873, Miller *v.* Smith, 112 Mass. 475; 1883, Johnston Harvester Co. *v.* Clark, 31 Minn. 166, 17 N. W. 111; 1906, Harris *v.* Quincy O. & K. C. R. Co., 115 Mo. App. 527, 91 S. W. 1010 (cattle); 1909, Sullivan *v.* Girson, 39 Mont. 274, 102 Pac. 320 (diamond ring converted; a witness who had seen it described its size, etc., and then a jeweler estimated its value); 1877, Thompson *v.* Boyle, 85 Pa. 481.

END OF VOLUME ONE